MELBOURNE LAW SCHOOL
Australia's first, Australia's global

Legal Studies Research Paper
No. 411

June 2009

Shareholders and Directors' Duties: Law, Theory and Evidence

Shelly Marshall and Ian Ramsay

This paper can be downloaded without charge from the
Social Science Research Network Electronic Library
at: http://ssrn.com

Electronic copy available at: http://ssrn.com/abstract=1402143

Stakeholders and Directors' Duties: Law, Theory and Evidence

Shelley Marshall* and Ian Ramsay **

An important debate concerns the meaning of the duty imposed on company directors to act in the best interests of the company. Are shareholders' interests paramount when directors act in accordance with this duty? To what extent can the interests of stakeholders other than shareholders be considered by directors? Does this duty need to be changed to facilitate socially responsible behaviour by directors? There have been significant international developments addressing these questions. For example, in the United Kingdom the duty to act in the interests of the company was reformulated in 2006. In Australia, two recent government inquiries have investigated these questions. However, the two government inquiries lacked empirical evidence regarding how directors understand their legal duties. This paper assesses the findings of the two government inquiries against the results of a survey of directors which inquired into how company directors balance the competing and sometimes conflicting interests of stakeholder groups, including employees, creditors and shareholders. The paper also investigates the extent to which the current law of directors' duties permits directors to consider the interests of stakeholders other than shareholders.

1. Introduction

Policy prescriptions in Australia regarding in whose interests company directors should act have largely been based on views about whose interests directors ought to take into account. This paper contrasts the results of a recent survey of Australian directors concerning the way they perceive their obligations to various stakeholders with current Australian corporate law[1] and two recent Federal government inquiries. These two inquiries were conducted by the Corporations and Markets Advisory Committee and the Parliamentary Joint Committee on Corporations and Financial Services. Both reported in 2006. The aim of this paper is first, to assess whether case law and the outcomes of the two inquiries reflect directors' views. The second aim is to explore alternative proposals to the conclusions of the inquiries based on this assessment.

---

* Lecturer, Department of Business Law and Taxation, Monash University.

** Harold Ford Professor of Commercial Law and Director of the Centre for Corporate Law and Securities Regulation, Melbourne Law School, the University of Melbourne. Both authors are members of the Corporate Governance and Workplace Partnership Project. The project is now being conducted by the Centre for Corporate Law and Securities Regulation and the Centre for Employment and Labour Relations Law at Melbourne Law School, the University of Melbourne and the Departments of Business Law and Taxation and Management at Monash University. The project was funded by an Australian Research Council Discovery Grant. The authors thank Nicole Yazbec for her research assistance in the preparation of this paper and Meredith Jones for research in relation to the survey data reported in this paper.

1 We use the terms 'company law' and 'corporations law' interchangeably to refer to the

Electronic copy available at: http://ssrn.com/abstract=1402143

The push to reconsider the question in whose interests companies ought to be managed and directed has attracted strong interest due to the growing impact of the corporate social responsibility (CSR) movement. The board of directors is the highest decision making body in the company. As a result, it receives a great deal of attention within the CSR policy and academic literature and, in particular, in the sub-strand of stakeholding discourse.[2] Whilst debates concerning the stakeholder theory of the corporation have been exchanged since the 1930s, it was not until the late 1990s that the idea that stakeholders who contribute to, benefit from, and bear risk in, companies should have their interests taken into account in corporate decision-making gained real influence in Australian public policy debates. Stakeholder models were seen as a means to moderate the shareholder primacy model of corporate governance by which shareholder interests are privileged, sometimes at the expense of other stakeholders in the company, such as employees.

In Australia, this aspect of the CSR movement has, for some companies, been driven by at least three related factors. The first of these is corporate misbehaviour which has resulted in harm to stakeholders and the reputation of these companies. Many businesses wish to present the image of good citizens both to distinguish themselves from companies which have fallen into disrepute and also to enhance their social licence to operate.[3] A second driver has been the growth of civil society movements which have brought into question the dichotomy between 'public' and 'private', claiming that private actors such as corporations ought to act in the public interest.[4] The third of these is a shift away from the provision of strong legislative protections for some stakeholders, such as employees, through conventional 'hard' law mechanisms.[5] For example, whilst statutory protection of employee entitlements upon insolvency within company law has increased, conventional protections provided by bargaining rights and the right to strike have been eroded in labour laws since 1993. As a result, stakeholder or other organisations such as unions, human rights bodies and environmental groups have looked for alternative mechanisms to make companies more accountable to stakeholders.[6] Whilst

---

body of statutory and common law which regulates the operation of companies.

