TOPIC 1 – Introduction to Corporate Law

A history of corporate law – Bottomley Ch 1

Introduction: Importance of Context

- Corporate law shaped by **social, political, economic, global, and local forces**.
- Modern corporations and Australian corporate law are **products of compromise** between competing ideas/philosophies.
- Law developed **piecemeal and inconsistently**, sometimes against lawmakers' intentions.
- **History matters**: explains why modern corporations and regulation exist in current form.
- History is interpretive → different historians give different accounts.

Perennial Questions in Corporate Law

Corporate law developed amid the rise of **liberalism** (17th–19th C). Central tensions:

1. **Group vs Individual**
    - Should corporations or individuals bear rights, duties, liabilities?
    - Key Qs: limited liability? ability of group to hold property? ability of group to sue/defend in own name?
2. **Management vs Ownership**
    - Liberal principle = individuals should control their property.
    - Large-scale enterprise requires **management by directors** on behalf of **members (owners)**.
    - Leads to issues of **internal accountability (managers vs members)** and **external accountability (creditors, customers, state)**.
3. **Facilitation vs Intervention**
    - Corporations as private entities → law should **facilitate private profit** (minimal regulation).
    - Opposite view → corporations are major **social/economic actors**, justifying **state intervention**.
4. **Private vs Public**
    - Corporations as **private associations for private profit** vs as **state-created entities with public responsibilities**.

These debates frame corporate law's development.

English Company Law (17th–18th C)

Early forms of corporation:

- **Chartered Companies** (via Royal Charter/Act of Parliament).
    - Separate legal identity; sometimes assumed limited liability.
    - Based on **joint stock principle** → pooled capital fund managed by committee, divisible into transferable shares.
    - Enabled **risk-spreading** for expensive long-term ventures (esp. foreign trade).
    - Major examples: **East India Company, Hudson Bay Company** (monopoly rights; key role in colonial expansion).

Separation of ownership & control

- Shareholders owned stock but management run by directors.
- Adam Smith (1776, *Wealth of Nations*): "The trade of a joint stock company is always managed by a court of directors ... [proprietors] give themselves no trouble about it, but receive contentedly such dividends" → owners detached, risk limited, encourages broad investment.
- **Fundamental principle today**: separation of ownership (members) and management (directors).

Partnerships vs Companies

- **Societas (common law partnership)**: partners jointly liable, actively involved, limited in size.
- **Commenda (Roman law model)**: distinction between active and passive partners (dormant only liable up to contribution). Rare in England.
- **18th C definitions**:
    - "Company" = large membership + committee managers, but no legal status.

- "Partnership" = small association, all/most members involved in management.
- "Corporation" = incorporated entity (charter/statute).

Speculative manias

- Unincorporated joint stock cos often took over defunct charters.
- "Bubbles" = inflated promises, fraud, rampant speculation.
- **South Sea Company (1711–1720)**: government debt-for-shares scheme collapsed → **South Sea Bubble**.

Critiques

- Adam Smith: directors manage "other people's money" → negligence/profusion inevitable; joint stock only suitable for routine industries (banks, insurance, canals, aqueducts).
- John Stuart Mill: risk of disengaged managers, but joint stock allows **large-scale enterprise + skilled directors**.
- Karl Marx: separation of ownership & control = "private production without control of private property" → capitalism driven by speculation, destined to decline.

Bubble Act 1720 & Aftermath

- **Bubble Act 1720**: prohibited formation of unincorporated joint stock companies with transferable shares unless incorporated (charter/statute).
  - Intent = restrict speculation, protect South Sea Co.
  - Partnerships remained main alternative (but lacked transferability, continuity, separate property holding).

Deed of Settlement Companies

- Workaround → funds vested in trustees under deed of settlement.
- Equity courts recognised them (as trusts), though common law still treated them as partnerships.
- Maitland: "in truth and in deed we made corporations without troubling King or Parliament."
- Importance: introduced corporate form for **private interests**, not just public purposes → shift to private enterprise focus.

Nineteenth Century Developments

- Speculative bubbles continued → fraudulent promotions, fake accounts, sham directors, dividends from capital.
- **Bubble Act repealed 1825** (ineffective; deed of settlement cos widespread).
- By early 1800s → 3 main forms:
  1. Partnership (common law).
  2. Deed of settlement company (unincorporated).
  3. Incorporated company (charter/Act).

Growth of Joint Stock Principle

- Became dominant form of business association.
- Seen as essential for large-scale enterprise.
- Non-active investors could limit exposure.

Debate on Limited Liability

- Practice: attempts made in contracts/deeds to limit member liability (often ineffective).
- Policy debate: should law **sanction limited liability**?
  - **Pro:** encourages investment, necessary for economic expansion.
  - **Con:** risks for creditors, abuse by managers.
  - Adam Smith / Marx: risk of speculative trading beyond means.
  - J.S. Mill: creditors can protect themselves if accounts disclosed; anti-paternalism.

Theme: continuing tension between **member/investor interests vs creditor protection** — remains central to corporate law reform.

TOPIC 2 – Fundraising

Bottomley [8.05]-[8.30]

The concept of 'capital'

- 'Capital' is context-sensitive: it can mean **wealth**, a **factor of production**, the **value** of those means, **net worth**, **present value of future receipts, money**, or the **money value of assets**; it is thought of "in physical terms, in value terms, and in money terms"
- Core distinction for fundraising:
  - **Equity (share) capital** – raised by **issuing shares** (incl. bonus, preference, partly-paid): CA ss 124(1)(a), 254A(1)
  - **Debt capital** – **borrowings;** debtor-creditor relationship, mainly contractual; creditors are **not members** and usually have **no voting rights**; their claims are **against, not in, the company** (Redmond: creditors "stand outside the collectivity whose interests define those of the company"). Statutory overlays can bite (e.g. debenture disclosing; PPSA security registration).

Sources of corporate finance & consequences

- Companies vary by **size/need** (short/medium/long-term; once-off vs ongoing)
- **Equity funding → membership:** shareholders typically get **voting rights, dividend rights,** and (on winding up) **return of capital** rights (constitution-dependent). Shareholders bare **residual risk** (may lose all their investment), so they have **some control** (voting/direct participation in small companies)

Share finance – key statutory settings

- **No minimum share capital** or **minimum issue price** required. Company may issue shares on such **terms/rights/restrictions as it determines (CA s 254B(1)).**
- "Shares" are within **"securities"** (s 92: includes "shares in a body")
- **Abolition of authorised capital & par value:** 1998 reforms (CA s 254C). a constitution can still **limit** number of shares to protect against dilution.
- **Issue price vs market price:**
  - **Issue price =** consideration paid to the **company** at issue
  - **Market price** = price **between investors** on **secondary market**; can be **< or > issue price** depending on performance/rights/design
- **Partly-paid shares:** may issue as **partly-paid** (s 254A(1)(c)); holder **liable to pay calls** up to unpaid **issue price** per terms (s 254M(1)). If transferred, the transferee also becomes liable up to the unpaid amount.
- **Limited liability:** shareholder's maximum liability to the company is the **issue price** (CA s 516)
- **Paid-up vs uncalled (reserve) capital:**
  - **Paid-up capital** = amounts paid for issued shares
  - **Uncalled capital** = balance unpaid; it is an **enforceable debt** owed to the company and may be used as **security** (CA s 124(1)(e)).
- **Issued/subscribed capital:** total value of shares issued to shareholder (creditors look to this on winding up as the **max** from shareholder funds).
- **Options over unissued shares:** company may grant options (CA s 124(1)(c)) and must **maintain a register of options (s 170).** Option holder has **no membership rights** until exercise (see *Re Compania de Electricidad* [1980] Ch 146).
  - Market options: **call** (buy) vs **put** (sell). Often as **executive incentives.**

Classes of shares – identifying a "class"

- A company may issue shares with **different rights** (**CA s 254B(1)**). It must **notify ASIC** when first dividing into classes (**CA s 246**).
- If shares aren't divided, **all shares are one class** (**CA s 57**).
- When are shares different classes? Focus on **rights**:
  - ***Crumpton v Morrine Hall*** [1965] NSWR 240 (Jacobs J): if rights **meaningfully differ**, they are **different classes**.

- **But the rule persists**: Australian courts still treat it as a **live organising idea**. See ***ANZ Executors & Trustee Co v Qintex*** [1991] 2 Qd R 360; ***Australasian Oil Exploration v Lachberg*** (1958) 101 CLR 119; and the **Victorian Court of Appeal** describing the dividend-out-of-capital prohibition as a **"vestigial remnant"** of capital maintenance, yet noting capital-affecting transactions remain **closely regulated** despite reforms: ***ICM Investments Pty Ltd v San Miguel Corporation*** (2014) 48 VR 503, **535–536**.
- **Where the rule still bites** (historical basis for present law):
    - **Dividends**
    - **Self-acquisition and control of shares** (e.g., on-market/off-market buy-backs)
    - **Share capital reductions**
    - **Share buy-backs** (specific regime)
    - **Financial assistance** for share acquisitions

*(These topics also raise **control**/governance issues, not just creditor protection.)*

ASX note: For listed entities, **ASX LR 7.25** restricts capital reorganisations that would reduce trading prices below **20 cents** (practical overlay for market integrity).

Dividends — how they work

Role of dividends

- Shareholders get returns via **share price rises** and/or **dividends**. In **proprietary companies** (limited market for shares), **dividends** are typically the main return (wages/salaries to shareholder-employees are from **employment**, not shareholding).

Who decides & how (replaceable rules)

- **Replaceable rule s 254U**: **directors may determine** that a dividend is payable and **fix amount, time, method** (cash, shares, options, asset transfer, etc.).
- **Proprietary companies**: **s 254W(2)** gives directors a **wide discretion** (subject to share terms).
- **Class rights**: in a **public company**, each share in a class has the **same dividend rights** unless the **constitution** or a **special resolution passed before issue** provides otherwise (**s 254W(1)**). If altered **after issue**, the **variation of class rights** regime applies.
- Constitutions can **replace** ss 254U/254W (common in closely-held/family companies—e.g., requiring consent of a named person or a formal **shareholder declaration**).

Determination vs declaration (and why it matters)

- **Determination** (board fixes amount/time): decision is **revocable** until the **time for payment** arrives; **no debt** arises until then (**s 254V(1)**; see ***Bluebottle UK Ltd v DCT*** (2007) 232 CLR 598).
- **Declaration** (formal declaration per constitution): **debt arises immediately** and **cannot be revoked** (**s 254V(2)**; ***Bluebottle***). Each entitled shareholder becomes a **creditor**, ranking **behind** non-member creditors (**s 563A**).

When may a company pay a dividend? — s 254T test (since 28 June 2010)

A company **must not pay** a dividend unless **all three** are satisfied (**s 254T(1)**):

1. **Balance-sheet solvency**: **assets exceed liabilities immediately before** declaration, and the **excess is sufficient** to pay the dividend (**s 254T(1)(a)**).
2. **Fair and reasonable** to shareholders **as a whole** (**s 254T(1)(b)**).
3. **No material prejudice** to the company's **ability to pay creditors** (**s 254T(1)(c)**).

And: **assets/liabilities** must be calculated per **current accounting standards** (**s 254T(2)**), even if they wouldn't otherwise apply.

- **Linkages**: limbs (b)–(c) mirror the **reduction of capital** and **financial assistance** tests
- **Uncertainties**: the provision is **negative-framed** (a prohibition unless conditions met). It's **not fully clear** whether meeting s 254T always makes a dividend **lawful**, e.g., if the company **reported no profit** in that year (see Alevras & du Plessis (2014) CSLJ 312).

Insolvency intersections & director exposure

- If a **declared** dividend becomes a **debt** but the company later **cannot lawfully pay** it (e.g., s 254T would be breached at payment time), the company faces a bind; repayment may be blocked by s 254T, yet the debt exists.
- **Insolvent trading risk**: directors may face **s 588G** liability if paying (or declaring so as to incur) a dividend while **insolvent** or causing **insolvency**
- Paying a dividend when **liabilities exceed assets** can amount to an **unauthorised reduction of capital**, exposing directors under **s 256D(3)**.
- On **winding up**: any **declared but unpaid** dividend is **postponed** behind all **non-member creditors** (**s 563A**).
- **Pre-liquidation payments**: if the company was **insolvent** when the dividend was **paid**, liquidators can seek to **set it aside** as a **voidable transaction** (see **s 588FE** definitions; policy goal: prevent asset preferences before winding up).

Corporate groups

- A **holding company** cannot use a **subsidiary's profits** directly to pay its own dividends; it must **receive a dividend** from the subsidiary first: ***Industrial Equity Ltd v Blackburn*** (1977) 137 CLR 567.
- If a **subsidiary incurs a dividend debt** and is (or becomes) **insolvent**, the **holding company** can be liable under **s 588V** for **insolvent trading by subsidiary**

Beck v Weinstock **[2013] HCA 15**

FACTS: LW Furniture Consolidated (Aust) Pty Ltd (LWC) incorporated 1971 with multiple classes: "A" 5% **convertible** preference shares; "B", "C", "D" **redeemable** preference shares; **no ordinary shares were ever issued.** Hedy Weinstock (mother) held **eight "C" class redeemable preference shares;** redemption on death & by 30 June 2016 was provided in the articles. After Hedy's death (2004), LWC (via Amiram Weinstock) **purported to redeem** her eight "C" shares at $1 each under the articles. No minute, but the trial judge accepted a letter as evidence of a board resolution.
PROCEDURAL HISTORY: SCNSW (Hamilton AJ): "C" shares **not** valid preference shares (no ordinary shares existed to be preferred over) → redemption invalid. **NSWCA (Giles JA; Handley AJA; Young JA dissenting):** reversed – "C" shares **were** preference shares; redemption valid (2011) 252 FLR 465. **HCA:** special leave granted; **appeal dismissed.**
ISSUE: Can shares be **'preference shares"** (and this **redeemable preference shares) when no ordinary shares are on issue** in the company? If yes, was redemption valid under the Corps Act?
HELD: Yes. "Preference share" is a **generic** term: if the constitution **attaches rights in priority** to *ordinary shares if and when issues* (e.g. priority on return of capital), the shares are **preference shares** on issue even if **no ordinary shares are yet on issue.** Redemption effected on the terms of issue is valid under **ss 254J-254K.**
REASONING
What makes a "preference share"

- Neither the **1961 Act** nor the **2001 Act** defines "preference share". They **require** the company to **set out the rights** (dividends, capital, voting, priority) in the **constitution/special resolution** (**1961 s 66; 2001 s 254A(2)**).
- Whether a share is a preference share is determined by the **company's constitution**, not by the company's **current issued capital**. If the constitution gives a class **priority** to "ordinary shares", those shares are "preference shares" **from issue**, even if ordinary shares **have not (yet) been issued**.
    - The NSWCA's point the HCA accepted: the preference may be **"potential only"** until ordinary shares are issued — that is fine (252 FLR 462 at 478 [148]–[149]).

Statutory powers & no implied limits

- **1961 s 61(1)** authorised issue of **redeemable** preference shares if the **articles** so authorised; **2001 s 254A(1)(b)** continues this.
- No statutory text **requires** ordinary shares to be on issue before issuing or redeeming preference shares. (Contrast the **UK Companies Act 1981 (UK) s 45(2)**, which did impose such a bar — **not** adopted in Australia.)

Maintenance of capital is protected without that implication

- Capital maintenance concern (from **Trevor v Whitworth** (1887) 12 App Cas 409, 423–424 (Lord Watson)) does **not** imply a prior-ordinary-shares requirement.

- Statutes already **protect capital on redemption**: redemption only if **fully paid** and **out of profits or proceeds of a new issue** (**1961 s 61(3), (5); 2001 s 254K**). That protection **does not depend** on ordinary shares being on issue.

"What if the company ends up with no members?"

- If a company issued only redeemable preference shares and redeemed them all, statute supplies the remedy: **winding up** on the ground the company has **no members** (**2001 s 461(1)(d)**). That possibility **does not** justify re-writing "preference share".

History doesn't narrow the term

- Historically, preference shares started as a tool for **additional capital**, but quickly broadened in usage (dividends, capital, voting). The term is **not** confined to "preference over already-issued ordinary shares".

PRINCIPLES

- **Definition source**: A "preference share" is defined by the **rights attached** in the constitution (or special resolution), esp. **priority** on capital/dividends/votes (**1961 s 66; 2001 s 254A(2)**).
- **No "issued ordinary shares" precondition**: The status of a class as "preference shares" **does not depend** on ordinary shares having been **issued**; it is enough that the rights give **priority to ordinary shares if and when issued**.
- **Redeemable preference shares**: Are preference shares **liable to be redeemed** on stated terms (**2001 s 254A(3)**). Redemption must **follow the terms of issue** and **ss 254J–254K** (fully paid; **out of profits** or **new issue proceeds**; cancellation on redemption).
- **Capital maintenance**: The statutory **redemption machinery** itself implements capital protection; courts **won't imply** extra limits (e.g., "must have ordinary shares on issue").
- **Remedy for empty register**: If redemption leads to **no members**, **winding up** is available (**s 461(1)(d)**).

***DSHE Holdings Ltd (Receivers and Managers) (in liq) v Potts* [2022] NSWCA 165**

FACTS: Dick Smith (DSH) declared an interim (Feb 2015, $16.6m) and a final dividend (Aug 2015, $11.8m) while experiencing cash-flow strain. Claims alleged directors breached s 180 by approving dividends contrary to s 254T. On appeal, both Potts (CFO/Director) and Abboud (MD/CEO) were held to have breached s 180 for the final dividend, with compensation equal to that dividend + interest.

ISSUES on construction (s 254T(1)(c)):

1. Does "materially prejudice the company's ability to pay its creditors" encompass **ability to pay debts as and when due**?
2. Can a company avoid "material prejudice" by pointing to **trading stock/assets** that could be sold to raise cash?

HELD:

- **Yes to timing:** "Prejudice" in s 254T(1)(c) **includes** detriment to the company's ability to pay creditors **as and when their debts fall due** – i.e. **material delay** as well as non-payment ([83]–[86], [99]–[101], [110])
- **Assets can count, but fact-specific:** Obkective ability to pay may be supported by **all resources** (including selling stock/assets), but there are **no hard rules;** practicality, speed and cost of monetisation matter ([93]-[107]).
- **Temporal focus:** Para (c) is assessed **at time of payment** (not merely declaration), so directors must look forward to that time; if dividents are "declared" under a constitution (s 254V(2)), the debt arises then and cannot be revoked; otherwise, the decision can be revoked until payment, so the analysis may need **ongoing review** ([108]-[109]).

