

ARTICLES

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OPPRESSION OR UNFAIRNESS BY CONTROLLERS — WHAT CAN A SHAREHOLDER DO ABOUT IT? AN ANALYSIS OF S 320 OF THE COMPANIES CODE

Section 320 of the Companies Code,¹ significantly amended in 1983, is the newest version of Australia's oppression provision. The section heading reads: "Remedy in cases of oppression or injustice". It is an important provision, designed to protect the vulnerable minority shareholder. It has a chequered history. But this latest version has the potential to be truly effective.

Section 320, as recast, could have a major impact on corporate law and on the internal workings of companies. But its effectiveness is by no means certain. Experience with the section's predecessors tells us that. With the new s 320, success in achieving the aims of the legislature lies to a large extent with the judiciary, providing of course that the drafting is clear and conveys the legislature's intentions.

This article examines the new s 320 and its answers to the residual problems in the previous version in the "National" Companies Code. That version had replaced s 186 of the Uniform Companies Act 1961 (which was itself modelled on s 210 of the UK Companies Act 1948).² Overseas experiences — especially those of the United Kingdom and Canada — helped our drafting. They may also help us to avoid difficulties in the interpretation of the new provision.

THE 1983 CHANGES

The Australian oppression provision was not reworked thoroughly enough in the 1981 rewriting of the companies legislation. It was difficult to be enthusiastic about the redrafted companies legislation. We ended up with bulky legislation, some of the wordiest in the world. Yet it did not tackle the drafting challenge of revising the oppression provisions. The original oppression measure — s 186 of the 1961 Uniform Companies Acts 1961 — had glaring gaps. Few companies provisions had been as disappointing in their effect. The legislation of 1981 improved matters little. But the prolix new s 320 looks comprehensive. It may solve many of the problems we have puzzled over in recent years.³

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1 Under the National company law scheme the respective Companies Codes of States differ in very minor ways only. South Australia adopted the Companies Code on 25 March 1982 (Act No 28 of 1982).

2 Section 210 of the Companies Act 1948 (UK) was enacted in response to the recommendations of the UK *Cohen Committee Report*, Cmnd 6659 (1945) para 60.

3 The Ghanaian Companies Report of 1961 and the Jenkins Committee Report (Cmnd 1749 (1962)), essentially the works of the English company law reformer and writer, LCB Gower, provided the inspiration for our most recent changes, over 20 years later. Gower's writings have been major constructive influences in corporate law in the last 25 years. Regrettably, we did not embrace much of his lucid and compact drafting. But we have, eventually, adopted most of his ideas.

THE 1983 VERSION OF SECTION 320

Section 320(1) and (2):

REMEDY IN CASES OF OPPRESSION OR INJUSTICE

320(1) 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 the members as a whole; or
- (b) by the Commission, in a case where—
 - (i) the Commission has received a report by an inspector under Part VII or under the provisions of a law in force in a participating State or in a participating Territory that correspond with that Part; or
 - (ii) the Commission has made a report, under Part VII or under the provisions of a law in force in a participating State or in a participating Territory that correspond with that Part, to the relevant authority within the meaning of that Part or of those provisions, as the case may be.

320(2) If the Court is of the opinion—

- (a) that affairs of a company are being conducted in a manner that is oppressive or unfairly prejudicial to, or unfairly discriminatory against, a member or members (in this section referred to as the “oppressed member or members”) or in a manner that is contrary to the interests of the members as a whole; or
- (b) that an act or omission, or a proposed act or omission, by or on behalf of a company, or a resolution, or a proposed resolution, of a class of members of a company, was or would be oppressive or unfairly prejudicial to, or unfairly discriminatory against, a member or members (in this section also referred to as the “oppressed member or members”) or was or would be contrary to the interests of the members as a whole,

the Court may, subject to sub-section (4), make such order or orders as it thinks fit, including, but without limiting the generality of the foregoing, one or more of the following orders:

- (c) an order that the company be wound up;
- (d) an order for regulating the conduct of affairs of the company in the future;
- (e) an order for the purchase of the shares of any member by other members;
- (f) an order for the purchase of the shares of any member by the company and for the reduction accordingly of the company’s capital;
- (g) an order directing the company to institute, prosecute, defend or discontinue specified proceedings, or authorizing a member or members of the company to institute, prosecute, defend or discontinue specified proceedings in the name and on behalf of the company;

- (h) an order appointing a receiver or a receiver and manager of property of the company;
- (j) an order restraining a person from engaging in specified conduct or from doing a specified act or thing;
- (k) an order requiring a person to do a specified act or thing.

...

While wider than its predecessors, the new section in essence is the same. It gives a course of action to members oppressed or unjustly treated by the controllers of the company. Following overseas models, the legislation grants the Supreme Court the widest discretion when dealing with an application. The Court may make such orders as it thinks fit.

Despite such flexibility and the desirability of having a workable remedy for minority shareholders, the judiciary, hampered by the limitations of drafting, undermined the effectiveness of the original provisions. Now the new national scheme — in s 5A of the Interpretation Act⁴ — instructs courts to heed the purpose or object of the Code when interpreting its provisions. Providing the drafting of our Code is sound, s 5A will help clinch the effectiveness of s 320.

WHY HAVE AN “OPPRESSION” PROVISION IN OUR CODE?

There will always be disputes — sometimes serious ones — among the members of companies and between the members and the management. In any conflict the minor shareholders, especially in small, private or “closely-held” companies (ie companies in which shares are held in a few hands), are vulnerable to the majority. Shareholders who command a majority can look after themselves. They can dictate the board’s composition and indirectly much of its management policy. They can pass resolutions and, if numerous enough, change the constitution of the company. They can generally grant or deny dividends, set corporate salaries and appoint office holders. These can be controversial matters indeed, especially in closely-held companies. But the realities of corporate life dictate that majority decisions usually prevail and that decision making rests with relatively few persons in the corporate hierarchy. Not every complaint should preoccupy management unduly and inhibit the proper pursuit of the company’s objects.

But this is also the rationale of the wrongly-sanctified rule in *Foss v Harbottle*⁵ and the rough and ready concept of majority ratification of the wrongful acts of management. It was very difficult to challenge managerial excesses or wrongs. Majority justice was sometimes too rough. Now we see reflected increasingly in the legislation the belief that while usually the majority should be able to vote as it wishes and prevail in company decision making, no longer should it do so unfairly. In the nineteenth century the courts interfered little with the internal

4 Companies and Securities (Interpretation and Miscellaneous Provisions) Act 1980. Inserted by amending legislation No 108 of 1983. Hampel J relied on s 5A(1) in *BHP Ltd v Bell Resources Ltd* (1984) 2 ACLC 157, 162. See *Bond Corporation Holdings Ltd and Anor v Grace Bros. Holdings Ltd and Ors* (1983) 8 ACLR 61, 86-87 for a discussion of the construction of corporate legislation.

5 (1843) 2 Hare 461, 67 ER 189.

management of companies. Now the legislature sanctions intrusion in the interests of those who suffer the rigours of unfair majority rule.

Powerful shareholders and directors sometimes misuse their powers, especially in smaller, proprietary companies. They may become intent on ignoring, depriving or pushing out their business associates, or they may act in a manner careless of other members' welfare. As Prentice emphasised,⁶ most members of closely-held companies expect to take part in the management of their companies. They also normally get their return on their investment not as dividends, but in the form of salaries and fees as directors or employees of their companies. Dismissal from management may deprive them of practically all the rewards of their investment. Their shares will be nearly worthless. Dividends in such companies are rare, and there will be restrictions on the transfer of shares.⁷

Examples of unfairness by a majority or by controllers towards a hapless minority abound. In one case a majority shareholder, who was also governing director, threatened to use his considerable voting power to change the articles to permit him, as governing director, to acquire compulsorily the petitioner's shares and oust him from the company.⁸ Well-known is the case of the autocratic 88 year old philatelist with voting control who ignored the finer points of company procedure, was contemptuous of the board (he told a prospective employee that one of the director/sons was "wrong in the head") and persistently overrode his two sons who were the majority beneficial shareholders.⁹ And, in another typical example, the chairman of directors, who owned one-third of the family company's shares, was locked out of management and found his shareholding diluted by a share issue. The combined votes of his former wife, his daughter and her husband were used unfairly.¹⁰

The Jenkins Committee¹¹ suggested a few other situations where the court's interference may be appropriate: for example, where directors appoint themselves to posts in the company and pay themselves excessively (thus depriving members of dividends), issue themselves shares on overly advantageous terms, or discriminate against the minority when issuing dividends. Wrongful deprivation of reasonable dividends, where the profits and the nature of the business justify a pay out, has been a popular weapon of capricious controllers, although taxation legislation discourages the accumulation of earnings. Such situations call for remedies of some sort.

To the Jenkins Committee's list we can add some of the colourful situations collected by O'Neal under his expressive title "Squeeze-outs":¹²

6 Prentice, "The Closely-Held Company and Minority Oppression" (1983) 3 Oxford J of LS 417, 421.

7 See s 34(1)(a) of the Companies Code.

8 *Re Anti-Corrosive Treatment Ltd* [1980] ACLC 34,165.

9 *Re HR Harmer Ltd* [1958] 3 All ER 689.