2 L. Mitchell, 'The Board as a Path Toward Corporate Social Responsibility' in D. McBarnet, A. Voiculescu and T. Campbell (eds.), *The New Corporate Accountability: Corporate Social Responsibility and the Law*, Cambridge University Press, 2007, at 279.

3 C. Tilt and C. Symes, 'Environmental Disclosure by Australian Mining Companies: Environmental Conscience or Commercial Reality?' (1999) 23 *Accounting Forum* 137.

4 S. Wheeler, 'An Alternative Voice in and Around Corporate Governance' (2002) 25 *University of New South Wales Law Journal* 556 at 559 and J Farrar, 'Frankenstein Incorporated or Fool's Parliament? Revisiting the Concept of Corporation in Corporate Governance' (1998) 10 *Bond Law Review* 142.

5 P. Utting, 'Regulating Business via Multistakeholder Initiatives: A Preliminary Assessment' in *Voluntary Approaches to Corporate Responsibility: Readings and a Resource Guide*, UN Non-Governmental Liaison Service Development Dossier, New York, 2002, 96-97.

6 Contrary to this position, however, the 1989 report of the Senate Standing Committee on Legal and Constitutional Affairs, *Company Directors' Duties: Report on the Social and Fiduciary Duties and Obligations of Company Directors* (Australian Government Publishing Service, November 1989, available at: http://www.takeovers.gov.au/display.asp?ContentID=542) at 18, found that the proper place for the protection of stakeholders was in the range of Federal, State and Territory Laws that are designed to protect various stakeholder groups or public values, and not

Electronic copy available at: http://ssrn.com/abstract=1402143

companies have mainly voiced a preference for 'soft law' or voluntary mechanisms, there have been occasions, such as following the James Hardie incident, when companies have called for stakeholder legislation to permit them to more carefully balance the interests of shareholders and other stakeholders.[7]

The development of corporate stakeholder-based policies in Australia has lagged behind some other liberal democratic OECD countries. Throughout the 1990s, for instance, the term 'stakeholder' gained increasing currency in the UK and the US. In Britain, Tony Blair invoked the term during and after his successful 1997 election campaign as a riposte to the 'enterprise economy' of the Conservative Party.[8] He referred to the stakeholder economy as being a unifying theme under which opportunity was available to all and from which no-one should be excluded.[9] Whilst Blair may not have acted upon the full range of stakeholder-related policies espoused early in his period in office, the UK Labor government enacted a number of policies and regulations which took steps towards fostering a stakeholder model of the corporation. As is discussed in greater detail in Part 3 of this paper, these include the *Companies Act 2006* which made reporting on environmental and social activities mandatory for companies listed on the London Stock Exchange, and created new obligations for company directors to consider the interests of workers, local communities, and the environment alongside the interests of shareholders when making decisions. In the US, also throughout the 1990s, many states were adopting stakeholder or 'constituency' statutes.[10]

It was some time after these developments in the UK and the US that serious policy consideration was given to these issues in Australia at the Federal level.[11] Significant policy consideration occurred after the events concerning James Hardie.[12] On 23 March 2005 the Parliamentary Secretary to the Treasurer sent a

---

company law.

7 B. Pheasant, 'Directors Need a Safe Harbour' *Australian Financial Review*, 17 March 2005, 3. The outcry from this event led to the government asking the Corporations and Markets Advisory Committee to consider, inter alia, directors' duties regarding corporate social responsibility. The Committee's report, *The Social Responsibility of Corporations*, was published in June 2006 and is available on the Committee's website: http://www.camac.gov.au.