REASONING

"Prejudice" includes paying on time

- **Language & purpose**: "Prejudice" (as a verb) means detrimental effect; late payment is a detriment ([85]). The test asks whether the dividend **reduces capacity** to meet obligations **in accordance with their terms**—"an ability to pay always involves consideration of how much and when" ([86]).
- **Note to s 254T(1)**: Example refers to insolvency; insolvency is inability to pay **as and when due** (s 95A)—supports inclusion of timing within prejudice ([87]).
- **Coherence**: Creditors can sue for late payment; s 254T shouldn't permit capital distributions that excuse systemic lateness ([88]).

- **Numerosity is formal, not substantive: Seven members** means seven members; **"One share is enough"**; courts will not enquire into **family ties**, **trusts**, or **control**, to defeat incorporation (Halsbury LC, **30–32**).
- **Agency/alias requires a legal basis:** You cannot simultaneously **affirm** and **deny** the company's existence; without proof of a genuine **agency/trust**, the company's business is **its own** (Halsbury LC, **31**).
- **Fraud on the company requires non-disclosure to the company:** Where **all shareholders** knew the facts, **no fraud upon the company** (as purchaser) is established (Halsbury LC, **33**).
- **Judicial role is confined:** Courts must **apply the Act**, not **add policy-driven limits**; perceived **inexpediency** of one-man companies is a matter for **Parliament** (Halsbury LC, **34**).

***Lee v Lee's Air Farming Ltd* [1961] AC 12**

FACTS:

- **Structure & roles:** Mr Lee formed **Lee's Air Farming Ltd** to conduct aerial top-dressing. Articles appointed him **governing director for life** with "full government and control" (Art 32) and provided that the company **"shall employ"** him as **chief pilot** under **master–servant** rules (Art 33). He held **2,999/3,000** shares; one share held by a solicitor. The company owned the **Auster** aircraft and business assets; it **insured** against workers' compensation liability for him (13–17).
- **Operations:** From incorporation (Aug 1954) Lee **worked as the company's pilot**, was **paid wages**, and wages were reported for workers' compensation insurance (findings incl. paras 10–11). He exercised "**full and unrestricted control**" over the company's operations as governing director and controlling shareholder (15).
- **Accident & claim:** On **5 Mar 1956** the aircraft crashed during top-dressing; Lee was killed (16). His widow claimed compensation, alleging he was a **"worker"** under the **Workers' Compensation Act 1922 (NZ)** (ss 2, 3(1)). The NZ Court of Appeal held he **could not** be both **governing director** and **servant** (14, 24).

ISSUE: Whether Lee, despite being **sole governing director** and **controlling shareholder**, could also be a **"worker"** (i.e., under a **contract of service** with the company) within **ss 2, 3(1)** of the 1922 Act.

HELD: Yes. Lee **was a "worker."** The company and Lee were **separate legal entities** capable of entering a **valid contract of service**; his position as sole governing director **did not** make it impossible for him to be the company's **servant** as **chief pilot**. The company could **give orders** to him; **dual capacities** are legally possible. NZCA judgment **reversed** (25–27, 30–31).

REASONING

Separate legal personality enables contractual relations

- The aerial work was done because Lee was in a **contractual relationship** with the company: "the deceased **as one legal person** was willing to work for and to make a contract with the company **which was another legal entity**" (25).
- The company was not a sham; once its separate existence is recognised, it is "**impossible to deny the validity of the transactions** into which it has entered" (quoting *Salomon*; 25; cf. *Salomon* [1897] AC 22, 34).

Dual capacities & control: orders can be given and obeyed

- **Dual roles are coherent:** "It is a logical consequence of *Salomon* that **one person may function in dual capacities**" (26–27).
- **Control resides in the company:** The objection that he must both give and obey orders fails because "it would be **the company and not the deceased** that would be giving the orders. **Control would remain with the company** whoever might be the agent … to exercise it" (27). The right of control **exists** in the company; the manner of its exercise **does not diminish** that right (27).
- Hence, a **contract of service** could validly be made and **operated** (30).

Articles & conduct point to contract of service (not for services)

- **Art 33** expressly contemplated **employment as chief pilot** on **master–servant** footing; wages were paid; the company owned the aircraft; profits belonged **to the company** (25, 29–30).
- "**Ex facie there was a contract of service**," and nothing in the facts supports recasting it as a contract **for** services (30).

Supporting authority and distinctions

those grounds (see also **s 95A(2)**: a company is **insolvent** when it **cannot pay its debts as and when due**).

Corporate groups

- **Reality vs doctrine:** Groups are ubiquitous (operations/profits/liabilities spread across entities, often with tax advantages; different jurisdictions/products). **Each company** remains a **separate legal entity** with its **own rights/liabilities**, absent statute (e.g., **s 588V**). Commercial actors treat groups as one **economic unit**, but **law** does not.
- **Terminology: Parent/holding company** at the apex; **subsidiaries** (partly/fully owned) controlled via shareholdings. Example: businesses grouped under **Woolworths Limited**; each is **separate** in law.
- **Typical arguments for group-as-single entity:** Pressed when a group entity becomes **insolvent**, incurs **tort liabilities** it cannot meet, or where **common directors** manage multiple companies; **rejected at common law**.

Case — *Walker v Wimborne*

- **Facts:** Common directors administered several companies "as a group". To meet debts as they arose, funds were moved between companies; **Asiatic** paid debts of **other companies**. On Asiatic's insolvency, liquidator alleged **breach of directors' duties** (payments not in Asiatic's interests); directors said actions **benefited the group**.
- **Holding:** Directors **owe duties to each company** they manage, **not** to the "group". Mason J: emphasis on group benefit obscures the "**fundamental principles**" of **separate and independent legal entity**, and that Asiatic's directors had to consult **Asiatic's interests alone** regarding payments (*Walker v Wimborne* (1976) 137 CLR 1, **6–7**).

Case — *DHN Food Distributors Ltd v Tower Hamlets*

- **Facts:** Holding company **DHN**; two wholly-owned subsidiaries (one owned the **land** where DHN's warehouse sat; the other owned **vehicles**). Land compulsorily acquired; DHN sought **disturbance compensation**.
- **Approach adopted:** Court of Appeal treated group entities as **partners/one unit**, avoiding a "legalistic" approach; Lord Denning MR: subsidiaries "**bound hand and foot** to the parent … virtually the same as a partnership … [They] should not be treated separately so as to be defeated on a technical point" (*DHN* [1976] 1 WLR 852, **860**).
- **Aftermath:** Heavily **criticised**; **not followed** in Australia (e.g., *Pioneer Concrete Services Ltd v Yelnah Pty Ltd* (1986) 5 NSWLR 254; *Dennis Willcox Pty Ltd v FCT* (1988) 14 ALD 794; *State Bank of Victoria v Parry* (1990) 2 ACSR 15). Control of a subsidiary is **insufficient** to justify veil-piercing. Rogers AJA: the argument is "**entirely too simplistic**" and "**[t]he law pays scant regard to the commercial reality** that every holding company … often does, exercise complete control over a subsidiary" (*Briggs v James Hardie & Co Pty Ltd* (1989) 16 NSWLR 549, **577**).

Comment — *Qintex Australia Finance Ltd v Schroders Australia Ltd*

- **Observation on mismatch:** Rogers CJ highlighted the **gap** between law and commercial practice in groups, noting repeated disputes in collapses, costs, and creditor unfairness; suggested **Parliament** consider reform (*Qintex* (1990) 3 ACSR 267, **269**).
- **Statutory response: s 588V** (inserted 1993) — limited to **insolvency** — is a significant **inroad**: a **parent** may be **liable** for a **subsidiary's debts** where **insolvent trading** is involved, if at the time the debt is incurred there were **reasonable grounds to suspect** the subsidiary's insolvency and the **parent** or **one/more of its directors were aware or should have been aware** of those grounds.
- **Continuing concern:** Despite reform, **liability in groups** remains contentious (noted in the extract with reference to high-profile collapses and public concern).

***Prest v Petrodel Resources Ltd* [2013] 2 AC 415**

FACTS:

Six indicia test (the SSK factors) → all point to the parent

Atkinson J distilled six relevant questions from revenue cases to decide "**Who was really carrying on the business?**" ([1939] 4 All ER 116, **121**):

1. "**Were the profits treated as the profits of the [parent]?**" → **Yes**: sub's profits were allocated to SSK's departments; the sub "**never declared a dividend**" and its "**profit was... treated as the claimants' profit**" ([1939] 4 All ER 116, **120–121**).
2. "**Were the persons conducting the business appointed by the parent?**" → **Yes**: SSK appointed the manager; directors overlapped; SSK exercised "**complete control**" ([1939] 4 All ER 116, **119–120, 121**).
3. "**Was the [parent] the head and the brain of the trading venture?**" → **Yes**: SSK supervised/controlled; sub had **no books**; SSK decided the operations ([1939] 4 All ER 116, **119–121**).
4. "**Did the [parent] govern the adventure... and the capital?**" → **Yes**: SSK "**found all the money**" and could change trading name instantly; there was **no assignment** to the sub ([1939] 4 All ER 116, **119–121**).
5. "**Did the [parent] make the profits by its skill and direction?**" → **Yes**: profits arose from SSK's operations, integrated as an SSK **department** ([1939] 4 All ER 116, **118, 120–121**).
6. "**Was the [parent] in effectual and constant control?**" → **Yes**: "**complete control** of the operations" and the sub was merely a **nameplate** ([1939] 4 All ER 116, **119–121**).

Conclusion on indicia: "**Every one of those questions must be answered in favour of the claimants**," and "if ever one company can be said to be the **agent or employee, or tool or simulacrum** of another, I think the Waste company was in this case" ([1939] 4 All ER 116, **121–122**).

Real occupier / agency analysis

- Given the facts, "**the business belonged to the [parent]**; they were... the **real occupiers** of the premises," and even if "physically or technically the Waste company was in occupation," that occupation was **for SSK's purposes** and is in law **SSK's occupation** ([1939] 4 All ER 116, **122**).
- This mirrors servant-occupation cases: where servants occupy premises **for the business**, "**their occupation is the occupation of their principal**" ([1939] 4 All ER 116, **122**).

Result as to compensation

- Because the **parent** was the real trader and occupier, the **disturbance/removal** loss "**will fall upon [SSK]**" (as their amended claim stated) and is recoverable **by SSK**; the council cannot use s 121 (yearly tenancy) to defeat compensation by pointing to the sub ([1939] 4 All ER 116, **118, 122**).

PRINCIPLES

- **SSK agency test (6 factors)** for when a subsidiary's business is truly the **parent's** business: (1) profits treated as parent's; (2) managers appointed by parent; (3) parent the "head and brain"; (4) parent governs venture/capital; (5) profits made by parent's skill/direction; (6) **effectual and constant control** ([1939] 4 All ER 116, **121**).
- **Separate corporate personality is not conclusive** on who carries on the business; it is a **question of fact** whether the subsidiary is **agent/tool/simulacrum** of the parent ([1939] 4 All ER 116, **120–122**).
- In **compulsory acquisition**, where a sub trades **for and on behalf of** the parent, the **parent** is the proper claimant for **disturbance/removal** (and s 121 cannot be used to strip compensation) ([1939] 4 All ER 116, **117, 122**).

***ACN 007 528 207 Pty Ltd (in liq) v Bird Cameron (reg)* [2005] SASC 204**

FACTS: Pre-1989: ~30 partners carried on a chartered accountancy practice (including statutory audit/insolvency and the "general practice") under **Bird Cameron** ([2]). **BPM Pty Ltd** (a renamed service company) began carrying on the **general practice** under the **Bird Cameron** business name from **1 Jan 1989** to 1995; the **partnership** continued only the statutory audit/insolvency work under **Bird Cameron Partners** ([3], [7]). The plaintiff was a long-standing client; it sues both the firm and BPM for losses in two transactions (1989–90 MBO; 1992–93 Haynes), alleging **actual agency** (not ostensible authority; not sham/veil-piercing) between the firm and BPM ([4], [8], [11]–[15]). The separate question asked, in substance, whether BPM traded **as agent** for the firm and whether the firm **continued to own** the business name, client files and goodwill ([6]).

ISSUES:

1. **Was there an actual agency** between the firm (principal) and BPM (agent) for the general practice during 1989–1995? ([118]–[121]).
2. Who **owned/held** the business name, client files and goodwill relevant to that practice? ([99]–[100], [126]–[133]).

TOPIC 4 – Corporate Constitutions & Decision-Making Organs

Bottomley Ch 5

- Companies come into existence by registration. To register, a company must **have a constitution and/or adopt replaceable rules** set out in the **Corporations Act**.
- These internal rules govern the company's operation, who they bind, how they are amended, and rules for varying rights attaching to shares.

An overview of the internal management of a company

- Companies act through **directors, officers, or members**; internal rules are needed for processes.
- Rules cover: share allocation; rights attaching to shares; rights/responsibilities of members and directors; how meetings are held.
- **Historical documents:**
  - *Memorandum of Association* (basic company particulars; sometimes an **objects clause**).
  - *Articles of Association* (internal rules—meetings, appointment/removal of directors, winding up). Table A provided model Articles.
- **1998 change:** Memorandum/Articles requirement removed. Companies may choose a **corporate constitution** and/or adopt **replaceable rules** in the **Corporations Act**. Pre-1998 companies with Memorandum/Articles are treated as if those documents are the **constitution**. "Corporate constitution" here includes Memorandum/Articles.

Objects clauses and ultra vires

- **Pre-1984:** Companies stated objects in the Memorandum; acts **outside the stated purpose were ultra vires and void**—problematic for third parties.
- **Now:**
  - All companies have **powers of a natural person** (**s 124**).
  - Only **no liability** companies must include an objects clause restricting activities to mining (**s 112(2)**).
  - Some not-for-profit/charitable companies choose objects clauses; most commercial companies do not.
  - **s 125(2):** an act of a company **is not invalid merely because** it is contrary to/beyond any objects stated in the constitution (protects third parties).
- **Internal consequences remain:** Directors authorising acts beyond purpose may breach directors' duties; members may pursue **oppression** or **just and equitable winding up**

The corporate constitution

- **s 134:** Internal management may be governed by **replaceable rules**, a **constitution**, or a **combination**.
- **Adoption:**
  - On registration if each named member agrees in writing (**s 136(1)**).
  - After registration by **special resolution** of members (**s 136(1)**).
  - If adopted, the constitution must be **lodged with ASIC**.
- **Practical note:** Large public company shareholders are bound by the existing constitution when they purchase shares; in smaller companies, members are also bound but may propose changes via general meeting.

The replaceable rules

- Replaceable rules (many ex-Articles) now appear as **sections** that apply **unless displaced** by a constitution (**s 135(2)**).
- **List:** in **s 141**. Any section/subsection can be displaced or modified by the constitution.
- Some rules apply only to **proprietary companies** (e.g., **ss 194, 203C, 249X, 254D, 254W(2), 1072G**).

Reform of the compulsory acquisition provisions

- **Takeovers regime (post-Gambotto): s 664A** permits a **90%** holder (by class or voting power) to compulsorily acquire the **remainder**—must act **within 6 months** of crossing **90%.**

Protection of class rights

- **Context:** Directors/shareholders may wish to alter **rights attaching to shares** (e.g., voting, dividends, surplus on winding-up). Some rights are in the constitution; others arise via statute.
- **Interaction with Gambotto/s 136:** If the rights are in the **constitution** and altering them **alters the constitution**, comply with **s 136** and (if applicable) ***Gambotto***.
- **Statutory framework: ss 246B–246G** govern **variation/cancellation** of class rights.

Three threshold questions (before applying procedure)

1. **Is the share capital divided into classes?**
   - **Common-sense test:** If shares are meaningfully differentiated by their **rights**, they form different classes, regardless of labels: *Crumpton v Morrine Hall Pty Ltd* [1965] NSWR 240, 245–6; *Clements Marshall Consolidated Ltd v ENT Ltd* (1988) 13 ACLR 90.
2. **Are the rights "class rights"?** (**rights "attached to shares" forming a class**)
   - *Cumbrian Newspapers* [1987] Ch 1—three categories:
     - **(i)** Rights **attached to shares** (e.g., dividend, voting) → **class rights**.
     - **(ii)** Rights conferred on a person **as shareholder** by the constitution (e.g., pre-emption; right to appoint a director on a threshold) → **class rights**.
     - **(iii)** Rights conferred **in another capacity** (e.g., to be company solicitor) → **not** class rights.
3. **Is there a "variation or cancellation" of those class rights?**
   - **No statutory definition; case law guides:**
     - **No variation where only enjoyment/control changes:** *Greenhalgh v Arderne Cinemas Ltd*—subdivision reducing a blocking stake **did not vary** the right of **one vote per share**; it reduced **control**, not the **right** (1 All ER 512, 518).
     - *White v Bristol Aeroplane Co Ltd* [1953] Ch 65, 74: distinction between **affecting rights** and **affecting enjoyment**.

Deemed variations (s 246C)

- **s 246C(1):** Dividing an existing class into further classes with **non-identical rights** → **variation** of **every** pre-division share's rights.
- **s 246C(2):** Varying rights of **some** shares in a class → **variation** of the rights of **every** other share previously in that class.
- **s 246C(5):** If a one-class company issues **new shares with different rights** allowed or not provided for in the constitution or a lodged instrument → **variation** of existing shares' rights.
- **s 246C(6):** Issuing **new preference shares ranking equally** with existing preferences → **variation** of existing preference rights **unless** authorised by the existing terms of issue or the constitution **as at the time of issue**.

Procedure to vary/cancel class rights (s 246B, plus any s 136 change)

- **First:** If the **constitution specifies a procedure**, that procedure **must be followed**, and **can itself be changed only by complying with it** (**s 246B(1)**).
- **Alternatively:** If **no constitutional procedure**, the rights can be varied/cancelled by:
  - a **special resolution** of the company **and**
  - either a **special resolution of the relevant class or written consent** of **≥ 75%** of votes in that class (**s 246B(2)**).
- **Timing of effectiveness:**
  - **Unanimous** class approval → takes effect **on the date** (or later specified) (**s 246E**).
  - **Non-unanimous** class approval → takes effect **one month later**, subject to **court challenge** (**s 246D(3)**).

- **a share buy-back** under an **employee share scheme**, an **on-market offer**, an **equal access scheme** >**10%** of issued capital in **12 months**, and a **selective buy-back** (**ss 257B(4), (5)**).
- **a reduction of share capital provided** it is **fair and reasonable to the members as a whole** and does **not materially prejudice** creditors (**ss 256B, 256C, 256D**).
- **financial assistance** to acquire shares in the company/holding company **where** assistance **materially prejudices** the interests of the company/its shareholders/**or** the company's ability to pay creditors (**s 260A**).