10 *Re Dalkeith Investments Pty Ltd* (1983) 3 ACLC 74. See also the interesting South Australian Supreme Court decision of Millhouse J in *Re City Meat Company Pty Ltd* (1984) 2 ACLC 149 where petitioners sought remedies under s 222 and s 186 of the UCA (equivalent to s 364 and s 320 of the Codes). Millhouse J held it would be just and equitable to wind up the company because the petitioners' "rights, expectations and obligations" [on entering the company] have been quite ignored. It is just not fair to them." (157)

11 UK, Cmnd 1749 (1962) para 205.

12 See O'Neal, *'Squeeze-Outs' of Minority Shareholders: Expulsion or Oppression of Business Associates* (1975 Callaghan & Co).

- ☆ withholding information and failing to hold meetings,
- ☆ siphoning earnings into disadvantageous contracts and “sweetheart” loans favourable to majority shareholders,
- ☆ appropriation of the company’s assets, credit or contracts for the personal advantage of the majority, and other “looting” of the company’s assets,
- ☆ advantaging other companies in the group at the company’s expense,
- ☆ changing the company’s articles and dilution of shareholding through share issues,
- ☆ “squeezes” by mergers and acquisitions, and
- ☆ excessive use of legal processes.

There is much that “squeezes” may have to endure.

Fairly powerful remedies have been offered the vulnerable minority in some countries. In Canada, for example, they have the ability to bring derivative or corporate suits (on behalf of the company) unencumbered by the restrictions of the rule in *Foss v Harbottle*.¹³ They also have in most jurisdictions the right to seek the winding up of the company, a drastic remedy for serious breakdown of the company’s affairs. They can seek injunctions to stop breaches of companies legislation. And they have the statutory oppression remedy, which, although not confined to minority shareholders, is used principally by them. In Australia the shareholder can, as a first resort, turn to s 320 and s 574.

WHO HAS STANDING UNDER S 320?

(a) *The Commission*

The new s 320(1) gives standing only to “a member” and the Commission. A Commission application must follow an inspector’s report or a report by the Commission conducted under Part VII.

There is the possibility under the new s 320 that the court could order the Commission to bring actions on behalf of the company under ss (2)(k), or even under the general permission to make “such orders as it thinks fit”. Under paragraph (k) the court may make “an order requiring a person to do a specified act or thing”. The Commission is “a person”, being a body corporate under the national scheme.¹⁴ Thus a court could order the Commission to take up cudgels against the controllers on behalf of the company. Such action would sidestep the major difficulties of cost and lack of expertise with which aggrieved minority shareholders contend in many cases of blatant breach of duty by controllers.

Under s 306(11) of the Code the Commission can bring proceedings in the company’s name providing it thinks the public interest is served. But such action has to follow a report or at least an examination by an inspector or the Commission under Part VII. While minority members can apply for such investigations,¹⁵ this preliminary procedure can be

13 Supra n 5.

14 See s 10(1) of the National Companies and Securities Commission Act 1979.

15 See s 290(2) of the Companies (SA) Code 1982. Members holding one-twentieth of either the issued shares or paid-up capital can apply for an investigation to be carried out.

cumbersome and time-consuming. However, during s 320 proceedings it may become clear to the court that a derivative suit is appropriate. It would be simpler for the court, then and there, to ask the Commission to act on the company's behalf. Recovery of damages or company property would be the immediate aim of any such proceedings. But such action by the Commission would be often justified by the need to reinforce investors' and the public's confidence in corporate affairs.

(b) *members*

"A member" now includes the legal personal representative of a member and others to whom a share has been transmitted by will or operation of law.¹⁶ Even though not registered as holders of the share or shares, they have standing. This extension stems from para 212(f) of the Jenkins Committee Report. The suggestion was taken up both in New Zealand and the United Kingdom¹⁷ before Australia adopted it. It was an overdue reform here. The abuses at which the change was aimed are outlined by counsel in *Re a Company*:

"Parliament [in enacting s 75 UK] was intending to extend assistance to personal representatives, whose usual complaint was either that they were refused registration or found it difficult to realise their holding at an appropriate price."¹⁸

This occurred in *Re Smith and Fawcett Ltd.*¹⁹ *Re Jermyn St Turkish Baths Ltd*²⁰ said that personal representatives of deceased shareholders had standing when they had been entered on the register as members. However, in *Re Meyer Douglas Pty Ltd* an executrix was held not competent to apply under the oppression provision because she was not a registered member. Nor could the deceased be regarded as a "member" for the purposes of the provision. As Gowans J pointed out, "a dead man . . . cannot 'complain', and cannot be 'oppressed' . . ." ²¹ The redrafted legislation removes the need for concern in this area.

Presumably a majority shareholder can complain of oppression by a minority, although action under s 320 by a majority shareholder would rarely be necessary given a majority's power in controlling management and general meetings. There have been occasions, though, when minorities have been held to be oppressive and where deadlocks gave grounds for actions for oppression.²² It is, furthermore, not difficult to characterise a deadlock in management as being, if not oppressive, at least "contrary to the interests of the members as a whole" within the meaning of s 320.

(c) *creditors and others?*

The new s 320 limits the rights of application to members and the Commission. It does not include creditors. In overseas statutes creditors

16 See s 320(4A)(a) [inserted by Act No 108 of 1983, s 89].

17 See s 209(b) of the NZ Companies Act 1955 (NZ) and s 75(9) of the UK Companies Act 1980 (UK).

18 [1983] 2 All ER 36, 43. Lord Grantchester QC set out counsel's arguments.

19 [1942] 1 Ch 304. This problem was commented on by the Jenkins Committee, *supra* n 11 at para 205.

20 [1971] 1 WLR 1042 (CA).

21 [1965] VR 638, 655.

22 See a good discussion of deadlocks and oppressions by Flower, *Judicial Intervention in Corporate Affairs: Legislative Initiatives*, unpublished LLB (Hons) dissertation (1984 University of Adelaide) 78-84.

and others have standing to apply. By ss 232-234 of the Canada Business Corporations Act 1974-1975, a "complainant" has standing. This includes a holder of a "debt obligation of a corporation". The Canadians also include former legal and beneficial shareholders, former directors and officers of the company or any of its affiliates and "any other person who, in the discretion of the Court, is a proper person to make an application . . ." This is wide indeed. A flood of applications did not ensue in Canada. And, of course, the court can always refuse ill-based applications.

A comment on the wide Canadian federal definition, which has been taken up in Canadian provincial legislation, notes that:

"the extensions on the whole appear to be desirable in the interest of ensuring that relief is not denied in proper cases for technical reasons."²³

For the same reason Australia could have been more adventurous and extended standing to creditors and others without great risk.

GROUND'S FOR A S 320 APPLICATION BY A MEMBER

Following overseas drafting precedents, the legislature broadened the category of grounds for oppression actions. The member must now show *either* that "the affairs of the company are being conducted" in a manner that is, *or* 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

- (a) oppressive to, or
- (b) unfairly prejudicial to, or
- (c) unfairly discriminatory against a member or members, or
- (d) contrary to the interests of the members as a whole.

"Affairs of a corporation" was widely defined by Bowen CJ in *Re Cumberland Holdings* to mean "all matters which may come before the board for consideration".²⁴ The term "affairs of a *corporation*" [emphasis added] is defined widely but not exhaustively in s 6 of the Code. The term "corporation" embraces "any body corporate" (with special exceptions). But s 320 does not, as s 6 suggests, contain references to "affairs of a corporation". It refers instead to affairs of the/a *company*. While in this instance it is probably inconsequential, such looseness of terminology can be unfortunate.

Because of the 1983 changes it is now more accurate to call s 320 the "injustice" rather than the "oppression" section. Actions may well be unfairly prejudicial to, or discriminatory against, or contrary to the interests of, members and not amount to "oppression" in the ordinary meaning of that word. While not actually oppressing someone you can unfairly prejudice or discriminate against or act contrary to his rights.

23 Institute of Law Research and Reform, Edmonton, Canada, *Proposals for a New Alberta Business Corporations Act*, Vol 2 (1980) 326. Cf the comment of Waldron, "Corporate Theory and the Oppression Remedy" (1981-1982) 6 Canadian Bus LJ 129, 138: "a complaint of oppression is often not carefully analysed by the court and rarely does the matter reach an appellate level at which a more carefully reasoned judgment might be expected."

24 [1976] ACLC 28,515, 28,529.

You can do it without meaning to. You may think it is for the good of the company. The section is now a good deal broader than the title "oppression" suggests.²⁵

(a) *Oppressive conduct*

However, unlike the UK, Australia retains oppression itself as one of the grounds of application under the section. "Oppression" connotes wilful or careless imposition of pressure, or unfair dealing or tactics of a reasonably serious kind. Some courts have stretched the meaning of the word, anxious to relieve beleaguered shareholders. But most attempts at definition suggest fairly serious misbehaviour is required, short though of fraud and illegality.²⁶

An American jurist, Justice Hershey, in *Gidwitz v Lanzit Corrugated Box Co* tried to limit the meaning of "oppressive":

"The word does not necessarily savor of fraud, and the absence of 'mismanagement, or misapplication of assets', does not prevent a finding that the conduct of the dominant directors or officers has been oppressive. It is not synonymous with 'illegal' and 'fraudulent'." ²⁷

English and Australasian cases agree. Fraud and illegality are not required. But in *Scottish Co-operative Wholesale Society Ltd v Meyer* Viscount Simonds suggested that "oppressive" did mean "burdensome, harsh and wrongful".²⁸ That is difficult to muster without some element of mala fides.