8 P. Ireland, 'Corporate Governance, Stakeholding, and the Company: Towards a Less Degenerate Capitalism?' (1996) 23 *Journal of Law and Society* 287 at 287. Ireland goes on to explain that, "by the time of Blair's grand pronouncements, 'stakeholding' in this narrower corporate sense, had already been widely embraced in Britain, with both the Trade Union Congress and the Labor Party enthusiastically backing the 'modernizing theory' of the stakeholding company. Considerable support had also already been expressed by some in industry, with the final report of the Tomorrow's Company inquiry, organized by the Royal Society of Arts and supported by companys such as Cadbury Schweppes, Guinness, Thorn EMI, and Whitbread, wholeheartedly endorsing the merits of an 'inclusive' conception of the company" (at 288).

9 He stated in an early speech delivered in Singapore that the stakeholder principle should also apply to companies which should operate as a community or partnership in which employees have a stake, and not as a mere vehicle for the capital market. Blair's speech is referred to in A. Hicks, *Palmer's In Company* (1996) No 4, 17 April, at 41.

10 See the text associated with nn 73-78.

11 Previous consideration of the issue was given by the Senate Standing Committee on Legal and Constitutional Affairs, *Company Directors' Duties: Report on the Social and Fiduciary Duties and Obligations of Company Directors*, November 1989.

12 See DF Jackson QC, *Report of the Special Commission of Inquiry into the Medical*

letter to the Corporations and Markets Advisory Committee (CAMAC) asking CAMAC to inquire into whether the *Corporations Act 2001* should include corporate social responsibilities or explicit obligations to take account of the interests of certain classes of stakeholders other than shareholders.[13] CAMAC's report, 'The Social Responsibility of Corporations', was released in December 2006.

On 25 June 2005 the Parliamentary Joint Committee on Corporations and Financial Services (PJC) resolved to inquire into corporate responsibility and triple-bottom-line reporting for incorporated entities in Australia. The PJC's report, 'Corporate Responsibility: Managing Risk and Creating Value', was released in June 2006. Neither of these reports recommended changes to directors' duties to reflect a stakeholder model of the company.

As we shall see in the account of the policy debate that occurred in relation to the two inquiries,[14] it is generally assumed that a legal requirement that directors take into account the interests of stakeholders is unnecessary. Within the debates and policy literature two reasons gain most attention. First, it is often said that Australian companies largely follow a 'shareholder primacy' model, in which the interests of shareholders are pursued either over a short or long-term time frame. For some, this is seen to have wider economic benefits which would be diluted if companies were expected to pursue stakeholder interests as well. For others, it would be too complex and onerous to expect company directors and managers to change the way in which they operate so as to take into account interests other than those of shareholders.[15] The second, more widely held view, is that current Australian company law permits directors sufficient freedom to pursue stakeholder interests without requiring that they do so. Rather than legislating, policy makers have shown a preference for allowing a more temperate adaptation to current practices and views through case law developments.

Against this, advocates of the stakeholder model of the corporation argue that the law should be changed so as to more clearly permit directors to take into account the interests of stakeholders. There has been concern that under the laws as they are currently constituted directors may be breaching their duties to the company if they privilege the interests of non-shareholder stakeholders. Stronger advocates wish to require directors to take into account non-shareholder interests. These advocates hark to the lengthy development of the concept of 'stakeholding' in the sphere of company law and corporate management theory, where it has surfaced regularly in academic debates about corporate governance since the famous debate between Berle, Means and Dodd in the 1930s.[16] Stakeholding conceptions of the company

---

Research and Compensation Foundation, 21 September 2004.

13 CAMAC Homepage 'Reference in relation to directors' duties and corporate social responsibility' (March 2005) available at: http://www.camac.gov.au/CAMAC/camac.nsf/byHeadline/Whats+Newdirectors%27+duties+and+corporate+social+responsibility?openDocument.

14 See the text associated with nn 118ff.

15 A mixture of these two reasons informed the view of the Senate Standing Committee on Legal and Constitutional Affairs, *Company Directors' Duties: Report on the Social and Fiduciary Duties and Obligations of Company Directors*, November 1989.