Disclosure and voting on directors' remuneration (listed companies)

- **Remuneration report** required in directors' report (**s 300A**): policy, pay elements, pay–performance link; performance-conditioned pay; options.
- AGM chair must allow **reasonable opportunity** for **questions/comments** on the remuneration report (**s 250S**).
- **Advisory vote** on adopting the remuneration report (**s 250R**); **non-binding** (**ss 250R(2), (3)**); KMP (and closely related parties) **cannot vote** (**s 250R(4)**).
- **Two-strikes rule** (2011 reforms):
    - If **≥25% "no"** on rem report → next report must include **explanation** of action/inaction (**s 300A(1)(g)**).
    - If the **subsequent** report also gets **≥25% "no"** → put **spill resolution**: vote on whether all directors must stand for re-election; if **>50%** in favour → hold **special meeting within 90 days** to elect directors (**ss 250V(1), 250W(2)**).
    - Debate continues; in 2016 ~9% of ASX 200 had "no" ≥25%.

Additional rights given to members under the Corporations Act and the constitution

- This chapter focuses on **GM** rights; other **statutory** rights include:
    - **ss 249D, 249N**: power to **convene meetings** and **request resolutions**.
    - **s 314**: right to **receive** financial report.
    - **s 173(2)**: right to **inspect registers**
    - **s 461**: right to **apply to wind up**
    - **ss 236–237**: **derivative** action; **oppression** action
    - **s 1324**: **injunction** to restrain **Act** breaches
- **Constitutional personal rights** (statutory contract: **s 136**) often mirror Act provisions (appointments, meeting mechanics).
- **Small Pty** constitutions commonly add shareholder powers: adopt/vary **business plan**; appoint/remove **key employees**; approve **monthly/annual accounts**; change **accounting practices**; approve **directors' salary/allowances**; approve **sale of key assets**.
- Many common law rights now addressed by **replaceable rules** or constitution: enforce **statutory contract** (s 136), **appoint directors** (ss 201G–201H), **dividends** (s 254T).

Members' reserve powers

- **Limited, rare circumstances** where GM can intervene **within board powers** (e.g., **deadlock**).
    - *Barron v Potter* [1914] 1 Ch 895: if directors are **unable/unwilling** to act, "**there must be some power in a company to do itself that which ... would otherwise be done**" (at 903).
    - **s 195(4)**: public co members may deal with matter where **board lacks a quorum** (conflicts).
    - *Massey v Wales* (2003) 57 NSWLR 718: **no unlimited reserve** to manage; in deadlock, shareholders may act only to **restore board functionality** (e.g., appoint directors), not to **substitute** their management decisions; ratification of steps **beyond** this is **invalid**.
- **Ratification of breaches**: members may **ratify** director breaches because they are the **beneficiaries**

Where members disagree with a decision of the directors

- Members **do not** have a general power to make **management** decisions (unless constitution says so). If they disagree with the allocation, they can **amend the constitution** to require member approval for **key management matters** (common in small companies).
- **Core rule** on division of powers:

- *Automatic Self-Cleansing Filter Syndicate Co Ltd v Cuninghame* [1906] 2 Ch 34:
  - Board had management power **subject to special resolution**; GM passed an **ordinary** resolution directing sale of assets; **board refused**.
  - Court of Appeal: only board was **authorised** to sell; GM could **not direct** by ordinary resolution. Cozens-Hardy LJ: shareholders "**by their express contract**" stipulated management by directors; once stipulated, "**what right is there to interfere with the contract** ... apart from misconduct?" (at 44).
- *John Shaw & Sons (Salford) Ltd v Shaw* [1935] 2 KB 113:
  - Greer LJ: if **management powers** are vested in directors, "**they and they alone can exercise those powers**"; shareholders' control is via **altering the articles** or **(re)electing** directors; they **cannot usurp** director powers, and vice versa (at 134).
- *Howard Smith Ltd v Ampol Petroleum Ltd* [1974] AC 821:
  - Privy Council: directors, **within** management powers, may act **against majority shareholders' wishes**; majority **cannot control** them **while in office** (at 837).

- **Australian shareholder activism limits**
  - *NRMA v Parker* (1986) 6 NSWLR 517:
    - Members used **s 249D** to requisition a special GM for a motion **advising** directors on employment matters; McLelland J: members **cannot** "express an opinion by resolution on how a power vested in the directors should be exercised"; not a proper matter; **no meeting required**.
  - *NRMA Ltd v Snodgrass* (2001) 52 NSWLR 383:
    - Proposed **constitutional amendment** requiring director campaign **funding disclosure**, with **disqualification** for non-compliance; held **proper** to convene meeting: management vested "**subject to the law and other provisions of the constitution**," so constitution can **condition** management.
  - *Australasian Centre for Corporate Responsibility v Commonwealth Bank of Australia* (2016) 248 FCR 280:
    - ACCR proposed three resolutions: **two advisory** (reporting on financed emissions) and **one special** constitutional amendment requiring that disclosure.
    - CBA included only the **constitutional** resolution; it failed at AGM.
    - **Held (Full Fed Ct)**: no **inherent** member power to propose **non-binding advisory** management resolutions; unless **constitution/statute** grants it (e.g., **s 250R** remuneration report vote). A GM cannot pass a resolution the company **lacks power** to undertake; members cannot **control/usurp** director powers (citing *Automatic Self-Cleansing*).
- **Practice**: Between 2004–2013, **877** shareholder resolutions; **92%** about director appointments/removals; only **3%** management-opposed passed.

Decision-making in single director/shareholder companies

- **s 198E**: a **single director** may exercise **all powers** of the company **except** those the constitution requires to be exercised in **GM**.
- **s 201E**: in a **single director/single shareholder Pty**, the director can **appoint an additional director** by **recording** the appointment and **signing** the record.
- **s 249D**: **single member** may pass a resolution by **making a record** of it and **signing** the record.
- **s 251A(1)(e)**: such resolutions must be **entered in the minute book**.

Automatic Self-Cleansing Filter Syndicate Co Ltd v Cuninghame [1906] 2 Ch 34

FACTS:

- Company's **memorandum** allowed sale of undertaking to another company (cl 3(k)) (35).
- **Articles**:
  - **Art 96** vested "**the management of the business and the control of the company**" in directors, subject only to **regulations made by extraordinary resolution**; directors could exercise all company powers not expressly required to be exercised in GM (35–36).

- **Art 97(1)** expressly empowered directors to **sell/lease/otherwise deal with company property on such terms as they think fit** (35–36).
- **Art 81**: directors removable **only by special resolution** (35).

- GM (ordinary meeting) passed **simple-majority resolution** to sell assets to a new company and **directed directors** to seal and complete the contract (36–37).
- Directors, believing the sale **not in the company's interests**, **refused** to implement (37–38).
- **Plaintiffs** (company + majority shareholder) sought orders compelling execution; **Warrington J** refused; **appeal** to CA (38–39, 41–42).

ISSUE: Whether a **simple-majority** shareholder resolution can **direct/compel** the board to **implement a sale** where the articles vest management in the directors and empower them to decide sale terms (38).

HELD: No. On the **true construction of the articles**, the **directors could not be compelled** to carry out the sale; altering their mandate requires an **extraordinary/special resolution** amending or regulating under the articles. Appeal **dismissed** (38–39, 42–43, 46).

REASONING

Warrington J (first instance)

- The question "**depends upon the true construction of the articles**" (38).
- Because Art 97(1) makes **directors' view** as to terms the standard, an ordinary resolution **cannot compel** them to sell "**not on such terms and conditions as they think fit, but upon such terms and conditions as a simple majority** ... think fit" (38).
- Art 96 vests **management/control** in directors and is "**for the protection of a minority**" and "**can only be altered by a special resolution**" (38–39).
- If a simple majority could override the board on matters vested in it, "**there might just as well be no provision at all ... as to the removal of the directors by special resolution**" (39).
- Result: the January 16 resolution **not binding** on directors; motion refused (39).

Collins MR

- Under Arts 96–97, **directors have the company's full powers** "**other than those that are expressly required to be done by the company**," and any change is **"subject to such regulations ... made by extraordinary resolution"** (42).
- Hence, it is "**not competent for the majority ... at an ordinary meeting to affect or alter the mandate**" originally given by the articles (42).
- Rejects "principal–agent" shortcut: the **principal is the whole corporate entity**, not an ordinary-meeting **majority**; "**the mandate ... is not that of the majority—it is that of the whole entity made up of all the shareholders**," and alteration must use the **articles' machinery** (43).
- Practical point reinforces this: the article requiring **special resolution to remove a director** would be pointless "**if the views of the directors can be overridden by a mere majority at an ordinary meeting**" (43).

Cozens-Hardy LJ

- Articles are a **contract between members inter se** (*Browne v La Trinidad*) (44). Under that contract, members "**have by their express contract mutually stipulated that their common affairs should be managed by certain directors ... liable to be removed only by special resolution**" (44).
- Given that stipulation, "**what right is there to interfere with the contract, apart ... from misconduct**?" (44).
- **Analogy**: directors are "**in the position of managing partners**," and the Court **does not interfere** with a managing partner absent **misconduct** (45).
- **Statutory contrast**: unlike the Companies Clauses Act 1845 s 90 (where management is "**subject ... to the control and regulation of any general meeting specially convened**"), the Companies Act 1862/Table A **contains no such subordination**; thus *Isle of Wight Ry v Tahourdin* is distinguishable (46).

PRINCIPLES

- **Division of powers by constitution controls**: where articles **vest management in directors** and **empower them to dispose on terms they think fit**, an **ordinary GM majority cannot direct** or **compel** the board to act contrary to its judgment; change requires **extraordinary/special resolution** under the articles (38–39, 42).

TOPIC 5 – Company Meetings

Bottomley [7.30]

Meetings

- **Function & types.** Directors' and members' meetings enable corporate decision-making. Meetings are **ordinary** (regular—e.g., AGM once a year) or **special/extraordinary** (unscheduled to address urgent/new matters). Decisions are framed as **resolutions** and voted on.
- **Sources of rules.** Procedures are set by the **constitution** (if any) and/or the **Corporations Act**; most meeting provisions are **replaceable rules** (i.e., can be altered by the constitution). Correct procedure verifies that a **valid decision** has been made.
- **Complexity & technology.** Requirements can be detailed and technical; challenges arise in large listed companies convening face-to-face meetings. **s 249S** permits video-conference meetings; there is **no provision for online voting** by persons not present. Practical challenges: chair control of online meetings, facilitating voting, and member communication.
- **Standard matters covered.** Who can convene a meeting; who may propose resolutions; **notice** requirements; **quorum**; conduct; and recording decisions (minutes).
- **Circulating resolutions (proprietary companies).** An actual meeting is not required if there is a **circulating resolution** signed by **all eligible participants** (**ss 248A, 249A**). Useful for small companies.

Members' meetings

Annual general meeting

- **Obligation.** A **public company** (other than a single-member public company) must hold an **AGM once each year** (**s 250N**) **within 5 months** of the end of its financial year.
- **Proprietary company.** AGM is optional unless required by the constitution.
- **Purpose & business.** AGM provides key financial/business information. **s 250R(1)**: may include consideration of **annual financial report, directors' report, auditor's report**, **election of directors**, **appointment of auditor**, and **voting on directors' remuneration**.

Convening an extraordinary members' meeting

- **Members' power to convene.** Members with **≥5%** of votes may **convene** a meeting (**s 249F**). Constitutions sometimes also permit member-convened meetings.
- **Directors' power.** Replaceable rule **s 249C**: a **director** can convene a meeting. In **listed companies**, directors' power to call a members' meeting **cannot be displaced** (**s 249CA**).
- **Costs.** If a **director** calls a meeting: company secretary organises; **company pays**. If **members with 5%** convene: they organise and **pay costs**—a significant hurdle in large companies.
- **Requisition to directors (company pays).** **s 249D**: members with **≥5%** votes may **request** the company to call a meeting (in **writing** and including **any proposed resolutions**: **s 249D(2)**). Directors **must call** the meeting **within 21 days**, and it **must be held within 2 months** of the request (**s 249D(5)**).
  - If directors fail to call within 21 days: the **requesting members** holding **≥50%** of the votes **of the requisitioning group** may call it; the **company must reimburse** their **reasonable costs** (**s 249E(4)**).
- **Court power.** Court may **call a members' meeting** if there is no other practical way to do so (**s 249G**).

Proposing a resolution

- **Include resolution on agenda.** Members with **≥5%** of votes **or ≥100** members entitled to vote may request inclusion of a **proposed resolution** on the agenda of an AGM or extraordinary meeting (**s 249N**). (Used in *Australasian Centre for Corporate Responsibility v Commonwealth Bank of Australia*.)
- **Send members' statement.** Members with **≥5%** of votes **or ≥100** members may require the company to **send a statement** to all members before the meeting (**s 249P**). The statement may address a proposed resolution **or any matter** to be considered.
  - **Form & limits.** ≤**1000 words** and **not defamatory**; must be sent **with** the notice (or **as soon as practicable thereafter**) and **in the same way** (**s 249P(6)**).

Who is a director?

- **Statutory definition (s 9).** "Director" includes **validly appointed** directors, **de facto** directors (acting in the position), and **shadow** directors (others in accordance with whose **wishes/instructions** the board is **accustomed to act**). In Australia, **shadow and de facto categories may overlap**; a person **may be both**. (UK authority treats them as mutually exclusive, but their definition differs.)
- **Labels by status** (executive, non-executive, independent) describe **role**, not legal status; whether a director is executive/non-executive is a **question of fact** (powers conferred).

De facto directors

- **Test.** A person **acting as a director** (exercising top-level management functions) can be de facto even if **not validly appointed**.
- *Deputy Commissioner of Taxation v Austin* (1998) 28 ACSR 565: after resigning, Austin continued **negotiating with the Commissioner/creditors**—functions **typically expected of a director**—and was held a **de facto director**.
- **Relevant factors** (Madgwick J): consider **company size** (scope of delegated discretion); how the person is **reasonably perceived by outsiders** dealing with the company; necessary that the person **exercises top-level management functions**.
- *Mistmorn Pty Ltd (in liq) v Yasseen* (1996) 21 ACSR 173: a "consultant" undertaking **director-type tasks** was a **de facto director**.
- **No "company screen".** Though **s 201B** requires directors to be **individuals**, a **consultant company** cannot be used as a **screen** to avoid a de facto finding; if a **consultant company** acts as a director, the **actual individual(s)** behind it may be de facto directors: *Grimaldi v Chameleon Mining NL (No 2)* (2012) 200 FCR 296, **339**, [68], [103], [136]–[140].

Shadow directors

- **Definition (s 9).** A person **"in accordance with whose wishes or instructions the directors… are accustomed to act"**. **Not** a shadow director **merely** because directors act on **professional/business advice** properly given.
- *Re Akron Roads Pty Ltd (in liq) (No 3)* (2016) 117 ACSR 513: although Mr Crewe was a director, **Crewe Sharp Pty Ltd** (consulting company) was **not** a shadow director—*"an adviser does not become a shadow director merely because the directors follow his or her advice"* (**565** (Robson J)).
- *Buzzle Operations Pty Ltd (in liq) v Apple Computer Australia Pty Ltd* (2010) 81 NSWLR 47:
  - **Two elements** (White J): (1) directors must be **accustomed to act as directors in accordance with the person's instructions or wishes**; (2) a third party is **not** a shadow director **merely** for imposing **commercial conditions** which directors **choose** to accept (*"unless something more intrudes"*, **70–71**).
  - Requires a **causal connection** between **instruction/wish** and **board action** and **habitual compliance over time** (**71–72**). A shadow director is not liable for **pre-shadow** debts; a **governing majority** of directors acting in that way is **sufficient** (**72**, citing *Ultraframe*).
  - On appeal, the Court of Appeal **agreed** with these propositions; a **mortgagee/creditor** is **not** a shadow director **merely** because the board tends to follow their advice (e.g., **[229]** (Young JA)).
- **Companies/creditors can be shadow directors.** Despite **s 201B** (natural persons for formal appointment), a **company** (or a **creditor**) **can** be a shadow director: *Standard Chartered Bank v Antico* (1995) 38 NSWLR 290; *Buzzle*; *Re Akron*.

Officers

- **s 9 definition of "officer" (step-through).**
  - **(a)** a **director or secretary** of the corporation; or
  - **(b)** a person:
    - **(i)** who **makes, or participates in making, decisions** that affect the **whole, or a substantial part**, of the business; or
    - **(ii)** who has the **capacity to affect significantly** the corporation's **financial standing**; or

- **Text + purpose:** s 129(5) says "**appears**"; that points to an **objective, face-of-document** inquiry ([397]–[399]). Drafting history shows Parliament **delinked** due-execution assumptions from ASIC/hold-out conditions that existed under earlier Codes ([367], [401]).
- **Cumulative assumptions:** s 129(8) lets assumptions operate together, but you can rely on **one** without the others ([352], [402]).
- **Third-party contests:** Common law (Turquand) + statute aim to put the outsider **as if** the assumptions were true; letting later counterparties upset that would **undercut** the scheme ([506]). Old authorities like **County of Gloucester Bank** and **Duck** support using Turquand against third parties; modern courts (e.g., **Australian Capital Television**) recognise this use in joined proceedings ([481]–[488]).
- **Northside** "red flags": qualification remains—outsider cannot ignore transactions **obviously unrelated** to the company's business—but here that wasn't made out.

PRINCIPLES

- **s 129(5):** If a document **on its face** has two officer signatures labelled as such, you may assume **due execution** under **s 127(1)**—**even if** one is forged and the other signer wasn't actually a director. No ASIC cross-check required; **s 130** blocks constructive notice.
- **Dealings threshold (s 128(1)):** Negotiations/steps with a person authorised to **negotiate** suffice; **authority to bind is not required** (*Soyfer*; *Frenmast*).
- **Fraud/forgery (s 128(3)):** Statutory assumptions still available despite an insider's forgery/fraud; only **actual knowledge/suspicion** (s 128(4)) turns them off.
- **Against third parties:** A document validated via ss **128–129** can **found an equitable proprietary interest** that **binds others** and takes **priority** by ordinary equitable rules (**qui prior est tempore**), absent better equities.

***Oliveri Legal Pty Ltd t/as Oliveri Lawyers v Cassegrain Tea Tree Oil Pty Ltd* [2024] NSWCA 74**

FACTS: In 2008 Mr Cassegrain was CaTTO's managing director/secretary; other director (his son) lived overseas. He and wife were the only shareholders. Articles empowered directors to appoint an MD and to **enter guarantees/indemnities** and **make loans** to directors/shareholders (Arts 95, 105, 106(k), 106(l), 106(p)). Evidence of **common practice** of CaTTO lending to shareholders (incl. to fund litigation). 2 Dec 2008: Mr Cassegrain told Oliveri he was MD; asked for a **controlled money account in CaTTO's name**; wrote on CaTTO letterhead as "Managing Director." 19 Dec 2008: signed "Guarantee and Indemnity Agreement" twice (incl. on behalf of CaTTO). Same day: **$10,000 cheque from CaTTO** deposited. Agreement's operative clause (p 1) said the "Guarantors… **indemnify** … for payment of all legal costs… in accordance with the payment terms of invoices rendered." Later references used the word "Guarantee" but no secondary obligation language in the operative clause. Later calls in 2009/2011 discussed carrying fees "as we have the [Agreement]".