There are other formulae.²⁹ Lord Cooper in *Elder v Elder & Watson Ltd* called for elements of foul play:

"The essence of the matter seems to be that the conduct complained of should at the lowest involve a visible departure from the standards of fair dealing, and a violation of the conditions of fair play on which every shareholder who entrusts his money to a company is entitled to rely." ³⁰

The Jenkins Committee suggested the section was originally meant to

"cover complaints not only to the effect that the affairs of the company were being conducted in a manner oppressive (in the narrower sense) to the members concerned but also to the effect that those affairs were being conducted in a manner unfairly prejudicial to the interests of those members." ³¹

25 See discussion of wide ambit of words "unfairly prejudicial" in *Diligenti v RWMD Operations Kelowna Ltd* (1976) 1 BCLR 36.

26 "Prima facie . . . the word 'oppressive' must be given its ordinary sense . . ." Per Jenkins LJ in *Re HR Harmer Ltd* [1959] 1 WLR 62, 75; [1958] 3 All ER 689, 698.

27 170 NE 2d 131, 135 (1960).

28 [1959] AC 324, 342 (HL).

29 See some listed by Russell, "The Companies Amendment Act 1980" [1981] NZLJ 71, 74-75; McPherson, *The Law of Company Liquidation* (2nd edn 1980) 122-124; the *Jenkins Report*, Cmnd 1749 (1962) para 204; Rajak, "Oppression of Minority Shareholders" (1972) 35 MLR 156, 162ff.

30 [1952] SC 49, 55. See also *Re Jermyn St Turkish Baths Ltd*, supra n 18 at 1060 per Buckley LJ: "Oppression must, we think, import that the oppressed are being constrained to submit to something which is unfair to them as the result of some overbearing act or attitude on the part of the oppressor."

The Committee here anticipated the redrafting of the oppression provision by implying that acting unfairly and prejudicially may not amount to the ordinary meaning of oppression.

Lord Keith in *Elder's* case stated the test of oppression to be "lack of probity or fair dealing".³² But he rephrased that in *Meyer's* case to "an element or lack of probity and fair dealing".³³ Jenkins LJ in *Re Harmer Ltd*³⁴ and Menhennitt J in *Re Tivoli Freeholds Ltd*³⁵ adopted the former.

Lush J in *Re Dalley & Co Pty Ltd* took a wider view:

"In my opinion want of probity is only one of the ways in which oppression can manifest itself, as indeed the use of the alternative 'lack of probity or fair dealing' by Lord Keith [in *Elder's* case] indicates. One person may subject another to continual injustice by insisting, however honestly, on a proposition that is wrong or by using his strength to maintain, however honestly, a position unjustified in law."³⁶

This is what happened in *Dalley's* case. The directors had obdurately insisted that the petitioner's shares were not ordinary shares but employee shares. The difference was vital. Employee shares could be expropriated at the direction of the board once the holder ceased to be an employee of the company. Ordinary shares could not. Even if they were honestly of this wrong view, Lush J ruled, the directors were acting oppressively both in their assertion and in purporting to expropriate the petitioner's shares at an undervalue. The oppressors

"were fixed in their determination to classify the petitioner's shares as employee shares and so to remove her from the company at relatively small cost and to their own and their children's advantage."³⁷

The fact that the oppressors in *Dalley* were trying to advantage their families should be irrelevant to the issue of oppression. The purpose or object of the oppressors may make their actions more culpable, but, objectively, has no effect on the level of oppression suffered. It may be more irksome if the oppression springs from selfish or vindictive reasons. But for clarity of application of the law it is useful to focus only on what was or is done (and this includes the manner in which it was or is done). It is the action and its effects, not the motivation of the oppressor, that is all important at the initial stage.³⁸ This cuts both ways, of course. Legitimacy of motive is no defence for the oppressor.

Motive becomes important when the court decides what remedy, if any, is appropriate. Motive can indicate whether there is hope for the company or for a reasonably effective solution to the problems within

31 Cmnd 1749 (1962) para 204.

32 Supra n 30 at 60.

33 Supra n 28 at 364. Emphasis added.

34 [1958] 3 All ER 689.

35 [1972] VR 445, 452.

36 (1968) 1 ACLR 489, 492.

37 Ibid 493. The High Court reversed Lush J's judgment on another point.

38 See *Re HR Harmer Ltd* [1959] 1 WLR 62, 84 per Jenkins LJ: "It seems to me the result rather than the motive is the material thing." See also Lush J in *Re M Dalley & Co Pty Ltd*, supra n 36 at 492.

the existing framework. Intractability in the oppressors, for example, bodes ill for any solution short of giving the oppressed a suitable exit from the company. Motive, too, helps tell us whether or not there has been a breach of duty by directors or controllers. And under the new section the courts are encouraged to do something about that. Under s 320(2)(g), for example, the court can order proceedings on behalf of the company.

Surprisingly, given the usual meaning of the word, negligent and inefficient management amounted to oppression under the 1960 version of the British Columbia Companies Act in *Re Van Tel Ltd*.³⁹ The profitability and reputation of the company were seriously affected by mismanagement: inefficiencies abounded, customers were badly treated, there were hints of dishonesty and the accounts were incomplete. The auditor had resigned in frustration. All this amounted to oppression. The company was ordered to purchase the petitioner's shares.

Somewhat curiously, in *Re Overton Holdings Pty Ltd*⁴⁰ it was deemed oppressive for the company not to sue alleged wrongdoers where there was a reasonable cause of action on the facts. The reasonable, prima facie case itself should give grounds for a finding of oppression or unfairness (as it did in *Overton*). The refusal by management to sue surely becomes oppressive only when there is a prima facie case already. Refusal to sue of itself is surely not oppressive. Anyway, there should be no need to rely on that ground alone.

"Oppression", then, has received varied definition from the courts. Sometimes, in the interests of justice, they stretched its meaning. Perhaps aware of the word's limitations, and increasingly concerned about the potential for mischief by corporate majorities and controllers, our legislatures enlarged the ambit of the section by introducing broader notions such as prejudice, discrimination and, widest of all, contrary to the members' interests.

(b) *Unfairly prejudicial or discriminatory*

Unfair prejudice and unfair discrimination overlap in meaning. Both phrases can be interpreted widely. Practically any example of unjust, inequitable or harmful activity is embraced by their plain meanings. Ongley J in *Re WH Thomas* thought discriminatory or prejudicial conduct contemplated a "wider category of conduct"⁴¹ than just oppressive conduct. McPherson J in *Re Dalkeith Investments Pty Ltd*⁴² agreed, and Crockett J in *Re G Jeffery (Mens Store) Pty Ltd* said:

"Now the newly introduced expressions 'unfairly prejudicial to' and 'unfairly discriminatory against' clearly contemplate conduct of greater amplitude than is understood by the term 'oppressive'. The new subsection has made the task of the applicant shareholder less

39 (1974) 44 DLR (3d) 146. Cf *Re Five Minute Car Wash Service Ltd* [1966] 1 All ER 242.

40 (1984) 9 ACLR 225.

41 (1983) 1 ACLC 1256, 1261. His Honour cited *Gore-Browne on Companies* (43rd edn 1977) para 28-13, which also concluded the new UK standard — "prejudicial" — will be "less demanding" than the old formula, "oppression".

42 (1985) 3 ACLC 74, 80: "It is enough that there is action, which if not 'oppressive' is at least 'unfairly prejudicial to' or 'unfairly discriminatory against' a particular member."

onerous in respect of the conduct about which he is entitled to complain . . .”⁴³

The *Oxford Shorter English Dictionary* defines “prejudicial” as “detrimental, damaging to rights, interests, etc”. To discriminate unfairly means to draw distinctions unjustly. In the context of s 320 this means to distinguish unfairly between shareholders. “Unfairly” is the key word in both phrases. The legislature could have simply said that activity that is “unfair” to a member may activate s 320. The word “unjust” would do quite as well. The legislature concedes this by heading the section “Remedy in cases of oppression or injustice”.

While an action — the non-payment of dividends, for instance — may apply to all shareholders equally, it may still unfairly prejudice some of them and not others. For example, some shareholders may rely entirely on income from their investments; others who are well-paid executives of the company may not. In *Re Overton Holdings Pty Ltd* the defendants unsuccessfully argued that s 320(a)(i) and (ii) did not apply because the actions complained of affected all members the same.⁴⁴ Rowland J, without conceding that the words “prejudicial” and “discriminatory” call for evidence of unequal treatment of members, focussed on the word “oppression”. Oppression was made out.

“The fact that a loss if suffered by Overton [Pty Ltd] will eventually also be borne equally by the other shareholders does not make the conduct any the less oppressive to the petitioner.”⁴⁵

Similar things cannot be said of “prejudice” and “discrimination”. Unequal treatment of members is at the heart of those words. But the oppressor, while he may suffer equally as a shareholder with the others, may be more than compensated in the end result. Denial of dividends, for example, may mean more for the controller in director’s fees. Anyway, the other grounds in s 320 — oppression and acts contrary to the interests of the members — do not focus on unequal treatment. The Court will not be hampered by the strict meaning of the words of s 320.

Under ss (4A)(b) and (c) the requisite unfairness can be to the member in any capacity (discussed below). If the applicant member were also a creditor of the company, he could show that, for example, inefficient or negligent management of the company unfairly prejudiced him in his capacity as creditor. His investment as a member and creditor might well be jeopardised by poor management. In *Re Five Minute Car Wash Service Ltd*⁴⁶ inefficient or negligent management did not amount to oppression. But it may well now amount to unfair prejudice to a member in his capacity as a creditor.