16 A.A. Berle, 'Corporate Powers as Powers in Trust' (1931) 44 *Harvard Law Review* 1049;

are supported by the idea that companies need not and should not be operated solely in the interests of their shareholders. According to its advocates, changes in corporate management and company law should be made to ensure that in their decision-making and policy formulation company directors take account of the interests of not only shareholders but all those with a 'stake' in the company, including employees, creditors, suppliers, consumers, the environment and the community at large.[17]

Whether imposing a legal requirement that companies take into account the interests of stakeholders or taking the lesser step of permitting them to do so through amendments to corporate law would entail a re-conceptualisation of 'in whose interests the company operates' is a matter which lacks empirical evidence. This is because, until now, very little has been known about in whose interests Australian company directors seek to act.[18] In this paper, new empirical evidence collected through a major survey of Australian company directors is examined concerning in whose interests directors consider themselves to be acting. This study is the most comprehensive of its type thus far conducted in Australia.

The remainder of this paper is structured as follows: Part 2 provides a brief description of the stakeholder theory of the company. Part 3 considers the extent to which current Australian corporate law encapsulates a broader sense of directors' duties. In Part 4, examples of stakeholder or constituency laws implemented outside Australia are considered. In Part 5, the findings and recommendations of the reports of the two inquiries are outlined, along with the main arguments of significant submissions to the inquiries. In Part 6 of the paper, empirical evidence regarding the way in which Australian directors perceive their obligations to various stakeholders is presented. In the concluding part of the paper, the findings of the two inquiries are critically assessed against this empirical evidence.

Whilst the stakeholder model of the company is concerned with the interests of all who contribute to, or benefit from, or bear risk in, the company's actions, this paper uses, particularly in Part 6, employees as the primary example of a stakeholder group. This allows us to exemplify and contrast the rights of shareholders with a group who make a significant contribution, with associated risks, in the company with which they are productively engaged.

2. Stakeholder Theory

The classical exposition of the stakeholder model of the company was developed by R Edward Freeman.[19] Since the publication of Freeman's landmark book,

---

E.M. Dodd, 'For Whom are Corporate Managers Trustees?' (1932) 45 *Harvard Law Review* 1145; A.A. Berle, 'For Whom Corporate Managers are Trustees: A Note' (1932) 45 *Harvard Law Review* 1365 and the text associated with nn 19-26. In the 1990s there were a number of symposia on stakeholding which brought the idea back into academic purview: see for example (1993) 43 *Toronto Law Review* and (1991) 21 *Stetson Law Review*.

17 Ireland, above n 8.

18 Previous empirical studies include I. Francis, *Future Direction: The Power of the Competitive Board*, FT Pitman Publishing, Melbourne 1997.

19 Freeman supplies a history of the term and the concept in R. E. Freeman, *Strategic*

literature about the concept has expanded rapidly. Within this still emerging literature the concepts stakeholder, stakeholder model, stakeholder management, and stakeholder theory are explained and used by different authors in very different ways. The defining feature of the normative aspect of the theory is the acceptance of the following ideas:

(i) Stakeholders are persons or groups with legitimate interests in procedural and/or substantive aspects of corporate activity. Stakeholders are identified by their interests in the corporation.
(ii) The interests of all stakeholders are of intrinsic value. That is, each group of stakeholders merits consideration for its own sake and not merely because of its ability to further the interests of some other group, such as the shareholders.[20]

The managerial aspect of the theory, as defined by Donaldson and Preston, is as follows:

> The stakeholder theory is managerial in the broad sense of that term. It does not simply describe existing situations or predict cause-effect relationships; it also recommends attitudes, structures, and practices that, taken together, constitute stakeholder management. Stakeholder management requires, as its key attribute, simultaneous attention to the legitimate interests of all appropriate stakeholders, both the establishment of organizational structures and general policies and in case-by-case decision making…Stakeholder theory does not necessarily presume that managers are the only rightful locus of corporate control and governance. Nor does the requirement of simultaneous attention to stakeholder interests resolve the longstanding problem of identifying stakeholders and evaluating their legitimate 'stakes' in the corporation. The theory does not imply that all stakeholders (however they may be identified) should be equally involved in all processes and decisions. [21]

So who, or what, is a stakeholder within the corporation? In the broadest interpretation, stakeholders are persons or groups that have, or claim, ownership, rights, or interests in a corporation and its activities, past, present, or future. Such claimed rights or interests are the result of transactions with, or actions taken by, the corporation, and may be legal or moral, individual or collective. Stakeholders with similar interests, claims, or rights can be classified as belonging to the same group.[22] These can be divided into primary and secondary stakeholders.