ISSUES:

1. Did the Agreement **bind CaTTO** (ostensible authority; s 129(3) Corporations Act)?
2. Proper construction: **guarantee and indemnity** or **indemnity only**?
3. **Estoppel** (by convention/promissory): do the 2009/2011 conversations extend the instrument to unbilled/deferred fees?

HELD:

1. **CaTTO bound.**
   - **Mitchelmore JA (Gleeson JA agreeing):** Yes—**ostensible authority**. Dealings (phone call, Company letterhead, signing & returning the document, CMA in CaTTO's name, CaTTO cheque) amounted to CaTTO **holding out** Mr Cassegrain as authorised; signing the Agreement was **incidental to CaTTO's ordinary activities** (loans to shareholders incl. for litigation) ([52]–[66]).
   - **Basten AJA:** Bound because Mr Cassegrain had **actual authority as CaTTO's alter ego** ([94], [103]).
   - Statutory assumptions (s 129(3)) unnecessary.
2. **Instrument = indemnity only (no guarantee).**
   - **Mitchelmore JA (Gleeson JA agreeing):** No secondary/contingent obligation appears in the operative clause; liability is **primary to hold harmless**, not secondary upon default ([70]–[77]). p 2 cannot be read independently to supply a guarantee.
   - **Gleeson JA (additional):** No pleaded/argued "obvious mistake" correction, estoppel or rectification; the **Seymour Whyte** absurdity test not met ([3]–[7]).

- Plaintiffs were "**having dealings with the company**" because by 23 Oct 1998 they dealt **through Earlmaze's solicitor (Baron)**, who had authority from both directors to act on the option (even though Lopatinsky misunderstood its terms).
- **s 129(6)**: A person may assume a document is duly executed if the **seal appears affixed and witnessed** per s 127(2). Here, the **seal + signatures above "Director/Secretary"** created the requisite **appearance**, **even though** the names were illegible/not identified and one signatory (Elcham) was not in fact an officer.
- **s 128(3)**: Assumptions may be made **even if an officer/agent acts fraudulently or forges** in connection with the dealing; no need to show the forgery was within authority.
- **s 128(4)**: Assumptions are lost only for **actual knowledge or actual suspicion** that they're incorrect; the statute **rejects "put on inquiry"**. Plaintiffs (and their solicitor) had **no such knowledge/suspicion**.

Result: Earlmaze **precluded** from denying due execution; the **Option Agreement bound** Earlmaze.

2) The March 1999 Variation

- Validly bound Earlmaze (authority from both directors).
- **Not** a ratification (Lopatinsky didn't understand the earlier option's true terms).
- But it **operated as a fresh agreement** manifesting an intent that plaintiffs have an option over **Unit 9 for $1,000**; there was **consideration** because plaintiffs bona fide believed they already held the option (sufficient: **Wigan v Edwards**).
- (Ultimately unnecessary given finding that the 1998 option already bound Earlmaze.)

3) Consideration / $1,000

- Option **not invalid** for want of consideration. Beyond the $1,000, consideration included the **$500,000 loan to Matar for the project** (acknowledged in cl 6).
- In any event, the $1,000 term is construed as a **promise to pay**, not a condition precedent; late payment did **not** justify rescission, especially after Earlmaze executed the **Variation** without insisting on it (and any termination would require cl 7 notice).

4) Exercise of option

- Option required serving a **duly executed and dated** contract. The annexed standard form stated: "**if not stated, the date this contract was made**". The covering letter/courier delivery date fixed the exercise date (24 Dec 1999).
- Thus there was **literal compliance**; alternatively, any discrepancy was **immaterial** and did not prevent acceptance (cf **Harrison v Battye; Quadling; Domb v Isoz**).

5) Relief

- **Specific performance** ordered. However, character of the arrangement viewed as **security** for the loan, not a windfall: plaintiffs to take title **subject to an equity of redemption**—they cannot recover more than the loan + interest/costs (they may realise as mortgagees or account at agreed value).
- **Judgment against Matar** for the debt + interest; **no double recovery**.
- **Costs**: Plaintiffs' costs payable by **Earlmaze and Matar**. Earlmaze's costs (and sums it must pay plaintiffs) to be **indemnified by Matar & Elcham**; declaration of indemnity also against **R & M** under the April 1999 Development Agreement.
- **Liberty to apply** on mechanics (stamping within 7 days of vendor's counterpart; potential accounting for rents).

(Addendum): Court declined to infer plaintiffs' solicitor had knowledge/suspicion negating s 128 assumptions.

PRINCIPLES

- Strong, practical application of **ss 128–129**: a **company seal with signatures over "Director/Secretary"** can satisfy the **s 129(6)** "appearance" threshold **even if** names are illegible and one signatory isn't an officer.
- Clarifies "**dealings with a company**": requires dealings **with someone authorised to conduct steps/negotiations** for the company (here, its solicitor), not necessarily someone authorised to **bind** it.
- Confirms **actual knowledge/suspicion** is required to displace statutory assumptions; **"put on inquiry"** is out.
- Illustrates courts' readiness to treat "sweetheart" options arising from financing arrangements as **security**, tempering specific performance to avoid **windfalls**.

TOPIC 7 – Corporate Liability in Tort & Under Criminal Law

Lecture

Corporate liability in tort

- **Capacity:** Companies have "the same legal capacity and powers as an individual" (**s 124** *Corporations Act*).
- **Consequence:** Companies can breach tortious duties; they can only act through natural persons.
- **Core inquiry depends on the liability rule:** Tort vs statute vs equity may use different **attribution** tests.
- **Three-step approach:**
  - **A. Attribution question** — Is the natural person's conduct/knowledge **in law** the company's?
    - Check constitution/board delegations; consider **"directing mind and will"**; apply **Meridian** rules of attribution.
    - Knowledge/intent may be **imputed** from directors/officers (e.g., *Beach Petroleum NL v Johnson* (1993) 43 FCR 1).
  - **B. If yes → Direct corporate liability** (company as sole or joint tortfeasor).
  - **C. If no → Indirect liability**?
    - **Vicarious liability** for employees acting in scope (e.g., *Citizens' Life Assurance Co Ltd v Brown* [1904] AC 423 — employer liable for malicious libel).
    - **Agency**: Company liable for acts of agents within **actual/apparent authority**.

Rules of attribution — Meridian Global Funds Management Asia Ltd v Securities Commission [1995] 2 AC 500

- **No "company as such":** "There is in fact **no such thing as the company as such… only the applicable rules** [of attribution]" ([1995] 2 AC 500, **506–507**).
- **Primary + general rules usually suffice:** Company's **primary rules** (constitution, resolutions) **+** general principles (agency, vicarious liability) **normally** determine attribution.
- **Special attribution rule (statutory interpretation):** Where a rule **excludes** general agency/vicarious attribution, **"the court must fashion a special rule of attribution… given that it was intended to apply to a company, how was it intended to apply?"** ([1995] 2 AC 500, **507**).
- **Purpose-led attribution:** Ask whose **act/knowledge/state of mind** was intended to count **for this statute/purpose** (language, content, policy).

Personal liability alongside corporate liability — Lifestyle Equities CV v Ahmed [2014] UKSC 17

- **No reverse shield:** Corporate attribution **does not** immunise the individual: "acts attributed to the company" remain **acts of the individual** ([35]).
- **Separate persons, separate liabilities:** Treating directors as automatically free from personal liability **"fails to respect the separate personality of the company"**; both can be liable ([37]).
- **No carve-out for directors:** "**No rule** of company or agency law which excepts directors from general tort principles," including **accessory** liability ([45]).

Lennard's Carrying Co Ltd v Asiatic Petroleum Co Ltd [1915] AC 705 (identification doctrine)

- **Result (from slides):** Mr Lennard's knowledge/omissions (registered managing owner; active manager) were attributed to the company; **s 502** fire defence failed.
- **Key formulation:** If Mr Lennard was the **directing mind and will**, "**his action… was the action of the company**" under **s 502**; the "fault or privity" is that of **"somebody… whose action is the very action of the company itself"** ([1915] AC 705, **713–714**).
- **Nature of a company:** "A corporation is an abstraction… its **active and directing will** must be sought in the person who is really the **directing mind and will, the very ego and centre** of the personality" ([1915] AC 705, **713**).

Attributing directors' knowledge and intention

- **Sole director/officer:** A sole director's knowledge/intent **can be** the company's (*Bernard Elsey Pty Ltd v FCT* (1969) 121 CLR 119).

- **Two-stage test (criminal analogue)**: (1) **Subjective** belief in necessity; (2) **Objective** reasonableness of the response as perceived — *"two-stage inquiry"* ([122]).
- **Error below**: No proper application of either limb to **each** incident ([136]–[137]).

s 53 (Exceptional case safety-valve)

- If self-defence fails **only** because response was **not reasonable**, damages still **not** to be awarded **unless** circumstances are **"exceptional"** and failure to award would be **"harsh and unjust"**; court must **explain** why ([164]–[166]).
- **Error below**: Bare conclusion that circumstances were "**exceptional**" and that failure to award would be "**harsh and unjust**" with **no reasons** ([165]–[166]).

C. Pleadings, segmentation, and evidence handling

- **Three separate torts**: The wounding, clicking episode, and shots at fleeing car are **distinct** torts with **different** elements/defences/damages; treating them cumulatively was wrong ([41]–[44], [130]–[132]).
- **Vicarious admission**: Defence admitted "**it was vicariously liable**" for Bingle's actions; nevertheless identification analysis still matters for **s 54(2)** corporate "offence" question ([40], [138]–[141], [155]–[160]).
- **Credibility & CCTV**: Judge referenced "**material inconsistencies**" but **did not identify** them; **made no mention** of the CCTV despite its significance (rapid sequence ~17 seconds; possible instinctive reactions) — omission suggests it was **not taken into account** ([83]–[91], [93]–[101]).

PRINCIPLES

- **Corporations can commit assault** via **identification** where the **directing mind** acts **for the company**; **vicarious mens rea** is **not** the route absent statute ([147]–[149], [154]–[158]).
- **Attribution limit**: If the actor's conduct is a **purely personal** violent frolic, **no attribution**; focus on whether acts **furthered** corporate purposes (security) ([6]).
- **CLA s 54(1)**: Defendant must prove (balance) **serious offence** by plaintiff **+ material contribution** to injury; **bar on damages** applies ([110]–[111], [124]).
- **CLA s 54(2)**: Plaintiff can avoid the bar by proving defendant's conduct **"constitutes an offence"**; **onus shifts** to defendant to prove **self-defence** if raised ([125]–[126]).
- **Self-defence (s 52 / Crimes s 418)**: **Subjective belief** in necessity **+ objective reasonableness** of response as perceived; **defendant's onus** (balance) ([121]–[122], [161]–[162]).
- **s 53**: If only **reasonableness** fails, court **still** withholds damages **unless** it finds (with reasons) **"exceptional"** circumstances and **"harsh and unjust"** to withhold ([164]–[166]).
- **Trial conduct**: **Segment incidents**, apply **self-defence** to **each**, identify any **offence** for s 54(2), and expressly deal with **CCTV** and **credibility** ([130]–[137], [93]–[101]).
- **Practice point**: Where MD/sole employee acts in course of business, courts readily find **directing mind** attribution — here **"Mr Bingle was the directing mind and embodiment"** ([156]).

Legislation

***Criminal Code Act 1995* (Cth)**

Division 4 — Physical elements

s 4.1 Physical elements

1. A physical element of an offence may be:
   a. **conduct**; or
   b. **a result of conduct**; or
   c. **a circumstance** in which conduct, or a result of conduct, occurs.
2. In this Code:

conduct means an act, an omission to perform an act or a state of affairs.

engage in conduct means:

a. do an act; or
b. omit to perform an act.

s 4.2 Voluntariness

1. Conduct can only be a physical element if it is **voluntary**.

2. Conduct is only voluntary if it is a **product of the will** of the person whose conduct it is.
3. Examples of conduct that is **not voluntary**:
    a. a spasm, convulsion or other **unwilled** bodily movement;
    b. an act performed during **sleep or unconsciousness**;
    c. an act performed during **impaired consciousness** depriving the person of the will to act.
4. An **omission** to perform an act is only voluntary if the act omitted is one which the person is **capable of performing**.
5. If the conduct constituting an offence consists only of a **state of affairs**, the state of affairs is only voluntary if it is one over which the person is **capable of exercising control**.
6. Evidence of **self-induced intoxication** cannot be considered in determining whether conduct is voluntary.
7. Intoxication is **self-induced** unless it came about:
    a. **involuntarily**; or
    b. as a result of **fraud, sudden or extraordinary emergency, accident, reasonable mistake, duress or force**.

s 4.3 Omissions

An **omission** to perform an act can only be a physical element if:

a. the **law creating the offence** makes it so; or
b. the law creating the offence **impliedly provides** that the offence is committed by an omission to perform an act that there is a **duty to perform** by a **law of the Commonwealth, a State or a Territory, or at common law**.

Division 5 — Fault elements

s 5.1 Fault elements

1. A **fault element** for a particular physical element may be **intention, knowledge, recklessness or negligence**.
2. Subsection (1) does not prevent a law that creates a particular offence from **specifying other fault elements** for a physical element of that offence.

s 5.2 Intention

1. A person has **intention with respect to conduct** if he or she **means to engage** in that conduct.
2. A person has **intention with respect to a circumstance** if he or she **believes that it exists or will exist**.
3. A person has **intention with respect to a result** if he or she **means to bring it about** or is **aware that it will occur in the ordinary course of events**.

s 5.3 Knowledge

A person has **knowledge** of a circumstance or a result if he or she is **aware that it exists or will exist in the ordinary course of events**.

s 5.4 Recklessness

1. A person is **reckless with respect to a circumstance** if:
    a. he or she is **aware of a substantial risk** that the circumstance exists or will exist; and
    b. having regard to the circumstances known to him or her, it is **unjustifiable to take the risk**.
2. A person is **reckless with respect to a result** if:
    a. he or she is **aware of a substantial risk** that the result will occur; and
    b. having regard to the circumstances known to him or her, it is **unjustifiable to take the risk**.
3. Whether taking a risk is **unjustifiable** is a **question of fact**.
4. If **recklessness** is a fault element for a physical element of an offence, **proof of intention, knowledge or recklessness will satisfy** that fault element.

s 5.5 Negligence

A person is **negligent** with respect to a physical element of an offence if his or her conduct involves:

a. such a **great falling short** of the standard of care that a reasonable person would exercise in the circumstances; and

TOPIC 8 – Directors' Duties: Good Faith & Proper Purpose + No Profit Rule

Overview of Statutory & General Law Duties

Introduction

- Thurlow's aphorism captures the punishment problem for corporations that have "no soul to be damned, and no body to be kicked" (Baron Thurlow, 1731–1806).
- The chapter situates directors' duties within corporate governance, then covers who counts as a director, the director's role, who else can be bound, the common law–equity–statute interplay, and consequences of breach including exoneration or relief under the Corporations Act.

Corporate governance

- Context. The Banking Royal Commission (2018, Final Report 2019) sharpened focus on managing corporate behaviour and accountability.
- Corporate personality. A company is a separate legal person but lacks a single physical form or consciousness. Competing theories explain this:
    - **Natural entity** views the company as capable of a will distinct from members and managers.
    - **Concession or artificial entity** ties existence to legislative grant and public interest.
    - **Aggregate** treats the company as the sum of persons involved.
- Decision-making organs. Under the Corporations Act a solvent company typically has two independent organs: the board and the members in general meeting. The organs are staffed by natural persons with their own interests, so outcomes vary with composition.
- Pragmatic Australian approach. Rather than adopting one theory, Australian law draws on whichever theory best fits the issue, and deploys different legislative measures across company types.
- Regulatory sources. Corporate conduct is shaped by a mix of hard law and soft law, often imposing overlapping duties at the same time.

Australian corporate governance

- Governance focuses on who makes decisions, how, and by reference to what values, with "accountability" at its core. The key question is "who is to be held accountable, for what, and how" (Royal Commission Final Report 2019, 394).
- ASX definition: governance is "the framework of rules, relationships, systems and processes within and by which authority is exercised and controlled in corporations" (ASX CG Principles, 4th ed, 2019, p 1), echoing the HIH Royal Commission's description of the same "framework of rules, relationships, systems and processes" and the practices that effect them (HIH Royal Commission, 2003, 101–2).
- Accountability chains. Members supply capital and elect the board. In large companies the board meets episodically and delegates day-to-day oversight to management, so management is accountable to the board and the board to members. Failures often occur because these accountabilities are not well understood or observed.
- Legal lens. The legal duties regime targets directors and officers as defined in s 9, so analysis of "the board" usually entails senior management.
- Separate legal personhood is conferred by ss 117, 119 and 124. Australian law regulates both firm and individual because "a dual focus on the firm and the individual is necessary. Neither can safely be ignored" (Coffee, 1980, 79 Mich L Rev 386, 410). This both deters individual decision-makers and recognises corporate culture as a driver of decisions.
- Governance landscape includes:
    - statutory directors' duties and their common law and equitable counterparts
    - members' statutory contract rights under s 140 and members' remedies
    - ASX Listing Rules and the ASX Corporate Governance Principles
    - other regimes such as ACL and ASIC Act, and market and community expectations.
- ASX Corporate Governance Principles (4th ed, effective for full financial years commencing on or after 1 Jan 2020). "If not, why not" regime. Eight Principles:

- Drafting tweaks from general law (good faith vs bona fide; "best"; extending to **officers**) **do not change** operation in practice. The two limbs are expressed discretely in **(a)** and **(b)**.
- **Standard under s 181(1)(a)**
    - Debate: did "good faith" and removal of "in what they believe to be" import objectivity. The case law aligns the **test with general law**: see **ASIC v Maxwell** (2006) 59 ACSR 373, [109]; **ASIC v Macdonald (No 11)** (2009) 230 FLR 1, [661]–[663].
- **Civil vs criminal** split
    - **s 184(1)**: offence where the director is **reckless** or **dishonest** in breaching s 181(1).
    - **Dishonest** defined in **s 9** as dishonesty **according to the standards of ordinary people**.
        - Note: "intentionally" was removed in 2018 so the test is wholly **objective** (Treasury Laws Amendment EM 2018, [1.171]–[1.178]).
- **s 187** (wholly-owned subsidiaries): a director of the subsidiary is **taken to act in good faith in the subsidiary's best interests** if
    - **(i)** the subsidiary's constitution **expressly** authorises acting in the **holding company's** best interests,
    - **(ii)** the director in fact acts in good faith in the holding company's best interests, and
    - **(iii)** the subsidiary is **not insolvent** and does not **become** insolvent as a result.
    - Background: modelled on **NZ s 131(2)**, which is **broader** (extends to partly-owned subs). The 2000 corporate groups review recommended extending Australia's rule to **partly-owned** subs with a minority approval **ordinary resolution**, but this has **not** been implemented.
- **Stakeholders and policy**
    - The **PJC (2006)** concluded s 181(1) already **permits** regard to stakeholder interests where aligned with the company's interests and recommended **no change**. Examples cited: preserving **reputation/goodwill**, attracting **ethical investment**.