(c) “manner contrary to the interests of the members as a whole”

These words also have wide meanings and overlap the meanings of prejudicial or discriminatory conduct. Negligence and breaches of fiduciary duty by directors, even though those duties are owed to the company and not the shareholders, are indirectly contrary to the interests of the members as a whole. If the company suffers then the members’

43 (1984) 2 ACLC 421, 425-426.

44 (1984) 9 ACLR 225, 230.

45 Ibid.

46 [1966] 1 All ER 242.

investment is hurt. This was acknowledged in *Overton's* case⁴⁷ where the defendant controller apparently breached his duty to act in the company's best interests in causing the company to borrow money the company did not need, to on-lend it at an unrealistic profit margin to another company he controlled and eventually to place the money with another of his companies which faced financial difficulties. In other words, there was a prima facie case that the controller was using the company's credit for his personal advantage. This was oppressive to the petitioning member as a shareholder — if the company suffered a loss she, as a member, would suffer, the court recognised.

The Jenkins Committee acknowledged that the remedy should apply in cases of boardroom negligence and wasting of corporate assets.⁴⁸ Under the new wording the facts of *Re Five Minute Car Wash Service Ltd*⁴⁹ may well give a different result. A good remedy from the list offered in s 320(2), if boardroom negligence is shown, is an order directing or authorising derivative suit proceedings under paragraph (g).

Probably nothing swings on the fact that the "manner", and not the acts themselves, must be contrary to members' interests. But it reinforces the view that lawful and otherwise proper acts can attract s 320 (discussed below).

The words "members *as a whole*" may operate restrictively if interpreted to mean that the behaviour must detrimentally affect *all* the members. The controllers' interests as members may be well served by their selfish manner of acting. Thus not all members would be disadvantaged. More likely those words mean that, where controllers act in their own interests only, they will be seen to be acting contrary to the interests of the members as a whole. Even if the controllers act in the majority's interests they will not, under this interpretation, be acting in the interests of members as a whole. And by not acting in those interests as a whole they will often be acting "contrary to" those interests, as the wording requires.

Lawful activity may be unfair or oppressive

The Supreme Court of Victoria in *Re Bright Pine Mills Pty Ltd*⁵⁰ thought that the predecessor of s 320 should not be used to interfere with the exercise of powers conferred on directors by the memorandum and articles. But the court recognised limits. The directors must be

"acting honestly and without any purpose of advancing the interests of themselves or others of their choice at the expense of the company or contrary to the interests of other shareholders".⁵¹

Smith J added in *Re Wondoflex Textiles Pty Ltd* that the articles constitute the bargain knowingly entered by members, and relief (in that case winding up) could not be given over "a valid exercise of powers

⁴⁷ Supra n 44.

⁴⁸ Para 207.

⁴⁹ Supra n 46.

⁵⁰ [1969] VR 1002, 1011.

⁵¹ Ibid. There two nominee directors were held to be acting oppressively by directing company work to their own family firm for their own advantage. Their actions were in breach of their duty to act in the company's best interests.

conferred by the articles".⁵² The important exceptions arose in the partnership-type situation where the exercise of power was

"entirely outside what can fairly be regarded as having been in the contemplation of the parties when they became members of the company".⁵³

Acting within the constitution is of itself no bar to action under s 320. It may be "constitutional", for example, to use your voting power to dominate decision-making, deny dividends or vote unjustified salaries for privileged positions in the company and so on. But it may still be oppressive or unjust to do so.

It is, though, more difficult to sheet home oppression where the controllers are formally correct in what they do. In the interests of commercial certainty members must normally accept valid, albeit harsh, management or majority shareholder decisions. Shareholders knowingly enter the company and the bargain is in part set out in the articles. What if, for example, the directors in *Dalley's* case had been right in their persistent assertions that the woman's shares were employee shares and not ordinary shares? Robust assertion of rights is an everyday part of corporate life. And, as the Victorian Supreme Court reminded us in *Re Bright Pine Mills Pty Ltd*,⁵⁴ the courts are traditionally reluctant to interfere in the internal management of a company. In *Re G Jeffery (Mens Store) Pty Ltd* Crockett J stressed it was not unfair or oppressive to be "required to abide by the decision of the majority of shareholders or directors . . ." ⁵⁵ And, generally, the refusal by a majority to release the applicant from the company by buying his shares is not oppressive or unfair within s 320.

But that line of argument now carries less force. Section 320 is all about interference in internal management. To repeat, the articles or the law may allow a majority or the board to dismiss a director, pay salaries, ratify breaches of duty, declare or not declare dividends and so on. Yet these very acts — internal matters — may amount to injustice or oppression for some shareholders. As the Canadian commentator, Professor Iacobucci, said of s 234 of the Canada Business Corporations Act 1975:

"[Section 234] permits the court to modify the company's conduct so as to allow it to continue as a viable enterprise while still protecting the interests of minorities. It is an express invitation to the court to substitute its judgement for the will of the majority. This is a departure from the general principle of judicial non-interference in corporate management." ⁵⁶

Usually, though, the company's action, sanctioned by the articles, will not be open to challenge by shareholders. In *Re Warrick Howard (Aust)*

52 [1951] VLR 458, 467. See also *Re G Jeffery (Mens Store) Pty Ltd* (1984) 2 ACLC 421, 427-428.

53 Ibid.

54 *Supra* n 50.

55 (1984) 2 ACLC 421, 426. See also *Re a Company* [1983] 2 All ER 38, 44 per Lord Grantchester QC: "... Parliament did not intend to give a right of action to every shareholder who considered that some act or omission by his company resulted in unfair prejudice to himself."

56 *Canadian Business Corporations* (1977) 208.

Pty Ltd, for example, the removal of a director was motivated by fears that he was setting up in competition. These fears were "well justified", Olney J concluded, and found no oppression. But His Honour generalised:

"The removal of a director cannot of itself be oppressive when it is specifically provided for in the articles."⁵⁷

Even allowing for the words "of itself", this probably goes too far. If the effects of removal are unfair, then removal of itself may well invite the application of s 320. Fairness is the guide, not black-letter legitimacy. Frustration of expectations of quasi-partners — exclusion from the board may be an example — may well be brought on by "valid" exercises of power by the majority. Nonetheless there may still be oppression or unfairness.⁵⁸

WHAT REFORMS CAME WITH THE 1983 REDRAFTING?

As noted earlier, there was considerable dissatisfaction with the 1981 drafting of s 320. It did not cure several major ills in the old s 186 UCA. Has the 1983 redrafting cured them?

(a) *Detriment to members in their capacity as members no longer required*

Under the UCA and then our 1981 Code, relief could only be extended to a member who was being oppressed as a member, and not if he was being oppressed or unfairly treated in some other capacity. In *Re Lundie Brothers Ltd*,⁵⁹ for example, the petitioner (a member of the company) was removed from his post as working (executive) director in a closely-held company. He was unable to invoke the section, even though he suffered genuine financial disadvantage because all profits were channelled into directors' remuneration. He had been affected as a director only, the court ruled. Likewise in *Elder v Elder and Watson Ltd*.⁶⁰ Thus, although you were also a member, if you suffered as a director, officer, employee, creditor or in some other capacity you could not use the oppression remedy. This was not satisfactory where, with small closely-held companies especially, it was not easy except on paper to distinguish between your positions as shareholder, director or employee. As the New Zealand 1973 Special Committee to review the Companies Act and the Explanatory Memorandum to the Australian 1983 Bill pointed out, the most common forms of oppression or unjust treatment in the small partnership companies affect the interests of the members as directors or employees. In the closely-held company a member usually derives the benefit of his or her investment through being paid as an employee or director. Thus deprivation of employment or dismissal from the board may strike at the very roots of the members' financial interest in the company. For such reasons the ambit of s 320 has been broadened to include detriment suffered in capacities other than as members.

⁵⁷ (1983) 1 ACLC 634, 636.

⁵⁸ See the analogy in the winding up application considered in *Re Wondoflex Textiles Pty Ltd*, supra n 52 at 467 per Smith J, and *Ebrahimi v Westbourne Galleries Ltd* [1973] AC 360, 378-379 per Lord Wilberforce.

⁵⁹ [1965] 2 All ER 692.

⁶⁰ [1952] SC 49.

But what are the limits, if any? Can we foresee, to use Lord Grantchester QC's example from *Re a Company*, an application from

"a shareholder who objected to his company carrying out some operation on land adjoining his dwelling house, which resulted in that house falling in value."⁶¹

The wording of ss (4A) does not discourage such applications. The wording is wide — "whether in his capacity as a member or in any other capacity". Will we get litigants buying shares in mining companies to give them standing to bring s 320 applications over land rights or uranium mining? Can we now argue that standing under s 320 is available to us in our capacity as concerned members of the public? Or, more plausibly, can we argue, for example, that the mining of sites of religious or cultural importance unfairly prejudices or discriminates against us in our capacity as members of a race or religion? Is there a limit to the "capacities" under which we can assert oppression or injustice?

Once again, though, we should remember that the court does have a discretion under the section. It can make such orders as it thinks fit. Persons who have sought membership solely to use s 320 may well get an unsympathetic hearing. But the potential is there for s 320 to be used for non-corporate or at least non-financial ends.