A primary stakeholder group is one without whose continuing participation the corporation cannot survive as a going concern. Primary stakeholder groups typically are comprised of shareholders and investors, employees, customers, and

---

Management: A Stakeholder Approach, 1984, at 31-42. He claims an intellectual heritage for the concept derived from Adam Smith and A. Berle and G. Means.

20 T. Donaldson and L. Preston, 'The Stakeholder Theory of the Corporation: Concepts, Evidence, and Implications' (1995) 20 *Academy of Management Review* 65 at 67.

21 Ibid.

22 Freeman specifically includes within such groups suppliers, customers, employees, shareholders, and the local community.

suppliers, together with what is defined as the public stakeholder group: the governments and communities that provide infrastructures and markets, whose laws and regulations must be obeyed, and to whom taxes and other obligations may be due.[23] There is a high level of interdependence between the corporation and its primary stakeholder groups. Failure to retain the participation of a primary stakeholder group will result in failure for that corporation.[24]

Secondary stakeholder groups are defined as those who influence or affect, or are influenced or affected by, the corporation, but they are not engaged in transactions with the corporation and are not essential for its survival. The media and a wide range of special interest groups are considered secondary stakeholders under this definition. Competitors may also fall into this category.

What kind of rights does a stake give rise to?

The types of rights endowed upon constituencies by the stakeholder model vary depending upon the model of corporate governance that is proposed. In theory, according to Freeman, each one of these stakeholders has a right to be treated as an end in itself, not to be treated as a means to some other end.

Evans and Freeman suggest that if the modern corporation or its management and directors insist on expanding their power by disrespecting the rights of others, and treating others as a means to an end, then at a minimum the others must agree to and hence participate or choose not to participate in the decisions. It follows, according to this thinking, that each stakeholder group must participate in determining the future direction of the company in which it has a stake.[25]

What are the employees' stakes within the corporation?

Employees have at stake their jobs and sources of livelihood, among other things. As a result, they are concerned with what happens to them (a) in the process of employment, such as recruitment and selection, (b) during job incumbency, and (c) as they seek continuance of their jobs.[26]

---

23 Public stakeholders are sometimes considered to be secondary stakeholders.

24 The corporation's survival and continuing success depend upon the ability of its directors and managers to create sufficient wealth, value, or satisfaction for those who belong to each stakeholder group, so that each group continues as a part of the corporation's stakeholder system: M. Clarkson, 'A Stakeholder Framework for Analyzing and Evaluating Corporate Social Performance' (1995) 20 *Academy of Management Review* 92 at 106-7.

25 According to the theory, managerial rights must have implicit and explicit limits. Implicitly, if they are exerted for any other aim, or disproportionately to their legitimate aims, they are unfounded and can be ignored. Explicitly, the interests of a given category of stakeholders limit the interests of the other ones: E. Freeman and W. Evans 'Corporate Governance: A Stakeholder Interpretation' (1990) 19 *Journal of Behavioural Economics* 337.

26 C. Summers, 'Codetermination in the United States: A Projection of Problems and Potentials' (1982) 4 *Journal of Comparative Corporate Law and Securities Regulation* 155 at 170, cited by K. Van Wezel Stone, 'Employees as Stakeholders under State Non-shareholder Constituency Statutes' (1991) 21 *Stetson Law Review* 45 at 49.

For some advocates of the stakeholder model of the company, employees have a particularly strong stake in the company by virtue of both their high level contribution and risk. Employees make a financial contribution to the corporation in the form of human capital. Summers represents this view as follows:

> [E]mployees . . . are as much members [of the company] as the shareholders who provide the capital. Indeed, the employees may have made a much greater investment in the enterprise by their years of services, may have less ability to withdraw, and may have a greater stake in the future of the enterprise than many of the stockholders.

Accordingly, employees as stakeholders have their own rights whose fulfilment is required by the corporate organisation. Therefore, it is argued, the corporation, working through its officers, must have a corresponding responsibility to respect each of those rights with the result that companies need to be managed for the benefit of their stakeholders, including employees.