An international comparison: s 172 Companies Act 2006 (UK) and enlightened shareholder value

- **s 172(1) UK** adopts **enlightened shareholder value (ESV)**: act in a way the director **considers, in good faith**, most likely to **promote the success** of the company for the **benefit of members as a whole**, **having regard** to listed matters (long-term consequences, employees, relationships, community and environment, reputation, fairness between members).
- Structure keeps **shareholder benefit paramount** but **makes explicit** the permissibility of considering other interests. It reflects Bowen LJ's "no cakes and ale except for the company's benefit" idea operationalised by requiring **regard** to wider factors.
- **Policy lineage**: UK Company Law Review Steering Group (1999) targeted short-termism, arguing cooperative relationships may involve short-term costs for long-term value.
- **Critiques**
    - Too light-touch: only requires directors to **think about** other interests.
    - Vague principles and uncertain remedies mean limited substantive advance over common law.
    - The Steering Group's shareholder-centred clarification: non-shareholder interests are considered **insofar as** doing so **promotes shareholders' interests**.
- **Australian reform stance**: CAMAC (2006) noted adopting s 172 might either be unnecessary codification or a radical shift, and might entrench a contestable list of factors. It preferred Australia's flexible s 181 framework.
- **People & Planet v HM Treasury** [2009] EWHC 3020: court refused JR of HM Treasury's RBS investment policy; s 172 leaves decisions to the **board** acting for **shareholders**. Social and environmental factors **may** be considered by the board, but external policy imposition would **conflict** with s 172(1) ([33]–[34]).
- The most cogent criticism for transplant debates: a non-exhaustive catalogue with no guidance on **weighting/prioritisation** is of limited practical utility.

The duty not to fetter discretion

- Directors must **retain independent judgment** to meet the bona fide/proper purpose duty. Agreements to vote per directions of another person are generally impermissible fetters.
- **Thorby v Goldberg** (1964) 112 CLR 597

- Hence the directors acquired the shares "**by reason and only by reason of the fact that they were directors of Regal, and in the course of their execution of that office**" [AC 147].

3) No defence that Regal lacked funds or directors acted for Regal's benefit

- The fact Regal could not subscribe is irrelevant, just as impossibility did not help the trustee in **Keech**; the proper protection was a fully informed **shareholder** resolution, which was not obtained [AC 150].
- Arguments that they acted bona fide or for the company's benefit misconceive an **account of profits** claim; those considerations go to damages for misconduct, not accounting for fiduciary gains [AC 144–145].

4) Individual outcomes

- **Bobby, Griffiths, Bassett, H Bentley**: liable to account for profits on their 500 shares each [AC 150].
- **Gulliver**: evidence showed he only "found" others; cheques, certificates and proceeds went to South Downs, Seguliva and Miss Geering; with no mala fides, there was no reason to dress up ownership, so he **made no profit** to account for [AC 150–151].
- **Garton (solicitor)**: he subscribed "**at the request of Regal**;" there is "no principle or authority" to require a solicitor to account for profit on his own subscription entered at the client's request [AC 152].

5) Directors stand in a fiduciary relationship; classic authorities applied

- Although directors are not trustees in every respect, the **Parker v McKenna** "**inflexible rule**" that an agent may not secretly profit "in the course and execution of his agency" applied in full to directors, as did **Imperial Mercantile Credit Association v Coleman** [AC 148–149].

ORDERS

- Appeal dismissed as to Gulliver and Garton.
- Appeal allowed against the other four, with judgment for **£1,402 1s 8d** each plus interest (reflecting 500 shares × £2 16s 1d) and costs, subject to a reduction reflecting wasted trial costs from failed fraud allegations [AC 152–153].

PRINCIPLES

- **No-profit, no-conflict for directors**: if a director makes a profit **by reason and in the course of** office, they must **account**, even if they acted honestly, took risk, the company could not take the opportunity, or there is no company loss [AC 145, 147, 150].
- **Proper ratification** requires **fully informed shareholders**; board-level say-so is not enough [AC 150].
- **Causation test** is positional: did the profit arise because of and during the office, not whether the company had a right to the asset [AC 147].
- **Exceptions**: no liability where the director **did not in fact receive** the profit, and none where the fiduciary acted **at the company's request** in their personal capacity (here, the solicitor) [AC 150–152].

Corporations Act 2001 (Cth)

s 181 Good faith — civil obligations

Good faith — directors and other officers

1. A director or other officer **must** exercise their powers and discharge their duties:
    a. **in good faith** in the **best interests of the corporation**; and
    b. **for a proper purpose**.

Notes: Civil penalty provision: **s 1317E**. Directors of wholly-owned subsidiaries: **s 187**.

2. A **person who is involved** in a contravention of **s 181(1)** contravenes **s 181(2)**.

Notes: **s 79** defines **involved**. Civil penalty provision: **s 1317E**.

s 184 Good faith, use of position and use of information — criminal offences

Good faith — directors and other officers

1. A director or other officer **commits an offence** if they:
    a. are **reckless**; or
    b. are **dishonest**;

and **fail to exercise** their powers and discharge their duties:

   c. **in good faith** in the **best interests of the corporation**; or

- Rationale: fiduciary rules are **prophylactic**. Fairness of the transaction and absence of loss are **immaterial**. The aim is to remove temptation.

Regal (Hastings) Ltd v Gulliver [1967] 2 AC 134

- **Facts**: Regal sought to acquire two cinema leases via a subsidiary. Lessors required additional capital and director guarantees. Directors personally subscribed for the remaining shares, later sold at a profit on a group sale. New owners sued for account of profits.
- **Held**: account ordered.
    - **Lord Russell** at 143–145: liability does **not** depend on fraud, bona fides, whether profit would otherwise go to the company, whether the director took risk or acted for the company's benefit, or whether the company suffered loss. The liability arises from the **mere fact** of profit **by reason of** the fiduciary position.
    - Protection path was **shareholder approval**, antecedent or subsequent (at 150).
    - **Lord Macmillan** at 153: plaintiff must show (i) what directors did was sufficiently related to company affairs and used their opportunities and special knowledge, and (ii) it resulted in a personal profit.
- **Who was not liable**: Gulliver did not subscribe; Garton acted under company instructions.

Identifying the fiduciary's role and capacity

- Ask: what was the director tasked to do, and in what capacity was the gain obtained
    - **Furs v Tomkies**: chair told MD to make the best deal he could, but that did **not** authorise subordinating the company's interests; secret commission had to be accounted.
        - Latham CJ at 589–590; Rich, Dixon and Evatt JJ at 598.
    - **Holyoake** [2011] FCA 1154: opportunity existed only due to fiduciary role. Pursuit in "private time" after work still breached duty. Resignation **is not sufficient** to avoid breach where the opportunity is traceable to the office.
    - Contractual limits on side opportunities may apply: **Australian Careers Institute v AIF** [2016] NSWCA 34.
    - Capacity and private benefit issues: **Streeter v Western Areas Exploration** [2011] WASCA 17.
    - **Ratification or rejection**:
        - Informed rejection or consent can allow private pursuit: **Queensland Mines v Hudson** (1978) 18 ALR 1; **Peso Silver Mines v Cropper** (1966) 58 DLR (2d) 1.

Causal nexus for account of profits

- **Streeter** [2011] WASCA 17, [74]–[75] (McLure P): there must be a **sufficient causal connection** between the breach and the profit. Mere temporal connection is inadequate.
- **Maguire v Makaronis** (1997) 188 CLR 449, 468: ask whether the profit was obtained **by reason of** the fiduciary position or taking advantage of **opportunity or knowledge** derived from it.

Cook v Deeks [1916] 1 AC 554

- **Facts**: directors diverted a new railway contract to their new company, then used their votes in a general meeting to declare the old company had no interest.
- **Held**: account of profits ordered, ratification **invalid**.
- **Quotes**:
    - They "deliberately designed to exclude" the company whose interests they were bound to protect: **at 562**.
    - Those in complete control "are not at liberty to sacrifice" the company's interests and divert business "which should properly belong to the company they represent": **at 563** (Lord Buckmaster LC).

Furs v Tomkies — facts distilled

- MD negotiated sale of tannery. He secured a **secret commission** of £5,000 in addition to price.

- There was a breach of duty concerning **Golden Granite's 30% interest** and the resulting **150,000 shares** [51], [94].
- However, apart from those 150,000 shares, there was **no sufficient causal connection** between their role as WAE directors and the profits on the initial WANL shares (arising from Streeter's personal seed capital and IPO subscriptions) [92], [96].
- If laches had not applied, any constructive trust would be confined to the **150,000 shares** linked to the diverted 30% interest [94], [96].

REASONING

1. Conflict rule & profit rule

- **Conflict rule:** fiduciary must not promote personal interest where there is a conflict or real and substantial possibility of conflict between their personal interest and the interests of the person to whom the duty is owed [66].
- Mason J's "interest vs interest" formulation in Hospital Products clarified that **non-fiduciary duties can still generate a relevant company "interest"** for conflict purposes if the director has a positive duty to pursue a benefit for the company [66]–[68].
- **Profit rule:** a fiduciary must account for profit obtained either:
    - where there is a conflict or possible conflict between duty and interest, or
    - **by reason of the fiduciary position** or by taking advantage of **opportunity or knowledge derived** from that position [73]–[74].
- There must be a **sufficient causal connection** between the profit and the use of the fiduciary office; a merely temporal link is not enough [75]–[77].

2. Scope/content of the directors' fiduciary duties

- Content of fiduciary duties is **moulded to the specific relationship**: can be narrowed by constitution, course of dealing or circumstances of appointment [70].
- Here, Streeter was not just a director; he was also a **major shareholder, creditor and sole funder** of WAE [80]. He was approached for ANPC precisely in his role as an **astute seed capitalist** [72], [81]–[82].
- Given WAE's history (failed raisings, dormant, no staff, only minor tenement asset), it was "far-fetched and fanciful" to suggest all Streeter's future mining investments had to be through WAE [72].
- Therefore, Streeter and Cooper were **entitled to pursue personal mining opportunities**, including the ANPC proposal, provided they did not misuse WAE's assets or position [71], [79]–[82].

3. Was the ANPC "Nickel Opportunity" WAE's corporate opportunity?

- ANPC proposal was already **in the public domain**; ANPC approached broker Brailey, not WAE [81]–[82].
- ANPC came to Streeter because it needed **seed capital and a broker**, not a vehicle specifically tied to WAE [62]–[64], [84].
- Although Streeter initially tried to use WAE as the vehicle (Streeter Group proposal), ANPC **rejected WAE** for commercial reasons [22], [47]–[48].
- There was **no positive duty** on Streeter to secure the proposal for WAE, and no realistic opportunity for WAE to become the vehicle [48], [87].
- Using WAE to provide seed capital to another company was **outside WAE's actual or intended business**, so that was not a relevant corporate opportunity of WAE [87]–[88].

4. Use of WAE assets: Cue tenements & name

- Trial judge had found that using WAE's name and Cue tenements was **"essential"** to float WANL and secure Streeter's 20% control [41].
- McLure P rejected this:
    - Inclusion of Cue tenements was **not essential** to ANPC's project. It was more an "undesirable add-on" used in negotiating Streeter's overall package [57], [92].
    - On the evidence, Streeter could achieve a large WANL stake simply by his **personal capital**: he ended up with ~28% of offered shares and ~37.8% of issued float shares even ignoring WAE/Cue [58].
    - The assumption in ANPC models that Streeter held 80% of WAE was false; he never held more than 18.6%, and the restructuring steps to reach 80% were never pursued [59].
- **Golden Granite 30% interest:**

1. **Reasonable grounds to expect solvency** – the director had reasonable grounds to **expect**, and did expect, that the company was solvent.
2. **Reasonable reliance on information about solvency** – the director expected solvency **in reliance on information** from a person responsible for providing adequate solvency information, whom the director believed on reasonable grounds to be **reliable and competent**.
3. **Illness or other good reason for non-participation** – the director did not take part in management at the relevant time because of **illness** or **some other good reason**.
4. **All reasonable steps taken to prevent incurring the debt** – the director **took all reasonable steps** to prevent the company incurring the debt.

"Suspect" vs "expect"

- There is a tension between:
  - **s 588G**, which uses "reasonable grounds for **suspecting**" insolvency, and
  - **ss 588H(2)–(3)**, which retain "reasonable grounds to **expect**" solvency.
- In **Metropolitan Fire**, Einfeld J noted that **"suspect"** is a lower threshold than **"expect"**:
  - Expectation must be differentiated from **mere hope** and implies a **measure of confidence** that the company is solvent (23 ACSR 699, 711).
- This makes the solvency defences relatively difficult to satisfy once reasonable grounds for **suspicion** are shown.

Re McLellan; Stake Man Pty Ltd v Carroll

- **Re McLellan; Stake Man Pty Ltd v Carroll** (2009) 76 ACSR 67:
  - Carroll was a director who monitored stock levels and production and obtained advice from:
    - Accountant **Bright**, who said the company was **close to insolvent**, and
    - An insolvency practitioner, who said the company could survive with further investment.
  - Bright continued to advise there were **cash flow problems but not insolvency**.
- Carroll relied on s 588H(2) and (3), but Goldberg J rejected both.

s 588H(2) – reasonable grounds to expect solvency

- Goldberg J stressed that having a **suspicion of insolvency** does not answer whether there is an **expectation** of solvency (76 ACSR 67, 105 [169]).
- He applied the staged inquiry from **Hall v Poolman** (2007) 65 ACSR 123:
  - The question is how sure one is that assets can be turned into cash to pay all debts present and to be incurred within a given period (often three months) – is it certain, probable, more likely than not, possible with luck, or remote (65 ACSR 123, 182 [269]).
  - A reasonable expectation of solvency exists only if the honest and reasonable answer is that payment is **certain or probable** (65 ACSR 123, 182 [270]–[275]).
- In Re McLellan, although there was substantial stock, the size of outstanding and accruing debts meant it was **not reasonable to expect** that stock could be sold quickly enough, so **s 588H(2) was not made out**.

s 588H(3) – reliance on solvency information

- For this defence, the information must come from a **competent and reliable person responsible for providing adequate advice about solvency**.
- Bright was competent and reliable, but he had been engaged to provide advice about **cash flows, costs and business model** rather than specifically about solvency.
- Goldberg J held this did not satisfy s 588H(3); it may be necessary to **engage someone specifically to advise on solvency** for the defence to apply (76 ACSR 67, [183]–[186]).

s 588H(4) – non-participation for good reason

- s 588H(4) reflects Harmer Report policy that liability should not be imposed on directors who **could not influence** the financial affairs at the time.
- Only directors who are genuinely **unable to participate or influence management** for proper reasons can use this defence.
- In **Tourprint International Pty Ltd (in liq) v Bott** (1999) 32 ACSR 201:

TOPIC 11 – Insolvency & Insolvent Trading

An Overview of Insolvency

Winding up / liquidation – core idea

- *Winding up* and *liquidation* are the **same thing** – the process by which a company's business and affairs are **brought to an end**.
- Davies, Worthington and Micheler describe it as the process used where a company:
    - **no longer has funds to function**, or
    - **its members no longer wish it to function**
- so there must be a way to bring the **existence of the legal entity to an end**.
- The process is designed so that, **before the company ceases to exist**:
    - all **outstanding obligations are met so far as they can be**, and
    - any **surplus assets** are distributed to members according to their *agreed entitlement* (Davies, Worthington & Micheler, *Gower's Principles of Modern Company Law* 1151).
- Because of competing interests, the process is **not** carried out by the company's own directors. Instead:
    - **independent, qualified insolvency practitioners** are appointed as **liquidators**, and
    - when their work is finished, the company is **removed from the register and "dissolved"**.

What actually happens in liquidation

- The company's **business ceases**.
- Its **assets are collected and sold**, and the proceeds are applied in the order set out in the *Corporations Act*.
    - First, **creditors are paid**.
    - Any **balance is paid to shareholders**.
- After this, the company is **deregistered and ceases to exist**.
- **Types of winding up**
    - **Compulsory**: court-ordered winding up.
    - **Voluntary**: initiated by members (if solvent) or creditors.
- The **most common reason** for winding up or liquidation is **insolvency**.

Policy: winding up and liquidation

Insolvency policy into four tenets:

1. **Collective action**
2. **Harmony with non-insolvency law**
3. **Strategic behaviour**
4. **Rehabilitation**

At the point of **winding up / liquidation**, the company is **beyond rehabilitation**, but the other three tenets still matter.

1. Collective action and pari passu

- Law promotes **collective action** and tries to prevent **individual actions** from undermining the best use of assets for creditors and members.
- Rules are designed so **no creditor or member can exploit insolvency by individual action and receive more than their entitlement**.
- The **pari passu principle** applies:
    - assets are **pooled by the liquidator**, and
    - creditors are ranked and paid in a **fair and equitable order**.
- The pari passu principle is dealt with later.

2. Harmony with non-insolvency law

- The **ranking of creditors** reflects broader **social and corporate law norms**.
    - For example, **employees receive priority** for some debts, reflecting social policy.
    - **Shareholder interests are deferred** in liquidation – they sit behind creditors.

2. **Genuine dispute / offsetting claim** – ss 459H, 459G
   - A demand may be set aside where:
     - there is a **genuine dispute** about the existence or amount of the debt, and/or
     - the company has an **offsetting claim**.
   - s 459H requires the court to calculate the **"substantiated amount"** of the demand by subtracting any offsetting claim from the total.
   - An **offsetting claim** is a genuine claim the company has against the creditor by way of **counterclaim, set-off or cross-demand**.
   - Example: in *Elm Financial Services Pty Ltd v MacDougal* [2004] NSWSC 560, the company argued the creditor (a financial adviser) had taken **secret profits in breach of duty**. Barrett J held this was an **offsetting claim**, so the demand was set aside.

Use and abuse of statutory demands

- Statutory demands are commonly used as a **debt recovery tactic**, even though they **should not be used** against companies that are plainly solvent.
- **Solvency alone** is not a reason to set aside a demand.
  - It may, however, support a finding of **substantial injustice** under s 459J(1)(a) (*Chippendale Printing Co Pty Ltd v Deputy Commissioner of Taxation* (1995) 55 FCR 562).
  - Solvency may also lead the court to **refuse a winding up order** under s 459A.
  - Where the presumption of insolvency is enlivened, a company that relies on solvency must produce the **"fullest and best" evidence** of its financial position to discharge its onus (*AG Coombs Pty Ltd v M & V Consultants Pty Ltd (In Liq)* (2018) 55 VR 513, 539 [81]).