Even the old s 320 was capable of wide interpretation. British Columbia produced a case of major importance in *Diligenti v RWMD Operations Kelowna Ltd.*⁶² It was a typical "squeeze out" situation.⁶³ One of four equal founding co-members and directors was voted off the boards and out of his job as salaried manager of two restaurant services companies the directors operated. Fulton J conceded that removal as a director could not be oppression to the applicant as a member. But he did find it was "unfairly prejudicial" to the applicant as a member.⁶⁴ His Honour reasoned that the rights of which the applicant was deprived were enjoyed by him as "a member as part of his status as a shareholder . . . amongst these rights are the rights to continue to participate in the direction of that company's affairs."⁶⁵ Fulton J added:

"Second, although his fellow members may be entitled as a matter of strict law to remove him as a director, for them to do so in fact is unjust and inequitable, and is a breach of equitable rights which he in fact possesses as a member . . . such unjust and inequitable denial of his rights and expectations is undoubtedly 'unfairly prejudicial' to him in his status as a member."⁶⁶

By this ingenious route the blockade of decisions narrowing the provision to oppression only in one's role as member was avoided. It was indeed "very welcome but in terms of precedent perhaps doubtful".⁶⁷ Mercifully, it seems Australia no longer has to hope for such judicial

61 [1983] 2 All ER 36, 44.

62 (1976) 1 BCLR 36.

63 Other good examples of "squeeze outs" arise in *Ebrahimi v Westbourne Galleries Ltd*, supra n 58, and *Re North End Motels (Huntly) Ltd* [1976] 1 NZLR 446.

64 The words "unfairly prejudicial" appear in s 244(1)(b) of the 1979 British Columbia Company Act [formerly s 221(1)(b) of the 1973 Act].

65 Supra n 62 at 51.

66 Ibid.

67 Hansen, "Annual Survey of Canadian Corporation Law" (1978) 10 Ottawa LR 617, 701.

creativity to make its provision effective. Section 320(4A)(b) and (c) specifically say that the section can apply whether you suffer in your capacity as a member "or in any other capacity".

There was no solid reason for retaining or tolerating the restrictive approach for as long as we did, especially as winding up was often ordered under s 364 (or its predecessors) on the ground of loss of office as director.⁶⁸ Anyway now the position will be different. If a member suffers detriment as an employee or director or creditor he may be able to find some satisfaction in the new section. Curtailing not extending the ambit of s 320 may now concern the courts.

(b) *Who can be the oppressor?*

Section 320 is silent as to the range of persons who can be "oppressors". Jenkins LJ in *Re HR Harmer Ltd* insisted that,

"the phrase 'the affairs of the company are being conducted' . . . is wide enough to cover oppression by anyone who is taking part in the conduct of the affairs of the company, whether de facto or de jure." ⁶⁹

Thus the actions of directors, even de facto directors (those not properly appointed to the board) and indeed of anyone who conducts affairs of the company, could found an application. Actual or proposed resolutions of classes of members can also provide grounds: s 320(1)(a)(ii).

Section 320(1)(a)(ii) and (2)(b) add actions "by or on behalf of the company" as possible grounds for proceedings. The company itself may be oppressive in the sense that general meeting resolutions⁷⁰ and decisions of the board or a managing director are acts by or on behalf of the company. In *Re Overton Holdings Pty Ltd* the company itself was held to be oppressive because it would not take action to sue in

"circumstances where on the information before me there is disclosed sufficient to give a reasonable cause of action against those others [defendants]." ⁷¹

The oppression proceedings intimately concern internal relationships of companies. Any cry for judicial non-interference in internal management is wasted breath. Our 1981 legislation had limited itself in ss (1)(a)(ii) to the acts of directors only. Recognising that the unfairly or unjustly acting controllers will not always be directors, or acting in their capacity as directors, the legislature widened the wording to embrace all actions by or on behalf of the company.

68 A 1980 Companies Amendment Act widened New Zealand's s 209 to include oppression to a shareholder, "whether in his capacity as a member or in any other capacity". Like the 1981 Australian Codes, s 75 of the 1980 UK Act failed to make a similar change. Either the UK courts will try the *Diligenti* approach or they and company personnel must continue to tolerate the restricted application of the section.

69 [1958] 3 All ER 689, 698.

70 See discussion of whether or not shareholders' resolutions are acts of the company by Burridge, "Wrongful Rights Issues" (1981) 44 Mod LR 40, 60-66 and Shapira, "Minority Shareholders' Protection — Recent Developments" (1982) 10 NZULR 134, 139-140, esp fn 33. This writer prefers Shapira's view. See also *Wayde v NSW Rugby League Ltd* (1984) 9 ACLR 349, 366.

71 (1984) 9 ACLR 225, 231.

On this matter the Explanatory Memorandum of the 1983 Bill notes that s 320

"will apply irrespective of whether the conduct complained of is that of the directors, of the controlling shareholders in general, of the de facto controllers of the company or, as in *Scottish Co-operative Wholesale Society Ltd v Meyer* [1959] A.C. 324 of an associated company."⁷²

(c) *Oppression can be continuing process or single act or omission:*

The old law insisted the petitioner show a continuing process of oppression. Furthermore, it had to continue up to the date of presentation of the petition.⁷³

There was no sensible reason for such a rule. Isolated acts — for example, the improper allotment of shares (to dilute a member's voting power) or an amendment to the articles — could be quite as damaging to minority shareholders as any continuing process. Again the courts strained to get around a valueless restriction on the ambit of the section.

In *Re Anti-Corrosive Treatments Ltd*,⁷⁴ for example, a majority shareholder intended to use his voting power to change the articles to enable him, as managing director, to acquire compulsorily the petitioner's shares. At first sight this looked very much like a single act and not a course of conduct. But White J of the New Zealand Supreme Court ruled that this constituted the beginning of a damaging course of conduct — the ousting of the minority shareholder — which conduct constituted a continuing process of oppression.⁷⁵

The Jenkins Committee⁷⁶ long ago suggested changes to the UK provision to ensure that it covered "particular acts which are oppressive to or unfairly prejudice the interests of the complaining members as well as to courses of conduct having those effects". This was only taken up in s 75 of the 1980 UK Act. That provision now embraces "any actual or proposed act or omission of the company (including an act or omission on its behalf)". The 1980 New Zealand Companies Amendment Act made a similar change. The enlargements were considered sensible and uncontroversial. Curiously our 1981 legislation did not make the extension. In *Spicer v Mytrent Pty Ltd*⁷⁷ Needham J pointed to the need for a continuous process when refusing to apply the 1981 version of s 320. We waited until the 1983 enactments. Section 320(1)(a)(ii) and (2)(b) now refer to "an act or omission" and "a resolution".

Past and proposed acts also attract the provision. The legislation talks of an act that "was or would be oppressive or unfairly prejudicial". The present tense — ie, the act that "is" unfair or oppressive — is not

72 Companies and Securities Legislation (Miscellaneous Amendments) Bill 1983, Explanatory Memorandum, para 482(b).

73 See *Re Tivoli Freeholds Ltd* [1972] VR 445, 453; *Re Jermyn Street Turkish Baths Ltd* [1971] 1 WLR 1042, 1058-1059.

74 [1980] ACLC 34,165.

75 Ibid 34,172.

76 Cmnd 1749 (1962) para 204.

77 (1984) 2 ACLC 214, 224. The decision of Hodgson J in *Wayde v NSW Rugby League Ltd* (1984) 9 ACLR 349, 365-366 notes the 1981 and 1983 versions of s 320. The 1983 version and its reference to single acts or omissions was applied.

included.⁷⁸ And one can argue that paragraph (a)(i) covers only “affairs of the company” that “are being conducted”, not single acts or omissions or resolutions. When this section is interpreted by the courts, hopefully the omission of the present tense in paragraph (a)(ii) will be immaterial. For instance, it is likely that an act that leads to a s 320 application, while it may have present effect, will have happened already — ie, in the past. But there seems no good reason why a formulation like that of s 574 — “has engaged, is engaging or is proposing to engage in any conduct” — could not have been used in s 320 to put the matter beyond doubt.

“Omissions” are also covered. Refusal to declare adequate dividends when there are plenty of distributable profits available in the company is an oft-cited example of an omission that may qualify. In *Meyer’s case*⁷⁹ inaction by nominee directors amounted to oppression.

NATURE OF RELIEF AVAILABLE UNDER S 320

As commented earlier, s 320 gives the court a wide discretion to make such orders as it thinks fit. The legislation sets out possible orders, without limiting the courts’ discretion.⁸⁰ Some of the more important remedies suggested are:

(i) *an order for winding up* (ss (2)(c)): This will often be too drastic. Section 320(4) adds that a winding up cannot be ordered where the court thinks the winding up would “unfairly prejudice the oppressed member or members”. It is a minor point, but ss (4) talks only of the “oppressed member or members”. Does this mean that the unfairly prejudiced or discriminated against member (who is not also oppressed) cannot have his interests taken into account when a winding up order is being considered? Or is the term “oppressed member” intended to embrace all successful applicants under s 320(1)(a)?

Under the winding up provision, s 364, two new grounds were added in 1983 — ss (1)(fa) and (fb). They list oppression, unfair prejudice, unfair discrimination and activity contrary to the interests of members as specific grounds for a winding up application. Often members bring applications for oppression and, in the alternative, for winding up the company (on the “just and equitable” ground usually). *Re Tivoli Freeholds Ltd*⁸¹ is an example of this.