In this section we have sought to provide a sketch of the features of what is an amorphous construct. Within the jurisprudential setting, discussion has centred on the responsibilities and duties of directors, with the proponents of the stakeholder model making a variety of different proposals for legal reform, most notably an extension of directors' duties, representation of stakeholders on the board of directors, voting rights for stakeholder groups, and greater disclosure of corporate information. Our main focus in this paper is on directors' duties.

3. Stakeholders and Directors' Duties under Australian Corporate Law

A major argument used by those who are opposed to including stakeholder provisions in corporate law is that the law is already permissive enough to allow directors wide discretion to take into account the interests of stakeholders.[27] This interpretation of corporate law is also held by some proponents of the stakeholder model. For instance, Blair and Stout, who constructed the team production model of corporate governance,[28] argue that 'many features of corporate law in the United States are more consistent with our team production model than they are with shareholder primacy, at least if shareholder primacy is interpreted to mean maximization of shareholder value in the short term'.[29] For Blair, in the United States context, this is because the 'prescriptions for directors' duties under the team production model turn out to be very similar, and perhaps even "observationally equivalent" in practice to the prescriptions that advocates of long-term share value

---

[27] This was the conclusion of both the CAMAC and PJC Reports. See also R.P. Austin, H.A.J. Ford and I.M. Ramsay, *Company Directors: Principles of Law and Corporate Governance*, LexisNexis Butterworths, 2005, at 7.13, for elaboration of this interpretation of the law.

[28] M. Blair and L. Stout, 'A Team Production Theory of Corporate Law' (1999) 85 *Virginia Law Review* 247. This is one of the more thoroughly developed, stakeholder-type, alternative models of corporate governance.

[29] M. Blair, 'Directors' Duties in a Post-Enron World: Why Language Matters' (2003) 38 *Wake Forest Law Review* 886 at 890.

mazimization would make'.[30] For others, such as Sheldon Leader, the formulation of the company as an autonomous legal entity - separate from its members as well as other stakeholders - creates the possibility that the legal conception of the company may already be largely consistent with the stakeholder conception.[31] The company has interests which are independent of any single set of people affected by it, including shareholders. Thus, the role of managers and directors is to mediate a constantly shifting set of interests.

There is another view. The purpose of the company, according to a narrow conception, is to advance the interests of its owners (predominantly to increase their wealth), and the function of directors, as agents of the owners, is to faithfully advance the financial interests of the cormpany, because the company is the property of its shareholders.[32] The purpose of this part of the paper is to assess the extent to which any of these contentions is accurate with regards to Australian corporate law.

Although it has not been discussed previously in the judgments of courts or the literature on Australian directors' duties, it can be argued that there has been a shift in the extent to which the interests of stakeholders other than shareholders can be considered by directors. Writing in 1967, Professor Parsons commented on what is meant by the interests of the company in the following terms:

> It would seem that the interests of employees (cf, *Re William Brooks & Co Ltd and the Companies Act* (1962) 79 WN (NSW) 354) consumers and the public at large do not enter the calculation. The interests of creditors and debenture holders do not enter the calculation (*Richard Brady Franks Ltd v Price* (1937) 58 CLR 112; *In re Atlas Engineering Company* (1889) 10 LR (NSW) Eq 179).[33]

Writing 20 years later, in 1987, Professor Sealy had a different interpretation of Australian corporate law – one that would allow the interests of non-shareholder stakeholders to be considered by directors, but only where shareholders benefited from such consideration:

> Under the traditional rules of company law, directors' duties are regarded as being owed to the company and to the company alone; and for this purpose the company's interests are equated with the interests of the members

[30] Ibid at 890-891.

[31] S. Leader, 'Private Property and Corporate Governance Part 1: Defining Interests' in F. Patfield (ed.), *Perspectives on Company Law: 1*, Kluwer Law International, 1995, 85 at 86.

[32] A more radical view is the contract conception of the company espoused by R. Coase, 'The Nature of the Firm' (1937) 4 *Economica* 386. In adaptations of this model, the corporation tends to disappear, transformed from a substantial institution into part of the market in which autonomous property owners freely contract. K. Van Wezel Stone and others suggest that this model does not rule out a role for labour in corporate governance, because no group has an a priori privileged relationship to the entity as a whole. For a development of the Coasian view see also: O. Hart, 'An Economist's View of Fiduciary Duty' (1993) 43 *University of Toronto Law Journal* 299; R. Daniels, 'Stakeholders and Takeovers: Can Contractarianism Be Compassionate?' (1993) 43 *University of Toronto Law Journal* 315.