Consequences if the demand is not set aside

- If the demand is **not set aside**, and the period for compliance has expired, the creditor may rely on the **failure to comply** as the basis for a **winding up application** under s 459P.
- Under **s 459Q**, the application must:
  - set out **particulars of service** of the demand,
  - attach a **copy of the demand**, and
  - be supported by an **affidavit of debt**.
- If the company wants to avoid winding up, it must get the statutory demand **set aside before the creditor relies on it**.
- Under **s 459S**, leave of the court is required to **oppose the winding up application** based on a failure to comply with a statutory demand, and the debtor cannot raise matters at the hearing that **could have been raised earlier**.

Court order to wind up the company – introduction

- The court has a **discretion** under s 459A to make a **winding up order**.
- Generally, where the company is **insolvent**, a person with standing (under s 459P) will obtain an order **unless**:
  - the application is an **abuse of process** (for example, brought to defeat other proceedings, as in *Re Kolback Group Ltd* (1991) 4 ACSR 165, or where the defendant company is effectively the plaintiff's "alter ego" and related matters are before the Family Court, as in *Roberts v Wayne Roberts Concrete Constructions Pty Ltd* (2004) 50 ACSR 204); or
  - the **company is actually solvent** (*Chippendale Printing*).
- A winding up order is made **in favour of all creditors and contributories** – the applicant acts in a **representative capacity**.
- Sometimes the court refuses a winding up order because **other creditors oppose it**, arguing their interests would be better served by **another form of external administration**, such as:
  - a **scheme of arrangement**, or
  - **voluntary administration** rather than liquidation (*Deputy Commissioner of Taxation (Vic) v Avram Investments Pty Ltd* (1992) 9 ACSR 580; *Laucke Flour Mills (Stockwell) Pty Ltd v Fresjac Pty Ltd* (1992) 58 SASR 110).
- When the order is made, the court also **appoints a liquidator** to the company (ss 472, 532(8)).

- It is generally the **day the winding up application was filed** (s 91, item 14),
    - or an earlier date if administration, DOCA or voluntary winding up occurred before the order (s 91 generally).
- Many voidable transaction provisions refer to the **relation-back day**, and claw-back periods are measured from it (see 16.25).

Immediate legal consequences

- Upon the order:
    - The company **ceases to carry on business**, except so far as is necessary for the liquidator to perform their functions.
    - The **liquidator takes custody and control of company property** (s 474).
    - The company **cannot dispose of its property** unless the court orders otherwise. Any purported disposition is **void** (s 468).
        - "Disposition" is interpreted **widely** and includes sales, encumbrances, mortgages and payments (*Re Mal Bower's Macquarie Electrical Centre Pty Ltd (in liq)* [1974] 1 NSWLR 254; *Re Loteka Pty Ltd* [1990] 1 Qd R 322).
        - This prohibition does **not** apply to dispositions by the **liquidator or administrator**, or under a **deed of company arrangement** (s 468).

Reporting and deregistration

- Directors and the secretary must lodge with the liquidator a **report on the company's affairs** (s 475).
- If the liquidator's inquiries reveal:
    - offences,
    - negligence,
    - breaches of duty,
    - misappropriation of money or property, or
    - an inability to pay more than **50 cents in the dollar**,

the liquidator must **report to ASIC** (s 533).

- After realising assets, paying **"dividends"** (payments to creditors), and making a **final return to contributories**, the liquidator applies:
    - to the court to be **released**, and
    - for ASIC to **deregister** the company (s 480).

Restrictions on litigation and enforcement

- From commencement of winding up:
    - No person can **commence or proceed with**:
        - a court proceeding against the company or relating to its property, or
        - any **enforcement process** against its property,

without leave of the court (s 471B).

- These restrictions:
    - prevent **dissipation of assets in litigation**,
    - force creditors to **prove their debts** in the winding up, and
    - prevent a creditor gaining an **advantage over others** by obtaining judgment or enforcing against property (*Re Gordon Grant and Grant Pty Ltd* [1983] 2 Qd R 314, 317; *Re Sydney Formworks Pty Ltd (in liq)* [1965] NSWR 646).

Effect on members and employees

- Members **lose their rights to transfer shares**, and their rights **cannot be varied** after commencement (s 468(1)).
- Employees are **discharged** on the relevant date (meaning of "relevant date" discussed later), but they have **priority rights** for arrears of wages and other entitlements **over certain other creditors** (s 558, and see 16.30).

Liquidators: appointment, powers, duties

The **primary task** of the liquidator is to:

- "Debt" is as discussed at 16.15.20 and Chapter 15.
- "Claim" is **wider** and includes:
  - present or future,
  - certain or contingent,
  - ascertained or sounding only in damages.

Uncertain and long-tail liabilities

- Before 1992, **tort damages claims** were not provable in a winding up.
- Following the **Harmer Report** (ALRC Report 45, *General Insolvency Inquiry* (1988)), the *Corporations Act* was amended:
  - **s 554A** provides a methodology for determining the amount of **debts and claims of uncertain value**.
- **Product liability and latent injury claims** (for example, asbestos-related disease) remain problematic because:
  - injury may manifest long after the company is wound up, and
  - there may be **no provision** for future claims.
- CAMAC has suggested that a **trust for future claimants** may be needed in some windings up to address long-tail liabilities.

Recovery of assets: voidable transactions

- In liquidation the liquidator collects:
  - property the company owns at the commencement of winding up, and
  - property clawed back using pt 5.7B div 2 *Corporations Act* (headed "Recovering property or compensation for the benefit of creditors of insolvent companies").
- Rationale: to maximise the pool of assets available so creditors can be paid as far as possible.
- Pt 5.7B div 2 lets the liquidator unwind certain pre-liquidation transactions that:
  - prefer some creditors over others, or
  - strip value from the company (eg transfers for less than market value).
- The liquidator applies to court to have the transaction set aside. If the transaction is declared void, the creditor can submit a proof of debt and share rateably in the pool (s 588FI).

Voidable transaction categories (pt 5.7B div 2)

1. **Unfair preferences**: s 588FA
2. **Uncommercial transactions**: s 588FB
3. **Unfair loans**: s 588FD
4. **Unreasonable director-related transactions**: s 588FDA
5. **Invalid circulating security interests**: s 588FJ

- Categories 1 and 2 must also be **"insolvent transactions"** within s 588FC, so insolvency must be proved.
- Categories 3–5 operate according to their own elements and usually occur in insolvency, but insolvency is not always an element.
- Overlap is common. A single transaction can be, for example, both an unfair preference and an uncommercial transaction. Courts accept this and liquidators can plead alternatives (eg *Featherstone v Ashala Model Agency Pty Ltd (in liq)*; *Re Ashington Bayswater Pty Ltd (in liq)*).

Timing and relation-back

- Clawback periods are measured from the **relation-back day** (see 16.15.35).
- General policy: the more morally "suspect" the transaction, the longer the clawback period.
  - Insolvent transaction that is an **unfair preference**: clawback period 6 months (s 588FE(2)).
  - **Unreasonable director-related transaction**: 4 years (s 588FE(4)).
  - Insolvent transaction entered into to defeat or obstruct creditors: 10 years (s 588FE(5), "creditor-defeating purpose").

Unfair preferences

Concept

TOPIC 12 – Member's Rights & Remedies

Minority Oppression

Introduction

Scope of chapter

- Focus is on **rights of company members** to protect:
  - their **own interests**, and
  - the **company's interests**.
- Concentrates on **shareholders in companies limited by share capital**, but the principles apply equally to **companies limited by guarantee**.

Typical dispute patterns

- Common context is a **contest between shareholders and controllers of management**. Examples:
  - management **disregarding shareholder rights** (eg exclusion from meetings, procedural unfairness)
  - **dilution of voting power** through new share issues
  - **ongoing mismanagement**
  - few or no **dividends**
  - **involuntary expropriation** of shares
  - **amendments to the constitution** that disadvantage minorities
  - **inadequate information** about the company's affairs.
- Disputes can be subdivided by who "speaks" for the company:
  1. **Shareholders v directors**
     - Directors exercise management powers in ways that **adversely affect shareholder interests**.
  2. **Majority v minority shareholders**
     - Minority disagrees with majority decision at general meeting.
     - Central question: **should the law recognise and protect the minority position?**

Two competing conceptions of the corporation

1. **Contractual perspective** (see Ch 2)
   - Shareholders have associated via **voluntary agreement**, embodied in:
     - the **corporate constitution**, and
     - the **Corporations Act**.
   - These instruments **define member rights**, including that individual members can be **out-voted**.
   - Protection against self-serving managers is provided by **directors' duties** (Chs 10–13).
2. **Concession theory** (also Ch 2)
   - The **state retains a regulatory role** over corporate behaviour.
   - Because **not all members will be treated fairly**, the state should provide **mechanisms for minority protection**.
   - Kirby P emphasised the value of "corporate gadflies": minority voices are important for **accountability**; courts should support them when they seek to correct "apparently unlawful and self-interested action by directors, defended by oppressive conduct" (*Parker v NRMA* (1993) 11 ACSR 370, 383–4).

Majority/minority conflict and alteration of rights

- Majority can use **voting power** to:
  - alter the constitution by **special resolution** (s 136(2))
  - increase their **dividend entitlements** or **voting power**
  - ratify director conduct that would otherwise be a **breach of fiduciary duty**.
- Problems:
  - What if **majority shareholders share the same personal interests as directors** and ratify conduct not in the company's best interests?
  - What if directors/majority will not act to protect the company's interests?

- **Share issues** by directors designed to dilute another shareholder's stake (*Kokotovich Constructions Pty Ltd v Wallington* (1995) 13 ACLC 1113).
- Serious breach of **fiduciary duty** in a small proprietary company: mixing personal and company funds, non-disclosure, failure to call meetings, obstructing access to records (*Martin v Australian Squash Club Pty Ltd* (1996) 14 ACLC 452).
- Failure to review dividend policy in light of improving cash position, resulting in **unfair dividends** (*Shamsallah*).

"Contrary to the interests of the members as a whole" (s 232(d))

- Now drafted separately from s 232(e), confirming it is an **alternative ground**, not part of the composite oppression formula.
- *Wayde* (NSWCA) treated this phrase as reflecting the equitable limitation that majority power must be exercised for the **benefit of the corporation as a whole**, and that members' legitimate interests as corporators are **circumscribed by the constituting documents**.
- *Goozee v Graphic World Group Holdings Pty Ltd*: asks whether conduct is contrary to the interests of a **hypothetical individual member**, an objective test (42 ACSR 534).
- *Sandy v Yindjibarndi Aboriginal Corporation*: phrase has been equated with "benefit of the company as a whole", with interests found within the **constitution** (126 ACSR 370, [99]–[100]).

Examples:

- Breaches of **statutory or fiduciary duty** by directors and officers may be contrary to the interests of members as a whole (*Exton v Extons Pty Ltd* (2017) VR 520, [39]).
- Diversion of funds by a director to another company under their control (*Bilsborough v Bilsborough* [2016] VSC 211).

Orders (s 233)

Two-stage judicial task

1. Determine whether a **ground under s 232** is established.
2. Decide whether, in light of that ground, the court **should exercise its discretion** to grant relief and what form it should take.

- s 232 says the court **"may"** make an order, preserving judicial caution about intervening in internal affairs.
- *Zephyr Holdings Pty Ltd v Jack Chia (Australia) Ltd*: Brooking J explained that in strong cases the court may act readily even without bad faith; in closer cases it can be hard to distinguish between failure to establish a ground and exercise of discretion. The stronger the ground, the more likely favourable exercise of discretion (7 ACLC 239, 246).

Breadth of remedial power

- s 233: court may make **"any order it considers appropriate"**, including but not limited to:
  - **winding up** the company (though this is often seen as a remedy of last resort; *John J Starr (Real Estate)*).
  - ordering another member or the company to **purchase shares** (common remedy).
  - directing the company or authorising a member to **institute, prosecute, defend or discontinue proceedings** (overlaps with derivative action regime).
  - requiring a person to **do or refrain from doing** specified acts (eg setting aside share issues and rectifying register).
- In choosing a remedy, courts emphasise:
  - use of the **least intrusive effective remedy**, and
  - the order must **"put an end to the oppression"** (*Munstermann v Rayward* [2017] NSWSC 133, [22]).

Constitutional orders

- s 233 expressly contemplates:
  - modification, repeal or adoption of a **constitution**.

- Where an order affects the constitution, s 233(3) provides that the company **cannot change or repeal the constitution inconsistently** with that order via s 136 unless the court permits.

Share purchase and comparisons with overseas "buy-out" rights

- Orders for **purchase of minority shares** are frequently used, but require a prior finding of oppression/unfairness and an appropriate exercise of discretion.
- In some jurisdictions (eg NZ, Ontario), there is a **statutory appraisal/buy-out remedy** independent of oppression, triggered by defined fundamental changes, reflecting a view that there is a level of change it is unreasonable to force a shareholder to accept and that disgruntled minorities may be of **little benefit** to the company going forward. Australia does not have a general appraisal regime.

Wide discretion illustrated

- *Jenkins v Enterprise Gold Mines NL*: once oppression/unfairness is found, it is the court's **obligation** to grant whatever relief is best suited; nothing in pt 2F.1 suggests reluctance is required where intervention is needed. Where a general meeting can achieve the same result, that may be preferred (6 ACSR 539, 561–2).
- *Re Spargos Mining NL*: court ordered removal of existing directors and appointment of an **independent board** for 12 months t o investigate and report (3 WAR 166).
- *Hannes v MJH Pty Ltd*:
  - Facts: governing director of a family company had extensive control under the constitution and used it to allot shares to another company he controlled and to enter a generous service agreement (salary, car, large termination payment).
  - First instance: found oppression and made orders **restricting his powers** and **amending the constitution**.
  - On appeal: Court agreed conduct was oppressive, unfairly prejudicial and discriminatory, but held the orders **went too far**, radically altering the balance of power; this exceeded what the discretion allowed (10 ACLC 400, 418).

***Wayde v New South Wales Rugby League Ltd* (1985) 180 CLR 459**

FACTS: NSW Rugby League Ltd was incorporated to take over the old unincorporated League and to **"foster and control the game of rugby league football"** and **"determine which Clubs shall be entitled to enter teams"** in competitions it conducted: cl 3(b), 3(j) (at 462–463). Article 76 provided that the League **"may conduct such competitions between teams representing all or any of the Clubs"** as the Board determined, and could invite other clubs at its discretion (at 463–464). In 1984, after concerns that there were too many games, the competition was too long and players did not have time to recover from minor injuries, and that early rounds in hot weather posed risks, a committee recommended reducing the premiership to 12 teams (at 463–464). On 3 September 1984 the Board resolved to:

- Limit the 1985 premiership to **12 teams**, and
- **Refuse Western Suburbs' (Wests) application** to enter the 1985 competition (at 463–464).

The Board knew the decision was likely to be financially and competitively devastating for Wests and might lead to its effective extinction (at 467–468). Wests' representatives, as members of the League, brought proceedings under **s 320 Companies (NSW) Code** alleging the decisions were **oppressive or unfairly prejudicial** (at 466).

ISSUE:

1. Did Art 76 (read with cl 3(j)) empower the Board to **exclude** a particular club from the premiership competition?
2. Were the resolutions to reduce the competition to 12 teams and to exclude Wests **oppressive or unfairly prejudicial or discriminatory** within s 320(2) (at 466)?

HELD:

1. **Art 76 did empower the Board to exclude a club.**
2. The decisions were **not oppressive, unfairly prejudicial or unfairly discriminatory** within s 320. The appeal was dismissed (at 468).

REASONING

(1) Power to exclude – Mason ACJ, Wilson, Deane, Dawson JJ

- On the text of Art 76, the phrase **"as the Board of Directors may from time to time determine"** qualifies the whole phrase **"competitions between teams representing all or any of the Clubs"**, so the

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FUNDRAISING

0. ONE LINE TO START A FUNDRAISING / DISCLOSURE ISSUE

Use this when:

- The problem involves raising capital / issuing shares or debentures
- There is marketing of an investment, “offer” or “invitation” to invest
- You see questions about disclosure documents, exemptions, small scale offerings, sophisticated investors, misleading documents, or ASIC stop orders

Where [COMPANY] proposes to raise funds by issuing [SECURITIES], the Corporations Act requires disclosure under Ch 6D if there is an offer of securities for issue, subject to specified exemptions (CA ss 706, 708). Failure to lodge a compliant disclosure document is a civil penalty provision (s 727).

[Soft prompt: then run through the spine: (1) company type; (2) offer or invitation; (3) “security”; (4) is disclosure required; (5) exemptions in s 708; (6) type and content of disclosure document; (7) defective disclosure / misleading conduct; (8) advertising and stop orders.]

PART A – IS CH 6D DISCLOSURE REQUIRED?

STEP 1 – PUBLIC OR PROPRIETARY COMPANY?

Core rule
Ch 6D applies to offers of securities for issue by a company, with public companies generally subject to disclosure and proprietary companies often raising capital through exempt activities (s 113(3)).

Template

- [COMPANY] is a [public company limited by shares / proprietary company] registered under the Corporations Act.
- As a public company, its offers of securities are prima facie subject to the disclosure regime in Ch 6D (s 706).
- As a proprietary company, it may still issue securities, but may only raise funds through activities that either do not involve a “securities” offer requiring disclosure, or fall within the exemptions in s 708 (s 113(3)).

[Soft prompt: If the problem emphasises “pty ltd”, flag s 113(3) and then jump quickly to exemptions.]

STEP 2 – IS THERE AN “OFFER” OR “INVITATION” OF SECURITIES?

(A) IS THERE AN OFFER OR INVITATION? (S 9)

Core rule
An “offer” of securities includes invitations to apply for the issue or to purchase securities (s 9(a)) and extends to material distributed to encourage negotiations calculated to result in the issue of securities (AG v Australian Fixed Trust).

Template
Prima facie, [COMMUNICATION / DOCUMENT / ROADSHOW / WEBSITE] is an offer or invitation in relation to securities because:

- it invites applications for the issue of [SHARES / DEBENTURES] (s 9(a)(i)), or
- it invites offers to purchase those securities (s 9(a)(ii)), or
- it involves circulating material encouraging [INVESTORS] to enter negotiations calculated to result in an issue of securities (AG v Australian Fixed Trust).

Therefore, there is an “offer” for the purposes of Ch 6D, subject to any specific exclusions (eg crowd-sourced funding: s 703B).

Here, [COMPANY] is proposing to raise [AMOUNT] by issuing [TYPE OF SECURITY]. As the total amount raised is [≤ / >] $10m, [COMPANY] must lodge [an OIS under s 709(4) / a prospectus] as the disclosure document. It may choose to use a **short form prospectus** under s 712 by incorporating lodged material by reference.