Why this addition of the two new grounds to s 364(1)? Strictly speaking it was not needed. The court has power under s 320 itself to wind up a company, providing one of the s 320 grounds is established. But under s 320 only members and the Commission have standing. Under s 364 a much larger group can seek a winding up — creditors, contributories (who include some past members) and even the company itself, among others. Presumably, then, someone who is not himself oppressed or treated unjustly can use those very grounds to seek the

78 This matter was first drawn to the writer’s attention by Jim Hambrook of the Adelaide Law School.

79 [1959] AC 324 (HL).

80 See s 320(2)(c)-(k).

81 [1972] VR 445. The petitioner was unsuccessful in establishing oppression (under s 186 UCA) but did show it was just and equitable to wind up the company (under s 222(1)(h) UCA).

winding up of the company under s 364. There does not seem to be anything wrong with that — the court has a discretion to wind up or not, after all, and can exclude busy bodies. But it does mean the oppression and injustice pleadings are going to get a greater airing than before. The new provisions — s 364(1)(fa) and (fb) — may only mean that the traditional “just and equitable” pleadings (s 364(1)(j)) will become more complex. Paragraphs (fa) and (fb), which will rely on the same facts as a “just and equitable” application, will be thrown into the ring too. Nothing much has been gained by these amendments to s 364.

Generally the court settles for some less severe remedy than winding up. These include:

(ii) *an order regulating the affairs of the company* (ss (2)(d)): In *Re HR Harmer*⁸² the aged and dictatorial stamp dealer was removed from office as chairman of the board and managing director. He was also ordered not to interfere in the company's affairs unless invited to do so by the board.

(iii) *an order for the purchase of the shares of any member by other members or the company itself* (ss (2)(e) and (2)(f)): In *Meyer*⁸³ the co-operative society, which through its nominee directors on the company's board subordinated the interests of the company to those of the co-operative society and thus acted in an oppressive manner towards the other shareholders, was ordered to buy the petitioning minority's shares. In *Re M Dalley*,⁸⁴ where the board wrongly insisted the petitioner's shares were employee shares, the company was ordered to buy the petitioner's shares. So too in *Re Dalkeith Investments Pty Ltd*⁸⁵ McPherson J ordered the oppressors to buy the applicant's shares.

This order is most likely to be used to deal with feuds in “quasi-partnership” companies; ie, in those companies which have a background of mutual confidence between members and understanding that all will participate in the management, along often with restrictions on the transfer of shares. A buying out of one of the “partners” at a reasonable price per share may be the only way, short of winding up, of settling an internal dispute. Applicants often request orders for purchase of their shares.

Valuation of shares, especially in closely-held or quasi-partnership corporation, can be very difficult.⁸⁶ While there are few helpful general rules for this procedure, several principles seem clear. First, one calculates the value which the shares would have had as at the date of the petition. Second, where the oppression or injustice has itself

82 [1958] 3 All ER 689.

83 [1959] AC 324.

84 (1968) 1 ACLR 489.

85 (1985) 3 ACLC 74.

86 For a discussion of valuation of shares on a minority shareholder's petition see Ravinsky, “The Statutory Protection Against Oppression” in Sarna (ed), *Corporate Structure, Finance and Operation* (1980) 51, 70-76; Birds, “Valuation of Shares on a Minority Shareholder's Petition” (1984) 5 Co Law 34-35. See also the discussion of valuations and their difficulties that arose in *Re a Company* [1983] 2 All ER 854 per Vinelott J. Hartwig, “Valuing an Interest in a Closely-Held Business for the Purpose of Buy/Sell Agreements and for Death Tax Purposes” (1974) 26 So Calif Tax Inst 215 is also helpful. See also Rubner, *The Ensnared Shareholder* (1964 Penguin) 120-131 on the market valuation of shares.

depressed the value of the applicant's shares, the valuation is made as if the oppression or injustice had not happened.⁸⁷ Third, to use the words of Fulton J in *Diligenti's* case,

"the court is concerned not with the market value of the shares, but with the fair value or price to be set in the circumstance."⁸⁸

The "market" value of shares in a closely-held company to an outsider will usually be very low indeed. There may in fact be no market for them. So, too, the value of traded shares may be low for a variety of reasons; low dividends, small numbers of shares traded and so on. For their part minority shareholders may overvalue their shares, clinging to some inflated value in a sentimental view of the family business's assets or its competitive abilities, or harbouring some suspicion that the controllers have a clandestine deal awaiting their departure for consummation. On the other hand the majority may indeed be keen to squeeze out the minority at an unfair price for personal advantage. But the difficulties of valuation only promote suspicion and discord.

To reach a fair valuation a combination of factors must be considered.⁸⁹ There can be little mathematical precision in this process. A recent North American commentary observes that valuing the private, non-listed company is

"not a science, but an art — an imprecise one at that. . . . for smaller businesses and for many larger private firms . . . valuation is done by the seat-of-the-pants method".⁹⁰

The realities of power affect values. As an American newspaperman commented on a corporation of 100 shares: "There are 51 shares that are worth \$250,000. There are 49 shares that are not worth a — —." ⁹¹ A bare majority can sometimes indeed be that powerful, especially where the articles do not provide for cumulative voting on directors.⁹² The courts, of course, try to see fairness done, and will if necessary defy the majority's domination.

Briefly, there are three favoured methods for valuing securities that are not actively traded. *First*, the price that the tangible and intangible assets would attract on liquidation may be estimated and used as a valuation basis. This is suitable for companies which principally trade in or hold securities or real property. This is, though, not a satisfactory way of valuing shares in a vigorous trading company that is not about to fold up. A going concern is invariably worth much more than simply the realisable net value of the company's assets. *Second*, there is the

87 See, for example, *Scottish Co-operative Wholesale Society Ltd v Meyer* [1959] AC 324, 369 per Denning LJ and 364 per Keith LJ; *Diligenti v RWMD Operations Kelowna Ltd* (1977) 4 BCLR 134, 166; *Re Dalkeith Investments Pty Ltd* (1985) 3 ACLC 74, 81 per McPherson J.

88 Ibid 166. See also Nourse J in *Re Bird Precision Bellows Ltd* [1984] 2 WLR 869, 876: "it is axiomatic that a price fixed by the court must be fair."

89 Some of these are articulated by MacFarlane J in *Re Wall & Redekop Corp* (1974) 50 DLR (3d) 733, 735-738.

90 Faris, Holman and Martinelli, "Valuing the Closely Held Business" [Fall 1983] *Mergers and Acquisitions* (Philadelphia) 53, 53.

91 See quoted in *Humphrys v Winous Co* 165 Ohio St 45, 50; 133 NE 2d 780, 783 (1956).

92 See discussion of cumulative voting in Canada, Select Committee on Company Law (Lawrence, Chairman) *Interim Report* (1967) ch 8.

valuation based on the earnings or income flow the private company produces (the earnings capitalisation method). An annual return per dollar averaged over a number of years can often be assessed and used as a basis. The value would be set at an appropriate multiple of the average annual return. This is more suitable for established operating companies, the true worth of involvement in such companies being not their assets but their ability to generate income. But a company with a poor earnings record may find its earnings-based value to be even lower than the dissolution value of its assets.⁹³ *Third*, we have the dividend returns valuation. Basically, this entails an estimate of what the shares would fetch on the market if they were listed and paid dividends typical of that sort of company. This method depends on finding comparable companies with traded shares, rarely an easy task. Because of the many factors unrelated to capacity to pay dividends that influence the regularity and quantum of dividends, this is often the least satisfactory method of the three. A composite approach – taking all three methods into account – may be appropriate.⁹⁴

In *Re Bird Precision Bellows Ltd*, Nourse J decided a fair value of the shares in the quasi-partnership company at issue was to be “fixed pro rata according to the value of the shares as a whole and without any discount”.⁹⁵ The value of the company’s tangible assets and its earnings were determining factors. Because a quasi-partner’s shares were being bought they could not be acquired at a low, discounted price by another quasi-partner, especially where prejudicial conduct or oppression led to the purchasing order. The fair value is generally the pro rata, not a discounted, value of the shares, although the limited marketability of most non-traded shares will depress their value to some extent. A valuation based primarily on dividend returns is likely only where the company historically has paid significant dividends and these payments were a realistic or fair return on the investment in the shares.⁹⁵

Several courts have cautioned that as a general rule “locked in” minorities cannot look upon s 320 as a convenient means of quitting their shares in the company to other shareholders at a price determined by the underlying assets of the company. Oppression or unfairness must first be shown. And refusal to buy out a minority shareholder on request *of itself* will not be unfair or oppressive.⁹⁷

(iv) Paragraphs (j) and (k) of ss (2) suggest *orders restraining or requiring actions*. The wording indicates prohibitory (para (j)) or mandatory (para (k)) injunctions. Such injunctions, granted under s 320,

93 See discussions of assets earnings valuations in O’Neal, “Squeeze-Outs” of *Minority Shareholders* (1975) paras 2.16, 5.24 and 8.12.

94 Faris, Holman and Martinelli (supra n 90) discuss these three methods and offer their own “weighted composite value method” which, they hope, gives a “more systematic and theoretically based approach to the valuation of the smaller business”. (ibid 59) Hartwig (supra n 86 at 254) is no doubt accurate:

“The dividends which are paid by a closely-held corporation are usually determined by the tax brackets of the controlling interests, the reasonable compensation which they may deduct for income tax purposes, the fringe benefits which the controlling interests choose to enjoy and the working capital requirements of the business.”