[33] R.W. Parsons, 'The Director's Duty of Good Faith' (1967) 5 *Melbourne University Law Review* 395 at 418, n 99.

> collectively. Directors on this view are not entitled, still less bound, to consider the interests of other groups, such as the company's employees, creditors, customers and suppliers, or to have any concern for such matters as the community, the environment, welfare and charity, unless what they do has derivative benefits for their shareholders.[34]

Three important questions can be asked. First, are there any circumstances when the interests of non-shareholder stakeholders can be considered by directors without there being any derivative benefit for shareholders? Second, are there any circumstances when the interests of non-shareholder stakeholders *must* be considered by directors? Third, are there any circumstances when the interests of non-shareholder stakeholders can be given higher priority by directors than the interests of shareholders? The questions relate only to the duty of directors to act in the best interests of the company. There may be other statutory obligations that require directors to consider the interests of particular stakeholders.

Writing 21 years after Professor Sealy, Justice Owen provides insight into these questions.[35] In brief, there can be limited circumstances when the answer to all three questions is yes. Justice Owen observes the 'a reflection of the interests of the company may be seen in the interest of shareholders'.[36] This is the established position. However, Justice Owen further observes that this:

> …does not mean that the general body of shareholders is always and for all purposes the embodiment of 'the company as a whole'. It will depend on the context, including the type of company and the nature of the impugned activity or decision. And it may also depend on whether the company is a thriving ongoing entity or whether its continued existence is problematic. In my view, the interests of shareholders and the company may be seen as correlative not because the shareholders *are* the company but, rather, because the interests of the company and the interests of the shareholders intersect.
> …
> It is, in my view, incorrect to read the phrase 'acting in the best interests of the company' and 'acting in the best interests of the shareholders' as if they meant exactly the same thing…it is almost axiomatic to say that the content of the duty may (and usually will) include a consideration of the interests of shareholders. But it does not follow that in determining the content of the duty to act in the interests of the company, the concerns of shareholders are the only ones to which attention need be directed or that the legitimate interests of other groups can safely be ignored.[37]

Because of the nature of the case before him, Justice Owen gave particular attention to the interests of creditors. He stated that in an insolvency context, the duty to act in the best interests of the company includes an *obligation* on directors to take into

34 L.S Sealy, 'Directors' "Wider" Responsibilities – Problems Conceptual, Practical and Procedural' (1987) 13 *Monash University Law Review* 164 at 187.

35 *The Bell Group Ltd (in liq) v Westpac Banking Corporation [No 9]* [2008] WASC 239.

36 Ibid at [4392].

37 Ibid at [4393] and [4395].

account the interests of creditors.[38] His Honour stated the obligation can arise in situations outside of actual insolvency, noting that:

> a decision that has adverse consequences for creditors might also be adverse to the interests of the company. Adversity might strike short of actual insolvency and might propel the company towards an insolvency administration.[39]

Moreover, according to his Honour, although the interests of creditors must be considered in an insolvency context, there is no rule that in this situation the interests of creditors are paramount.[40] They may be paramount in a particular situation but there is no rule that requires this conclusion.

Therefore, returning to our three questions, we can answer them as follows. First, as a general proposition, acting in the best interests of the company generally means acting in the interests of shareholders as a general body. The directors are able, but not required, to consider the interests of non-shareholder stakeholders, and where they do, such consideration needs to be done with a view to the benefit of the shareholders. However, in some circumstances, directors can consider the interests of non-shareholder stakeholders without there being any derivative benefit for shareholders. The only such situation that courts have clearly identified is where the company is insolvent or is close to insolvency or some contemplated transaction threatens the solvency of the company.

Second, in an insolvency context, there is an obligation on directors to take into account the interests of creditors. Finally, the only situation where the courts have clearly identified that the interests of non-shareholder stakeholders can be given higher priority by directors than the interests of shareholders is where the company is insolvent or is close to insolvency or some contemplated transaction threatens the solvency of the company. We now consider these principles in greater detail.