PART D – CONTENT OF DISCLOSURE DOCUMENTS (SS 710–713, 719)

PROSPECTUS CONTENT – S 710

Core rule sentence
A prospectus must contain all the information that investors and their professional advisers would reasonably require to make an informed assessment of:

- the rights and liabilities attaching to the securities, and
- the assets, liabilities, financial position, performance, profits and losses, and prospects of the issuing body (s 710(1)).

What information to include depends on:

- the nature of the securities and the body
- what investors can reasonably be expected to know
- what their professional advisers can be expected to know (s 710(2)).

Only the knowledge of specified persons is relevant (s 710(3)):

- the person making the offer
- directors / proposed directors
- underwriters
- named AFSL licensees
- persons named as making statements or providing professional services.

Template
The prospectus must include all information investors and their advisers would reasonably require to assess:

1. the rights and liabilities attached to the [SHARES / DEBENTURES / OPTIONS]; and
2. [COMPANY]'s financial position and prospects (s 710(1)),

having regard to the nature of [COMPANY] and the securities, as well as the knowledge reasonably attributable to professional advisers (s 710(2)–(3)).

Where the offer concerns:

- an **issue** of securities, the focus is on rights and liabilities of the securities and detailed financial information about the issuing body;
- an **option** or interest, the document must describe both the rights under the option and the underlying securities, and the issuing body's capacity to issue or deliver them.

Specific inclusions – s 711
The prospectus must also disclose:

- Terms and conditions of the offer (s 711(1))
- Interests and fees (s 711(2))
- Payments or benefits to directors or proposed directors (s 711(3))
- Whether quotation of the securities is to be sought (s 711(5))
- Expiry date (s 711(6))
- Particulars of lodgement with ASIC (s 711(7))

CONTINUOUSLY QUOTED SECURITIES – S 713

Core rule

CORPORATE PERSONALITY, GROUPS & REACHING CONTROLLERS

0. ONE LINE TO START A CORPORATE PERSONALITY / GROUP ISSUE

Use this whenever the problem involves a corporate group, asset-light subsidiaries, or an attempt to reach a parent or controller.

This problem raises issues about separate corporate personality, group structures and whether liability for [HARM] can be attributed beyond [COMPANY] to related companies or controllers.

PART A – PRELIM QUESTIONS & SEPARATE LEGAL PERSONALITY

PRELIM CHECKLIST (HOW TO OPEN A GROUP QUESTION)

Before diving into doctrine, quickly orient:

1. **Who is my client and what do they want?**

[CLIENT] seeks [DAMAGES / INJUNCTION] for harm caused by [PRODUCT / ACT].

2. **What kind of company or entity am I dealing with?**

[COMPANY] is a [public / proprietary] company [listed / unlisted].

3. **Internal governance structure?**

Its internal governance is governed by [replaceable rules / a constitution / both] (s 134, s 135).

4. **Who are the key characters and relationships?**

Key actors are [DIRECTORS], [CONTROLLERS], and [SHAREHOLDERS], with [PERCENTAGES] shareholdings and roles.

5. **Is there a corporate group?**

[PARENT] holds [X]% of [SUB] and can [appoint/remove majority of directors / control >50% of votes], so [SUB] is a subsidiary of [PARENT] under s 46, s 47, s 50AA.

[Soft prompt: in a Novatech-style scenario, explicitly label "parent", "joint venture sub", "sister company", "controller".]

SEPARATE LEGAL PERSONALITY – CORE DOCTRINE

Rule sentence

Once registered, a company becomes a separate legal person from its members and controllers (s 119, s 124). It has all the powers of an individual and of a body corporate (s 124(1)), and contracts, obligations and liabilities are ordinarily its own, not those of its members or controllers (Salomon v Salomon [1897] AC 22 at 30–31, 51).

Template:

A company is a separate legal entity from its members and controllers, with its own rights and liabilities (s 124(1); Salomon [1897] AC 22 at 30–31, 51). Therefore, prima facie only [COMPANY] is liable for [DEBT / TORT], not [SHAREHOLDER / DIRECTOR].

Sub-principles

1. **Company property is separate from members' property**
    - Shareholders have no legal or equitable interest in specific company assets, even if they hold all the shares. Their interest is in their shares, not in the underlying property (Macaura v Northern Assurance [1925] AC 619 at 626–627; Macaura principle).
    - Template:
        - Here, even though [CONTROLLER] owns [X]% of [COMPANY], they have no proprietary interest in [COMPANY ASSET]. Any loss from [ASSET] belongs to the company, consistent with Macaura [1925] AC 619 at 626–627.
2. **Company is separate from its controllers; dual capacities are possible**

CORPORATE CONSTITUTION, CLASS RIGHTS, POWERS & DUOMATIC

0. ONE LINE TO START A CONSTITUTION ISSUE

Use whenever the facts mention the constitution, replaceable rules, shareholder votes, class rights or "validity of resolutions".

The internal management of [COMPANY] is governed by its constitution and any applicable replaceable rules under **ss 134–135**, subject to the Corporations Act and the general law on amendments, class rights and minority protection.

[Soft prompt: if the issue is "company acting outside objects", add capacity line under Part A.]

PART A – CAPACITY, OBJECTS & INTERNAL GOVERNANCE

HAS [COMPANY] ACTED OUTSIDE ITS OBJECTS OR POWERS?

Core rule sentence
A company has the legal capacity and powers of an individual under **s 124**, and an act is not invalid merely because it is contrary to its objects or beyond a constitutional restriction on powers: **ss 125(1)–(2)**.

Template (rule + application)
Under **ss 124, 125(1)–(2)**, [COMPANY] has full legal capacity and powers, and its acts are not invalid simply because they are outside its stated objects or breach internal limits on powers. Even if cl [X] of the constitution purports to restrict [ACT, for example property development] to [SPECIFIC PURPOSE], the transaction with [THIRD PARTY] remains **externally valid**. Any consequences are **internal**, for example possible breaches of directors' duties or oppression.

Conclusion line
Therefore, the transaction with [THIRD PARTY] is **valid as a matter of capacity**, although it may still give rise to internal remedies considered below.

[Soft prompt: if a third party's knowledge is in issue, cross-refer later to authority/indoor management in your other topic.]

WHAT GOVERNS INTERNAL MANAGEMENT – CONSTITUTION OR REPLACEABLE RULES?

Core rule sentence
Internal management may be governed by replaceable rules, a constitution, or a mixture of both: **s 134**, and the constitution may modify or displace replaceable rules: **s 135(2)**.

Template
Here, [COMPANY] is a [public/proprietary] company. Its internal management is governed by [its constitution alone / constitution plus any replaceable rules not displaced], per **ss 134–135(2)**. [Clause] of the constitution expressly [modifies / replaces] the default rule in **s [198A/201G/202A etc]**.

Single director / single shareholder companies

- Replaceable rules **do not apply** to a proprietary company with a **sole director who is also the sole shareholder**: **s 135(1)**.
- Instead, internal management is governed by **ss 198E, 201F, 202C, 249B**.

Template

Because [COMPANY] is a proprietary company with a single director and single shareholder, the replaceable rules are switched off by **s 135(1)**. The single director may exercise all powers except those reserved to the members, under **s 198E**, and resolutions of the sole member may be passed by signing a written record under **s 249B**.

Replaceable rules not an "offence"
Any failure to comply with a replaceable rule is not itself a contravention of the Act under **s 135(3)**, but it may still be a breach of the statutory contract in **s 140(1)** where it is left in force.

HAS THERE BEEN A VALID REQUEST FOR A COPY OF THE CONSTITUTION?

Core rule sentence
On written request and payment of any prescribed fee, the company must send a copy of its constitution to a member within 7 days; failure is a strict liability offence: **s 139(1)–(2)**.

Template
[MEMBER] has made a written request for a copy of the constitution and paid any fee prescribed. Under **s 139(1)**, [COMPANY] must send a copy within 7 days; failure constitutes a **strict liability offence**: **s 139(2)**. This does not affect the validity of the constitution itself, but may support an argument about poor corporate governance or oppression if part of a wider pattern.

PART B – ALTERING THE CONSTITUTION

HAS THE CONSTITUTION BEEN VALIDLY MODIFIED OR REPEALED?

Power and nature of change

Core rule sentence
A company may modify or repeal its constitution, or a provision of it, by special resolution: **s 136(2)**. Constitutions are inherently alterable, subject to limits such as oppression and the protection of proprietary rights: **Peters' American Delicacy Co Ltd v Heath** (1939) 61 CLR 457 at 481–482.

Template – issue heading

Issue: Has [the attempted alteration] validly amended the constitution of [COMPANY]?

(A) Was there a valid special resolution?

- Special resolution: at least **75 per cent** of votes cast by members entitled to vote: **s 9; s 250MA**.
- Notice: must comply with **s 249J**, and the notice must set out intention to propose a special resolution and its terms: **s 249L(1)(c)**.
- Public company must lodge resolution with ASIC within 14 days: **s 136(5)**.

Template
A constitutional amendment must be made by special resolution under **s 136(2)**. This requires at least 75 per cent of votes cast by those entitled to vote: **s 250MA**. Here, the notice of meeting [did/did not] clearly state that the resolution was a special resolution and set out its text, as required by **s 249L(1)(c)**, and notice was [properly / improperly] given under **s 249J**. [If public company] A copy also needed to be lodged with ASIC within 14 days under **s 136(5)**.

Conclusion line
Therefore, the resolution to amend cl [X] is **[valid/invalid]** as a special resolution under **s 136(2)**.

[Soft prompt: if there is a minor procedural defect but clear majority support, think about **s 1322** to save irregularities.]

IS THERE CONTRACTUAL OR STATUTORY ENTRENCHMENT?

- Must not be disqualified under Pt 2D.6 (eg bankruptcy, serious convictions): s 201B(2), s 206B.

Director identification number – s 1272C

- Directors must have a DIN: s 1272C.

Consent – s 201D

Core rule sentence

A person must give written consent before being appointed as a director: s 201D. Failure to obtain written consent may render the appointment invalid.

Template

Here, [NAME] was purportedly appointed as a director at the general meeting on [DATE], but there is no evidence of written consent prior to the appointment. As in Shepley, this may render the appointment invalid under s 201D, although they may still be a de facto director if they acted as such.

Who can appoint directors?

Members – s 201G (replaceable rule)

Shareholders may appoint directors by ordinary resolution under s 201G, subject to the constitution. At common law, members have an inherent power to appoint directors, but this can be abrogated or modified by the constitution (McComiskie v Smith).

Board – s 201H (replaceable rule)

- Directors may appoint additional directors to fill casual vacancies or increase board size: s 201H(1).
- In proprietary companies, such appointments must be confirmed by members within 2 months or they cease: s 201H(2).
- In public companies, they must be confirmed at the next AGM: s 201H(3).

Managing director – s 201J

- Directors may appoint one or more of themselves as managing director and confer powers on them, subject to the constitution: s 201J.

Notice to ASIC

- Company must notify ASIC of director appointments within 28 days: s 201L.

Validity despite defects – s 201M (and s 204E for secretaries)

Core rule sentence

Acts done by a person acting as a director are effective even if their appointment or its continuance is invalid because of a failure to comply with the Act or constitution, though the acts may not bind the company if the other party knew of the defect: s 201M.

Template

Even if [NAME]'s appointment was defective due to lack of written consent or breach of constitutional procedures, acts done by them as a director are effective under s 201M, unless the company can avoid them under general law principles or statutory provisions.

[Soft prompt: this saving provision is about third party protection; it does not prevent internal disputes about validity of appointment.]

[3] REMOVAL OF DIRECTORS

Resignation and disqualification

- Directors may resign by giving written notice to the company: s 203A.
- Directors must be removed if disqualified under s 206A.

capital transaction / an indemnity for $50m exposure], which suggests a decision normally reserved for the full board, not a routine exercise of delegated power.

Conclusion line:
Therefore, [AGENT] did / did not have express actual authority to enter this contract on behalf of [COMPANY].

3.2 Implied actual authority – Hely-Hutchinson; Crabtree-Vickers

Use when the person holds an office such as MD, CEO, CFO, or there is a history of acquiescence.

Core rule sentence
Implied actual authority can arise from the agent's position and the company's conduct, where appointment to an office carries usual authority for contracts of that type, or where the board has acquiesced in similar unauthorised transactions in the past (Hely-Hutchinson; Crabtree-Vickers).

Step 1 – authority from position

[AGENT] is the [position, for example, managing director / CEO / CFO]. Appointment to that office implies authority to enter into contracts that are usual or ordinary for a person in that role (Hely-Hutchinson).

[Soft prompt:
- MD – usual trading and operational contracts
- But unusual, high value, or fundamental contracts are unlikely to be "usual"]

Apply the "ordinary vs extraordinary" distinction
However, this contract is not routine. It involves [eg a 2 year exclusive licence over [COMPANY]'s core technology in exchange for only $100,000 and contingent equity, arguably the most significant contract the company has entered] and includes an obvious conflict, as [AGENT] is promised a personal consultancy valued at [>$1m] per year. Similar to Crabtree-Vickers, a transaction of this magnitude is outside the usual day to day authority of a managing director and would ordinarily require express board approval.

Step 2 – acquiescence

There is evidence that the board has previously allowed [AGENT] to make business decisions without formal resolutions, and Jane and Abe have "traditionally agreed" with [AGENT]'s decisions. However, these past decisions were of a smaller scale. Acquiescence can only generate implied authority for future transactions of a similar type and quantum (Hely-Hutchinson). It does not support implied authority for an extraordinary deal that fundamentally affects [COMPANY]'s core assets.

Conclusion line:
Accordingly, [AGENT] is unlikely to have implied actual authority for this extraordinary transaction, even though they may have implied authority for routine operational contracts.

3.3 Ostensible (apparent) authority – Freeman & Lockyer; Crabtree-Vickers; Northside

Use when the third party is relying on how the company has held out the agent.

Core rule sentence
Ostensible authority arises where the company, through someone with actual authority, makes a representation that the agent has authority to enter a contract of that kind, the third party relies on that representation, and the company has capacity to make the contract (Freeman & Lockyer; Crabtree-Vickers).

Checklist
1. Representation or "holding out"
2. Made by someone with actual authority
3. Reliance by the outsider

LIABILITY IN CRIMINAL LAW - CORPORATE CRIME

0. ONE LINE TO START A CORPORATE CRIME ISSUE

Where the alleged wrongdoer is a company, the court must determine whether the offence can be committed by a body corporate and how the actus reus and mens rea of individuals can be attributed to it, having regard to the statute, the Criminal Code (Cth) pt 2.5 and the general law of attribution.

[Soft prompt: quickly flag - is this a Commonwealth offence (including Corporations Act) or a State offence?]

PART A - CAN THIS COMPANY BE CRIMINALLY LIABLE FOR THIS OFFENCE AT ALL?

1. Is the company a "person" capable of committing this offence?

Core rule sentence
A company has the legal capacity and powers of an individual under s 124 Corporations Act and, unless the contrary intention appears, references to a "person" in legislation include a body corporate (Acts Interpretation Act (Cth) s 2C). Corporations can commit offences, including many requiring fault, subject to limits of their artificial personality.

Template

- The offence in [STATUTE] is expressed as applying to a "person". Under s 2C of the Acts Interpretation Act (Cth), "person" includes a body corporate, so prima facie [COMPANY] can commit this offence.
- This is consistent with s 124 Corporations Act, which gives a company the legal capacity and powers of an individual, including incurring criminal liability, provided the elements of the offence can be attributed to it.

[Soft prompt: if the statute uses "individual", "natural person" etc, note that this usually excludes corporations.]

Special wording

- If the provision expressly uses "individual" or "natural person", this generally confines liability to human persons, not companies.
- Words like "someone", "anyone", "whoever", "another", "no-one" are ordinarily read to include companies, subject to context.

Optional line for strange labels

- Where the section is framed in terms of "owner" or "proprietor", this can still capture a company, particularly if it owns or operates the relevant business, and especially where it is a sole director-shareholder company.

2. Is this a type of offence which can sensibly apply to companies?

Policy-based construction
Even if the wording is broad, ask whether the offence is one which Parliament intended to apply to corporations, having regard to purpose and context (Meridian; Mousell).

Template

- The evident purpose of [STATUTE] is to [eg ensure accurate market disclosures / protect consumers / ensure safe workplaces]. That purpose would be substantially undermined if it did not apply to corporate actors who commonly perform the relevant activities (Meridian Global Funds Management v Securities Commission).
- Similarly, in Mousell Brothers Ltd v London & North Western Railway Co, the court held that a shipping misdescription offence applied to companies because otherwise the protective purpose of the statute would be frustrated in circumstances where companies commonly consign goods.

So it is likely that this offence is one which a corporation can commit.

DUTY TO ACT IN GOOD FAITH IN THE BEST INTERESTS OF THE COMPANY AND FOR A PROPER PURPOSE

(Corps Act s 181(1)(a)–(b); general law)

0. ONE LINE TO START A S 181 ISSUE

Use whenever a director or officer has used a power or made a discretionary decision.
Here, [DIRECTOR] is exercising their power to [DESCRIBE POWER, eg issue shares / refuse registration / enter into transaction / approve dividend]. Directors and officers must exercise powers in good faith in the best interests of the corporation and for a proper purpose, under both the general law and s 181(1)(a)–(b) Corporations Act.
[Soft prompt: if facts are about share issues, refusals to register transfers, group transactions, near insolvency or entrenchment of control, this is almost certainly a s 181 and general law bona fide / proper purpose issue.]

1. FRAMEWORK – HOW S 181 FITS WITH GENERAL LAW

Core rule sentence
Under s 181(1), a director or other officer must exercise powers and discharge duties

a. in good faith in the best interests of the corporation, and
b. for a proper purpose.

These statutory duties operate in addition to, and not in derogation of, the general law duties of good faith and proper purpose: s 185; Marchesi v Barnes [1970] VR 434; Westpac v Bell Group (No 3) (2012) 44 WAR 1.

Template
The duty to act in good faith in the best interests of the company and for a proper purpose arises both at general law (as a fiduciary duty of loyalty and good faith in the exercise of powers) and under s 181(1)(a)–(b). Section 185 confirms that ss 180–184 supplement, rather than replace, the general law duties.

Onus
The onus is on the party alleging breach to prove that the directors did not act honestly in what they considered to be the company's interests, or that the substantial purpose for using the power was improper (Australian Metropolitan Life Assurance Co Ltd v Ure (1923) 33 CLR 199, 206, 223–224; Mills v Mills (1938) 60 CLR 150, 164–165, 185–186).
[Soft prompt: quickly state that s 181 is also a civil penalty provision, so relief is available under ss 1317E, 1317G, 1317H, 206C; criminal overlay in s 184 if reckless or dishonest.]