95 [1984] 2 WLR 869, 882.

96 Ibid.

97 See *Re G Jeffery (Mens Store) Pty Ltd* (1984) 2 ACLC 422, 427, citing *Re A Company* [1983] 2 All ER 38, 45.

can be issued on wider grounds than those issued under s 574. The latter are limited to controlling contraventions of the Code only. Successful petitions under the Canadian federal s 234 often result in injunctive relief.

(v) *An order directing the company to bring proceedings or authorising a member to bring proceedings on behalf of the company* (ss (2)(g)). This is the most interesting innovation and possibly the most far-reaching reform in the 1983 amendments. The court can initiate or allow civil derivative actions to recover property or damages on behalf of the company. This takes the section into a wider sphere of complaints — ie, wrongs to the company. The history of the oppression section has been tied up mainly with members' personal complaints in closely-held companies. Paragraph (g) will attract a much wider interest.

The difficulties of a minority shareholder seeking to bring a derivative action are legendary. The so-called rule in *Foss v Harbottle*,⁹⁸ even with its "exceptions",⁹⁹ stultifies minority shareholder action against corporate mischief. Simply getting standing is very difficult. The costs of such proceedings are daunting, despite the promise of company support offered in the largely-ignored decision of the English Court of Appeal in *Wallersteiner v Moir (No 2)*.¹⁰⁰ Defining and proving fraud on the minority, showing the wrongdoers are in effective control of the company and grappling with the intricacies of corporate ratifiability befuddle the minority shareholder who lacks influence and access to corporate funds, information and procedures. Genuine grievances go unremedied, such are the difficulties of bringing a derivative suit.

Several overseas jurisdictions have, with some success, tried legislative solutions to *Foss v Harbottle*. They have enlarged the shareholder's right of access to the courts to bring derivative suits. In Canada the Ontario Lawrence Committee¹⁰¹ suggested changes which were adopted in s 99 of the Business Corporations Act 1970 (Ont). There the petitioner can simply seek the court's approval to bring an action.

Canadian courts have readily granted access. For example, O'Leary J in *Re Marc-Jay Investments Inc and Levy* advised:

"Where the applicant is acting in good faith . . . and where the intended action does not appear frivolous or vexatious and could reasonably succeed; and where such an action is in the interest of the shareholders, then leave to bring the action should be given."¹⁰²

Similar procedures are available under s 225 of the British Columbia Company Act 1979, s 232 of the Alberta Business Corporations Act 1981 and s 232 of the Canada Business Corporations Act 1974-1975. Old restrictions melted away. Even where the wrongdoing did not nearly amount to fraud (as defined in *Foss v Harbottle* cases) shareholders have

98 [1843] 2 Hare 461; 67 ER 189. See also *Mozley v Alston* (1847) 1 PH 790; 41 ER 833.

99 See *Gower's Principles of Modern Company Law* (4th edn 1979) 644-656.

100 [1975] QB 373; [1975] 2 WLR 389.

101 Supra n 92.

102 [1975] 5 OR (2d) 235, 237; (1974) 50 DLR (3d) 45, 47.

been granted standing.¹⁰³ The Canadian experiment has been successful. And the feared flood of litigation and "strike suits" (threatening suits to attract lucrative settlements) never came. Shareholders now have reasonable access to the courts to argue grievances on their company's behalf.

Meanwhile, we struggled on against the confusing law surrounding the *Foss v Harbottle* doctrine. The costly and unenlightening saga of *Prudential Assurance Co Ltd v Newman Industries Ltd*¹⁰⁴ provoked an examination of the benefits of the Canadian approach. Australia did not introduce a provision in its Codes simply allowing shareholders to apply to the Court for leave to bring derivative suits. But the redrafted s 320 offers an indirect route. If it fulfils its promise it may be a solution in this very difficult area of the law. We will not need any other provision if paragraph (g) works.

The Jenkins Committee¹⁰⁵ first recommended the measure now drafted into our legislation as s 320(2)(g). In the last few years both New Zealand and the UK have adopted similar provisions.¹⁰⁶ The Jenkins Committee, when putting forward the suggestion in 1962, had condemned the limiting effect of the rule in *Foss v Harbottle* and the difficulties facing the plaintiff member trying to prove fraud on the minority and control by the wrongdoers. The UK's s 75(4)(c) was enacted in 1980 amid hopes that derivative suit standing problems may be settled there, by the back door as it were.

Before a court can order derivative suit proceedings under paragraph (g), it must be satisfied that at least on the face of things either oppression or injustice exists: s 320(2)(a) and (b). Rowland J in *Re Overton Holdings Pty Ltd*¹⁰⁷ was satisfied by the applicant's establishment of a prima facie case of oppression, the defendants having "chosen to remain silent". Derivative suits are usually initiated over expropriation of company property or other breaches of duty by directors who control the company. Such breaches will nearly always fit into one of the categories of misbehaviour set out in ss 320(1) and (2). Canadian experience supports this.¹⁰⁸ For example, it must be "contrary to the interests of the members as a whole" for the directors to act negligently, or to usurp a business opportunity that belongs to the company, or misuse or misapply the company's funds in some way, or otherwise become involved in a conflict of duty and interest. In fact a

103 In *Re Northwest Forest Products Ltd* [1975] 4 WWR 724, 735 the applicants only had to show "the action sought is prima facie in the interests of the company". They did not have to prove a prima facie case. This low standard was set down because this was "in the nature of an interlocutory application because it decides nothing more than that an action may or may not be commenced."

104 [1982] 2 WLR 31.

105 Cmnd 1749, paras 206-207 and 212(e).

106 The NZ s 209(2)(d), a 1980 amendment, is virtually identical to s 320(2)(g) of the South Australian Code. Section 75(4)(c) of the UK 1980 Act is similar.

107 (1984) 9 ACLR 225, 231.

108 In *Re Peterson and Kanata Investments Ltd* (1975) 60 DLR (3d) 527 several actions, including misuse of corporate property for personal profit and generally acting in conflict of duty and interest — almost certainly in fraud on the minority, were held to be oppressive. As counsel suggested in argument, a derivative suit would have been open, no doubt. But the matter was dealt with under the oppression provision more cheaply and speedily.

much wider range of misdeeds falls under the s 320(1)(a) umbrella than is needed to satisfy the "fraud on the minority" criteria. Unjust or unfair resolutions or oppressive assertion of rights under the articles, for example, would rarely found derivative suits at general law. In other words, the scope for actioning s 320(2)(g) — the derivative suit paragraph — is wide.

Presumably, though, only activities or abuses of power that are injurious to the company could found an order. Only activity that is unjust to members *and* hurts the company will give grounds for the use of paragraph (g). But this should not be a problem if the courts accept that actions that hurt the company also prejudice or hurt the members' interests in the company. Injury to the company — through misappropriation of assets, improper use of powers and negligence, for example — depreciates the value of its shares and thereby hurts members. Indirectly the company's property is the shareholders' property.¹⁰⁹ There are, though, breaches of duty that do not hurt members — eg, taking up a corporate opportunity where the company itself cannot for some reason or other.¹¹⁰ Hopefully we shall have very few problems in working out this relationship between derivative (company) and personal (members) actions.

It is almost too much to hope that paragraph (g) will sweep away the troubles of *Foss v Harbottle*. But applied liberally it could do just that. It could give members (but not creditors unfortunately) a reasonable chance of pursuing wrongdoers on the company's behalf. And the court, which must authorise or order derivative action, can still filter out frivolous and misconceived complaints. Providing they can establish, to a *prima facie* standard,¹¹¹ grounds under s 320(2)(a) or (b), minority shareholders, by seeking permission to bring a derivative suit as a remedy from the court, should be in a position akin to that of Canadian minority shareholders.

Under paragraph (g) the court can require the company itself to take proceedings. And, where this is likely to be carried out diligently, the court will no doubt prefer the company to take the initiative. As actions begun as a result of a s 320 proceedings are "in the name and on behalf of the company", the companies themselves should bear any costs of the actions, whether the actions are brought by the companies or members. After all, the benefits of any successful proceedings or settlements would go to the companies. The legislation could have clarified this by actually saying the company would pay, or indemnify, a member for the costs of pursuing civil suits on the company's behalf under a paragraph (g) order. The courts can deal with this, anyway, when authorizing or ordering derivative suits. If the court authorises the action there should be no truly unmeritorious suits. So the threat of imposing costs on the member should not be needed. If the costs are to be met by the companies then a major hurdle to minority shareholder action is removed. So, too, are the complexities of proving fraud, dealing with the potential absurdities

109 Cf *Macaura v Northern Assurance Co Ltd* [1925] AC 619, 626-627 (HL) where the possession of a legal interest by shareholders in the company's property was denied.

110 See Birds, "Making Directors do their Duties" (1980) 1 Co Law 67, 74; cf views of Instone, (1981) 131 NLJ 1316-1318.

111 Supra nn 102 and 103.

of ratification, and showing control by the wrongdoers — the problems that have dogged derivative suit proceedings in the past. An approach to the application of paragraph (g) similar to that adopted by the Canadian court in *Re Marc-Jay Investments Inc and Levy*¹¹² seems desirable. It would rid us of long-standing and complex problems and clear a path for effective action by minority shareholders taking up genuine grievances on behalf of the company.

The Canadian jurisdictions mentioned already — federal, British Columbia, Alberta and Ontario — do not need to use their oppression provisions to initiate derivative proceedings. They have separate derivative suit provisions in their legislation allowing members to apply to the court for leave to bring actions on the company's behalf.¹¹³ The Canadian jurisdictions also specifically mention the derivative suit option in their oppression provisions. But it is there apparently only to "avoid a situation in which an application must be dismissed merely because the applicant made the wrong choice of procedure"¹¹⁴ — for where the applicant neglected to ask for derivative suit permission as well as pleading oppression. It merely backs up the derivative suit provision.

Some argue that a separate statutory derivative suit procedure is preferable.¹¹⁵ When commenting on the original Jenkins Committee oppression provision proposal which was adopted into Ontario law, Shreiner concluded:

"It seems something of an unnecessary confusion . . . to import into a section dealing primarily with wrongs done to a group of members a provision for suit for a wrong done to the company."¹¹⁶

Any confusion would probably only be of academic concern. Often the one act will offend both the company and the shareholders and the provision allows the courts to deal with both expeditiously and without lingering too long over thin distinctions and technicalities.

LITIGATION ON S 75 UK: FEW MODELS FOR AUSTRALIA

What hopes can we pin on the s 320(2)(g)? Will it do enough so that we do not need a separate derivative suit procedure in the statute? The recent English experience has been disheartening for those who hoped that s 75, enacted in 1980, would markedly increase protection for English minority shareholders. But the discouraging decisions do not concern the derivative suit paragraph in their provision, and because of our different drafting, their decisions should, fortunately, have little effect in Australia.

For example, the UK s 75 says that the misbehaviour must be "prejudicial to the interests of some of the members (including at least

112 Supra n 102.

113 See s 245 of the Ontario Business Corporations Act 1982; s 232 of the Canada Business Corporations Act 1979; s 232 of the Alberta Business Corporations Act 1981; s 225 of the British Columbia Company Act 1979.

114 Alberta, Institute of Law Research and Reform, *Proposals for a New Alberta Business Corporations Act*, Report No 36, vol 2 (1980).

115 See, for example, Shapira, "Minority Shareholders' Protection — Recent Developments" (1982) 10 NZULR 134, 159-160.

116 Shreiner, "The Shareholder's Derivative Action — A Comparative Study of Procedures" (1979) 96 South African LJ 203, 232.

himself)". Australian legislation says oppression or injustice must be to "a member or members" or to "the members as a whole". Also the UK s 75, like its predecessor (s 210 of the 1948 UK Act), does not specifically say, as s 320(4A) of our Code does, that detriment in a capacity other than member is covered.

In *Re a Company*¹¹⁷ a s 75 petition was struck out because it showed neither that unfair prejudice existed nor that the company's conduct unfairly prejudiced the member in his capacity as a member.¹¹⁸ The finding is unnecessarily restrictive on the plain wording of the section. A more recent English decision has taken some of the sting out of the earlier decision.¹¹⁹ Vinelott J in the later case in a dictum said that s 75 may not be restricted to protection only of a minority shareholder's "strict rights as a shareholder".¹²⁰ Anyway Australian courts do not need to be concerned with "member qua member" reasoning. Our new provision specifically excludes that possibility.

Likewise *Re Carrington Viyella plc*¹²¹ should not greatly concern us. It was alleged that a service agreement between the company and its chairman was concluded in breach of duty by the directors. A substantial shareholder alleged unfair prejudice under s 75 of the 1980 UK Act. Again one of the issues centred on the wording of that section. It requires a manner of action that is unfairly prejudicial to the interests of "some part of the members".

Vinelott J ruled that even if there had in fact been a breach of duty as alleged, that breach would have affected all shareholders equally. Thus, he reasoned, it would not be unfairly prejudicial to "part" of the shareholders. This seems, with respect, a myopic view of the meaning of s 75. Something that prejudices the whole membership will prejudice a part of the membership. It must depress corporate law reformers and legislators to hear that action can be taken only when a discrete part and not the whole of the membership is affected. The words of s 75 do not require such a narrow interpretation. Such decisions may well destroy much of the usefulness of s 75.¹²² One of the examples of unjust activity cited by the Jenkins Committee — the withholding of dividends when there are sufficient distributable profits to warrant a distribution — may be seen to affect all members equally. Surely such cases are not excluded from s 75 UK. Fortunately, Australian shareholders need not concern themselves with this interpretation difficulty.

SECTION 574: THE INJUNCTION PROVISION

The s 320 application, initiated by petition, can be a complex and relatively slow procedure for an impatient or distressed shareholder. For

117 [1983] 2 All ER 36; [1983] 2 WLR 381. Discussed by Boyle, "What Constitutes 'Unfair Prejudice'?" (1983) 4 Co Law 78.

118 Lord Grantchester QC, *ibid* 43-45, cited or relied on a passage from *Gore-Browne on Companies* (43rd edn 1977) para 28.13, which articulated the "member qua member" interpretation of s 75. Such an interpretation of s 75 was predicted by Boyle, (1980) 1 Co Law 280, 282.

119 *Re a Company* [1983] 2 All ER 854.

120 See comment by Sealy, (1983) 4 Co Law 164-165.

121 *Ibid* 165. Writer did not have access to the full report of this case in *FT Commercial Law Reports*, 4 Feb 1983, and relies on Sealy's comment in this discussion.

122 See comments of Boyle, *supra* n 117.

speedier action a minority shareholder can look to s 574 of the Code. Under it (as amended in 1983) the Supreme Court may grant an injunction to stop contraventions of the Code. The injunction may issue on the application of the Commission or "any person whose interests have been, are or would be affected by" any contravention of the Code.

The Court can also grant an injunction where there is a failure or refusal, or proposed failure or refusal, to do an act or "thing" that a person is required by the Code to do.

So minority shareholders, if they qualify as persons whose interests have been, are or would be affected by the conduct, can use this injunction procedure, for example, to stop breaches of statutory duty by directors. Not just minority shareholders have standing to seek these s 574 injunctions. Creditors too would be persons whose interests may be affected by contraventions of the Code. Likewise employees of the company.

Can it be argued that even the general public may have interests that are affected? A director who is negligent or dishonest in breach of s 229, or one who is acting in management of a company in breach of s 227, may well be a threat to the public. Could it be argued that a member of the public has standing under s 574 based on interests that would be affected by directors' breaches of the Code? The breadth of the wording does not discourage such applications. While Hampel J in *BHP v Bell Resources Ltd*¹²³ found that "interests" in s 574 referred to the interests of any person (including those of a corporation) which go beyond the mere interest of a member of the public, he noted that a "broad interpretation" of the section is appropriate.¹²⁴

The section does not require the "interests" that are "affected" to be major ones. Nor does it require them to be directly affected. Nor does it require them to be financial, corporate or proprietary in nature. Again, like s 320(4A), where we considered members' interests "in any other capacity", there is a potentially wide ambit of operation. Only breaches of the Code can be acted against, though. This is the main limitation on the breadth of the provision.

What sort of breaches of the Code may attract applications under s 574? Breaches of the directors' statutory duty of care under s 229(2), or of their duty to disclose interests in contracts under s 228, or their duty to convene a general meeting on requisition in writing under s 241, or obey notice requirements under the Code, are possible examples. If such breaches directly or indirectly cause, or threaten to cause, the value of members' shares to fall or a creditor's security to be undermined, for example, then s 574 may provide an effective remedy. Furthermore there is the interim injunction procedure available under ss (3) whereby the more urgent cases can be dealt with expeditiously while the application is determined.

It is noteworthy, too, that the Court may, either alternatively or in addition to an injunction, award damages to affected persons: s 574(8).

¹²³ (1984) 2 ACLC 157.

¹²⁴ Ibid 161-162: "The Companies Code . . . is legislation which is clearly concerned in the broadest sense with the protection of the public in respect of commercial activities of corporations."

CONCLUSION

The scope and potential of s 320 are wide. Clearly, the legislature envisages a larger role for the provision. Hopefully the courts will take this opportunity to dispense justice within companies and aid unjustly-treated minorities. Because the court has a wide discretion, the fewer judicial fetters on the application of the section the better. Reasonably applied, the provision should help keep corporate controllers honest and industrious. As a threat alone the section will check misbehaviour.

The days when majority shareholders could simply vote and ratify as they pleased and vote only in their own interests are gone. No longer do the controller-oriented notions that the company can manage itself and is the only proper plaintiff when it is wronged unduly fetter shareholders' action over management misbehaviour. Majority activities do not have to be fraudulent before they can be challenged. It is enough to show they were unfair. In this the statute has brought real change. Section 320 may have a profound influence on the development of duties between majority and minority shareholders. It is a small step now to the US position where the majority owes fiduciary duties to the minority.

Minority shareholders and their advisers should keep s 320 to the front of their minds when faced with corporate misdeeds. Providing they can overcome the usual difficulties in getting information and proving allegations of, for example, negligence or fraud, minority shareholders have a powerful remedy in s 574 as in s 320. One commentator thinks the former provision "may well overcome the strictness of the rule in *Foss v Harbottle*".¹²⁵ At least with respect to contraventions of the Code, this should be so. Undoubtedly, s 320 and s 574 improve the minority shareholder's position markedly. There is now plenty of wag in the corporate tail. If the judiciary is receptive — and there is no reason for it not to be — then the minority shareholder will play an important monitoring role in corporate affairs in Australia.

125 Baxt, (1980) 8 A Bus L Rev 406, 412.