PART A – DUTY TO ACT IN GOOD FAITH IN THE BEST INTERESTS OF THE COMPANY

(s 181(1)(a); general law bona fide duty)

1. TEST FOR GOOD FAITH AND BEST INTERESTS

Core rule sentence
Directors must exercise their discretionary powers honestly and bona fide in what they consider to be in the interests of the company, ordinarily understood as the company as a whole (Re Smith & Fawcett Ltd [1942] Ch 304, 306; Ure 33 CLR 199, 206; Mills 60 CLR 150, 164–165; Bell (No 9) (2009) 39 WAR 1, [4384], [4393]).

Subjective good faith
The good faith limb is primarily subjective. Directors must exercise their discretion bona fide in what *they* consider to be in the company's interests and not for collateral purposes: Re Smith & Fawcett [1942] Ch 304, 306, 308; Ure 33 CLR 199, 206.

Under s 181(1)(a), courts have treated "good faith in the best interests of the corporation" as aligned with this subjective test, not a purely objective one (ASIC v Maxwell (2006) 59 ACSR 373, [109]; ASIC v Macdonald (No 11) (2009) 230 FLR 1, [661]–[663]).

CONFLICTS & MATERIAL PERSONAL INTERESTS

(Fiduciary conflicts + ss 191–195 CA)

0. ONE LINE TO START A CONFLICT / INTEREST ISSUE

Use this whenever a director is on both sides of a deal, has shares in the counterparty, runs a competing business, or stands to benefit personally.

Here [DIRECTOR] is in a position where their duty to act for [COMPANY]'s benefit may conflict with [their own interests / duties owed to another entity / interests as shareholder or creditor]. At general law, directors owe strict fiduciary "no conflict" and "no unauthorised profit" duties, in addition to statutory duties in ss 180–183 and the disclosure regime in ss 191–195, which apply cumulatively rather than in derogation (s 185, s 193; Chan v Zacharia (1984) 154 CLR 178 at 199).

[Soft prompt: if the facts involve a contract with a related company or shareholding in the counterparty, think Transvaal, Grand Enterprises / Aurium. If competing business, think Streeter, ACI v AIF.]

PART A – GENERAL LAW CONFLICTS OF DUTY AND INTEREST / DUTY AND DUTY

1. IDENTIFY THE FIDUCIARY AND THE RELATIONSHIP

Core rule sentence
Directors, de facto and shadow directors, and many senior officers are fiduciaries of the company and must not place themselves in a position where their duty to the company conflicts, or may possibly conflict, with their personal interests or duties to others (Aberdeen Railway Co v Blaikie Brothers (1854) 1 Macq 461 at 471; Chan v Zacharia (1984) 154 CLR 178 at 199).

Template
[DIRECTOR] is a [director / de facto director / senior officer] of [COMPANY]. As such, they owe fiduciary obligations of loyalty, including the "no conflict" rule and the "no unauthorised profit" rule, which are overlapping but distinct (Chan v Zacharia (1984) 154 CLR 178 at 199).

[Soft prompt: if they are a nominee director or senior employee, mention that scope is moulded to the relationship, but still includes core loyalty duties.]

2. CORE "NO CONFLICT" RULE

Core rule + test

- A fiduciary must not place themselves in a position where their personal interest, or their duty to another, conflicts or may possibly conflict with their duty to the company (Aberdeen Railway Co v Blaikie Brothers (1854) 1 Macq 461 at 471).
- The question is whether there is a "real, sensible possibility of conflict" between interest and duty, not a fanciful or theoretical one (Boardman v Phipps [1967] 2 AC 46 at 124 per Lord Upjohn; applied in Chan v Zacharia (1984) 154 CLR 178 at 199).
- Equity does not ask whether the transaction was fair. Once a relevant conflict exists, the company can avoid the contract and demand an account of profits (Aberdeen at 471; Transvaal Land Co v New Belgium (Transvaal) Land and Development Co [1914] 2 Ch 488 at 502–503).

Template paragraph
The "no conflict" rule prevents [DIRECTOR] from entering engagements where there is a real, sensible possibility that their personal interest in [INTEREST] or their duties to [OTHER ENTITY] conflict with their duty to act in [COMPANY]'s interests (Aberdeen at 471; Boardman v Phipps [1967] 2 AC 46 at 124). The fairness of the terms is irrelevant once such a conflict is shown (Transvaal [1914] 2 Ch 488 at 502–503).

(ss 191–195 CA)

Use this Part (ss 191–195) when:

- The facts mention **"material personal interest"**, **board disclosure**, **failure to tell other directors**, or **participation in meetings**, especially in a **public company**.
- You are asked whether a director has complied with their **statutory disclosure obligations** or whether a **board resolution/approval** is valid despite a director having an interest.

6. STATUTORY REGIME VS EQUITY

Core structural point

- The Corporations Act does not directly prohibit directors from placing themselves in positions of conflict. Instead, it overlays fiduciary obligations with disclosure duties and meeting participation rules.
- Section 191 requires disclosure of material personal interests to the board, and ss 194–195 govern participation in decisions.
- Section 193 confirms that these provisions operate in addition to general law and the constitution, not in substitution. Breach of the statute does not remove equitable remedies, and compliance with the statute does not necessarily excuse equitable breach.

Template

The statutory regime in ss 191–195 does not exhaust the law on conflicts. It requires [DIRECTOR] to disclose material personal interests and, in public companies, may restrict their participation in board decisions. However, s 193 preserves the general law. Even if s 191 is not technically engaged, [DIRECTOR] may still be in breach of fiduciary conflict duties at equity. The statutory regime in ss 191–195 overlays, but does not replace, the general law fiduciary conflict and profit rules, which continue to operate via s 185 and s 193.

7. CORE DUTY TO DISCLOSE – S 191

(A) Base rule

Core rule sentence

- Under s 191(1), a director who has a material personal interest in a matter that relates to the affairs of the company must give the other directors notice of the interest, unless an exception in s 191(2) applies.
- Failure to comply is a strict liability offence (s 191(1A)) but does not affect the validity of any act or resolution (s 191(4)).

Template

Here, [DIRECTOR] has a personal interest in [MATTER] because [they hold X per cent of shares in COUNTERPARTY / stand to receive fees / are a guarantor of the loan]. Since the matter clearly relates to the affairs of [COMPANY], [DIRECTOR] must disclose the nature and extent of their material personal interest to the board under s 191(1), unless an exception in s 191(2) applies.

Conclusion short

On these facts, [DIRECTOR] [has / has not] complied with s 191, and any failure constitutes a strict liability offence, although it does not of itself invalidate the transaction (s 191(4)).

(B) "Material personal interest" – meaning and test

Principles

- "Material personal interest" is not defined. Courts have adopted the McGellin test: the interest must be of some real substance and have the capacity to influence the director's decision on the matter (McGellin v Mount King Mining NL (1998) 144 FLR 288 at 303; applied in Grand Enterprises Pty Ltd v Aurium Resources Ltd [2009] FCA 513 at [64], [68]–[69]).

RELATED PARTY TRANSACTIONS – CH 2E

0. ONE LINE TO START A RELATED PARTY ISSUE

Use this whenever a **public company** (or its controlled entity) is giving some kind of benefit to **directors / their family / entities they control**.

Where [PUBLIC COMPANY] or an entity it controls proposes to give a financial benefit to a related party, Ch 2E requires member approval unless an exemption in ss 210–216 applies. If an unapproved non-exempt benefit is given, the company and any person involved contravene ss 208–209, in addition to any general law and statutory duties (s 230).

[Soft prompt: always flag Ch 2E when you see money / assets / guarantees flowing to directors, their family, or their entities.]

PART A – DOES CH 2E APPLY AT ALL?

1. IS THERE A PUBLIC COMPANY OR CONTROLLED ENTITY?

(A) Public company or entity it controls – ss 207, 208, 50AA

Core rule sentence
Ch 2E applies where a **public company** or an **entity it controls** gives a financial benefit to a related party (s 208(1); "control" in s 50AA).

Template
Here, [COMPANY] is a **public company** / an **entity controlled by [PUBLIC COMPANY]** and is proposing to [TRANSACTION], so Ch 2E potentially applies (ss 207, 208(1), 50AA).

[Soft prompt: if it is a private company with no public parent, Ch 2E is likely not engaged. Move back to conflicts / fiduciary duty instead.]

2. IS THE COUNTERPARTY A "RELATED PARTY"? – S 228

Use this whenever you have to decide whether the other side of the deal is caught by Ch 2E.

(A) Checklist – s 228(1)–(4)

Core rule sentence
"Related party" is defined broadly to include controllers, directors of the public company and of controllers, their close relatives, and entities they control (s 228(1)–(4)).

Fill-in template
[PARTY] will be a related party of [PUBLIC COMPANY] if they fall within any of the categories in s 228, including:

1. an entity that **controls** [PUBLIC COMPANY] (s 228(1); "control" in s 50AA),
2. a **director** of [PUBLIC COMPANY] or of an entity that controls it (s 228(2)(a)–(b)),
3. any person who makes up the controlling entity if it is not a body corporate (s 228(2)(c)),
4. the **spouse, parent or child** of any such person (s 228(2)(d), 228(3)), or
5. an entity **controlled by** any of the above, unless it is also controlled by the public company (s 228(4)).

Application hook
Here, [PARTY] is [eg a director of [PUBLIC COMPANY] / the spouse of such a director / an entity wholly owned by [DIRECTOR]], so they are a related party under s 228([X]).

(B) Timing and "acting in concert" – s 228(5)–(7)

Checklist

    - **Cassimatis (Storm)** – founders who exercised “extraordinary control” over a high risk advice model dealing with vulnerable investors bore a very high duty to avoid exposing the company to catastrophic regulatory risk.

(B) Assumption of responsibility

Principle sentence
Where a director or officer voluntarily assumes additional functions or holds multiple roles, their responsibilities within the corporation expand, and the standard of care rises accordingly: s 180(1)(b); Shafron; Vines; Wheeler; Cassimatis.

Template
In assessing the standard under s 180(1)(b), the court looks not only at formal titles but also at functions the person actually undertook. Where a director or officer voluntarily assumes responsibility for [for example legal compliance, particular transactions, financial reporting, product design, restructuring], they must meet the standard of a reasonable person in that expanded role: Shafron; Vines; Wheeler; Cassimatis.

Key examples
- **Shafron** – company secretary and general counsel could not argue he acted only in one capacity. By assuming both roles and advising on the ASX announcement and Deed of Covenant, he took on responsibility for ensuring directors were properly informed; his failure to clarify key issues breached s 180(1).
- **Vines** – took on special responsibility for ensuring the GIO Re profit forecast information was prepared accurately for the board and due diligence committee; his failure to ensure adequate communication breached s 180(1).
- **Wheeler** – as chair of PBS and controller of the developer, he effectively drove the transaction and could not retreat into a minimal role.
- **Cassimatis** – founders designed and controlled the Storm model and assumed responsibility for how it was applied to vulnerable investors; this assumption of responsibility made their s 180(1) duty very demanding.

Conclusion line
Given [DIRECTOR]’s office, special skills and assumed responsibilities, the standard of care is elevated beyond the bare minimum. A reasonable person in their position would have [EXPECTED CONDUCT].

(C) Company circumstances

Core rule sentence
The standard also depends on the corporation’s circumstances, including type, size, structure, industry, listing/AFSL status, financial health and the nature and riskiness of the decision: Vrisakis; Rich; Cassimatis.

Checklist
When calibrating the standard, consider whether the company is:
- public or proprietary; listed or unlisted
- large, complex group or small, simple entity
- an AFSL holder or otherwise heavily regulated
- in a stable position or under financial, operational or regulatory stress
- heavily dependent on a controlling shareholder/founder
- making a high risk, transformative or “bet the company” decision.

Template
Here, [COMPANY] is a [large listed telco / AFSL licensee dealing with retail investors / depositor-funded building society / property developer] and the decision involved [high risk transaction / key ASX announcement / systemic business model / novel structured finance product]. In these circumstances, a reasonable director needed to

JUST AND EQUITABLE WINDING UP – S 461(1)(K) (AND RELATED GROUNDS)

[Use this whenever a member (or ASIC) wants to terminate a dysfunctional company relationship, especially in small, closely held or quasi-partnership companies, where oppression relief may be inadequate or impracticable. Think: relationship breakdown, deadlock, failure of purpose, or serious loss of confidence in management.]

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1. QUICK CHECKLIST

Use these questions first to decide if you even run JEWU:

- Can the court order winding up even where there is no oppression?
    - Yes - s 461 grounds (including s 461(1)(k)) operate independently of Pt 2F.1.
- Does [CLIENT] have standing to seek winding up?
- Is a s 461 ground enlivened, especially:
    - s 461(1)(e) directors acting in own interests / unfair or unjust to members
    - s 461(1)(f), (g) oppression-style grounds
    - s 461(1)(k) just and equitable
- For s 461(1)(k), which pattern fits?
    - Quasi-partnership / breakdown of mutual confidence (Ebrahimi; Re TM Fresh)
    - Failure of substratum / company purpose (Thomas; Re Tivoli)
    - Deadlock at board / shareholder level (Re TM Fresh; Re Amazon Pest Control)
    - Lack of confidence in management / public interest (ABC Fund Managers; ASIC v CME Capital; ASIC v ActiveSuper)
- Is winding up a last resort, with no suitable alternative remedy (s 467(4); Asia Pacific Joint Mining)?

ONE LINE TO START THE ISSUE

Use this when oppression is weak or you want JEWU in the alternative.

Although the conduct of [INSERT CONDUCT] may not (or may only marginally) satisfy the oppression provisions in Pt 2F.1, [CLIENT] can seek to have [COMPANY] wound up under s 461 of the Corporations Act. In particular, they may rely on the "just and equitable" ground in s 461(1)(k), which allows the court to dissolve the corporate association where, in light of the parties' relationship and the company's circumstances, it is no longer fair for the company to continue.

[Soft prompts:

- If ASIC is client, emphasise public interest and investigation under ss 462(2)(e), 464.
- If member is client, emphasise breakdown of quasi-partnership, deadlock or failure of substratum.]

STANDING – S 462

Issue – Does [CLIENT] have standing to seek a winding up order?

Rule

- Standing is governed by s 462(2).
- A "contributory" (s 462(2)(c)) includes:

    - directing that the company or any officer do, or refrain from doing, specified acts
    - appointing an independent person to investigate and report on
        - the company's financial affairs
        - facts giving rise to the proceedings
        - legal costs incurred.

Template

If leave is granted, [CLIENT] cannot discontinue or settle the proceedings without the court's permission (s 240). The court may also make case-management or protective orders under s 241, such as directing [COMPANY] or its officers to [disclose information / preserve assets], or appointing an independent person to investigate [COMPANY]'s financial affairs and report on costs.

(B) COSTS – s 242

Core rules

- The court may make any costs order it considers appropriate at any time in relation to the leave application and the derivative proceedings: s 242.
- Competing approaches:
    - Sub Rosa Holdings Pty Ltd v Salsa Sudada Production Pty Ltd [2006] NSWSC 916 [49] – common for the applicant to bear costs initially.
    - Wood v Links Golf Tasmania Pty Ltd [2010] FCA 570 [9] – emphasised that Pt 2F.1A is intended to encourage meritorious claims and there is often no good reason why the company should not bear costs.
- Ananda Marga Pracaraka Samgha Ltd v Tomar (No 3) [2012] FCA 184 – costs impact can be considered as part of the best interests analysis at leave stage.
- In Maher, leave was conditioned on the applicant indemnifying the company for costs of the derivative claim: Maher [52]–[53], [62].

Template

[CLIENT] should be aware of the costs risk. Under s 242, the court may:

- order that [COMPANY] indemnify [CLIENT] for reasonable costs of the derivative action (to encourage meritorious claims: Wood [9]);
- or, as in Maher, require [CLIENT] to indemnify [COMPANY] for its costs of the derivative proceedings as a condition of leave (Maher [52]–[53], [62]);
- or make some other order reflecting the best interests of [COMPANY], including recognising the potentially deleterious impact of costs (Ananda Marga).

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6. OUTCOME AND INTERACTION WITH OTHER REMEDIES

(A) MONETARY CONSEQUENCES AND CLIENT'S POSITION

Core rule

- Any damages, compensation or property recovered in the derivative proceedings belong to the company, not the applicant personally.
- The applicant benefits indirectly through their membership or shareholding, and bears the litigation burden unless indemnified.

Template

If [COMPANY] succeeds, any damages or equitable relief (compensation/account of profits/constructive trust) will be awarded to [COMPANY], not to [CLIENT] personally. [CLIENT] will benefit indirectly through the increased value of their shares or distribution of assets, but will ordinarily bear the costs of running the litigation unless the court orders an indemnity in their favour.

Core rule

- A member may apply to the court for an order authorising them (or their representative) to inspect and copy the company's "books": s 247A(1)–(2).
- "Books" is broad – registers, financial records, documents and any recorded information: s 9.
- The court may only make the order if satisfied that the member is acting in good faith and for a proper purpose: s 247A(1).

Composite good faith/proper purpose test

- Mesa Minerals Ltd v Mighty River International Ltd (2016) 241 FCR 241 [22] – "good faith and proper purpose" is a single composite standard, not two separate tests.
- Knightswood Nominees Pty Ltd v Sherwin Pastoral Co Ltd (1989) 7 ACLC 536, 541 – member must act bona fide for a proper purpose connected with their position as shareholder.

Template

Here, [CLIENT], as a member of [COMPANY], may apply for a s 247A order authorising inspection and copying of [BOOKS] (eg financial records, board minutes). The court must be satisfied that [CLIENT] is acting in good faith and for a proper purpose, in the sense described in Mesa Minerals [22] and Knightswood.

2. WHAT COUNTS AS A PROPER PURPOSE?

Key points

- Proper purposes are those connected with the proper exercise of membership rights, such as:
    - investigating a reasonable suspicion of director breach of duty,
    - valuing shares,
    - considering how to vote on resolutions,
    - preparing oppression or derivative proceedings.
- Courts are wary of:
    - pure fishing expeditions or idle curiosity,
    - harassment or blackmail,
    - using confidential information to benefit competitors.
- Hostility towards fellow directors is not fatal if there is a genuine corporate purpose.
- Mixed purposes – order can be made if the dominant purpose is proper: Humes Ltd v Unity APA Ltd (No 1) [1987] VR 467; Mesa Minerals [22].

Template

[CLIENT]'s dominant purpose appears proper because they seek to [investigate suspected breaches of duty / assess the true financial position of the company / prepare a possible SDA or oppression claim]. That is squarely within the proper exercise of shareholder rights. Any personal hostility towards [OTHER SHAREHOLDER] would not by itself defeat the application if the primary purpose is corporate (Humes; Mesa).

Nexus with SDA

- If the applicant has commenced or intends SDA proceedings, s 247A(5) requires a nexus between the inspection and the derivative action.

Template

Because [CLIENT] proposes (or has commenced) SDA proceedings, they must show that the requested inspection is connected with those proceedings (s 247A(5)), for example by providing evidence that the books may reveal further breaches or quantify loss.

3. SCOPE, DISCRETION AND LIMITATIONS