Directors are subject to a range of duties in conducting the affairs of the company. These are, most relevantly, ss 180 and 181 of the *Corporations Act*. Section 180 requires that directors and other officers of the corporation exercise their powers with the degree of care and diligence that a reasonable person would exercise in a similar situation. This duty is tempered by the 'business judgment' rule (s 180(2)). The purpose of this rule is to make it clear that it is not the intention of the law to second guess the decisions of officers. The effect of the business judgment rule is that the officer is assumed to have acted with appropriate care and diligence if all the factors contained in s 180(2) are satisfied.

Section 181 obliges directors and other corporate officers to exercise their powers and discharge their duties 'in good faith and in the best interests of the corporation' and also 'for a proper purpose'. As well as acting in good faith, directors must satisfy the test of acting 'in the best interests of the corporation'. In applying that test, the courts consider that it is the role of the directors to determine what is in the

---

38 Ibid at [4418].

39 Ibid at [4445].

40 Ibid at [4436] – [4440].

best interests of the company, unless no reasonable director could have reached the decision.[41]

An important question is what, if any, limits the requirements to exercise powers 'in the best interests of the corporation' and 'for a proper purpose' might impose on directors in taking into account the broader environmental and social context in their decision-making. According to one commentary on corporate law, although there may be no direct legal obligation for officers to take the interests of stakeholders other than shareholders into account, this does not preclude directors from choosing to do so:

> The decided cases in this area indicate that management may implement a policy of enlightened self-interest on the part of the company but may not be generous with company resources when there is no prospect of commercial advantage to the company.[42]

Mitchell, O'Donnell and Ramsay have argued that even if we accept that the interests of the company are largely co-extensive with the interests of shareholders, the formulation of directors' duties is still imprecise enough to allow considerable discretion to directors to take into account the interests of employees and other stakeholders.[43] These authors offer the following view of directors' duties:

> It can be in the interests of existing shareholders for directors to take a long-term view of shareholder welfare, having regard to their future as well as existing interests. Similarly, although the *end* of shareholder benefit is paramount, discretion as to the *means* to best achieve this remains with the directors. That is, long-term maximisation of shareholder wealth may not be served by short-term profit maximisation if the latter results in dissatisfied suppliers, antagonistic employees, and angry community groups. Rather, shareholder benefit might require a degree of largesse to other stakeholder groups. Finally, the duty is largely based on a director's motivation and opinion as to what is in the best interests of the company, and not directed to any assessment of actual outcome. This grants considerable leeway to directors, as courts rarely interfere with the decision-making of corporate boards or find conclusive proof that a director did not think the decision was in the best interest of the company.
>
> These three factors — the absence of a time frame, the distinction between ends and means, and the focus on motivation and purpose rather than outcome — mean directors retain considerable discretion and autonomy in exercising their powers. It is up to them to identify the interests of

---

41 See, for example, *Darvall v North Sydney Brick & Tile Co Ltd* (1987) 16 NSWLR 212; 12 ACLR 537; 6 ACLC 154.

42 R.P. Austin, H.A.J. Ford and I.M. Ramsay, *Company Directors: Principles of Law and Corporate Governance*, LexisNexis Butterworths, 2005 at 7.13.

43 R. Mitchell, A. O'Donnell and I. Ramsay, 'Shareholder Value and Employee Interests: Intersections of Corporate Governance, Corporate Law and Labor Law' (2005) 23 *Wisconsin International Law Journal* 417.

> shareholders, the period over which these can be appropriately achieved, and the extent to which they require bestowing benefits on other stakeholder groups. Thus the formulation 'in the interests of the company as a whole' remains compatible with directors striking a balance between the competing interests of different stakeholders in order to benefit the interests of shareholders in the long run. The main legal restriction on directors' discretion in this regard is that there be the possibility of *some* eventual return to shareholders which justifies a departure from short-term profit maximisation. Bestowing benefits on other stakeholders has purely instrumental value, and such value will be difficult to justify where companies have ceased to trade (even where bestowing benefits reflects the declared wishes of the majority of shareholders).
>
> Even where the fate of the company and the short-term welfare of shareholders diverge, the law does not compel the pursuit of shareholder wealth maximisation but often continues to grant considerable latitude to directors to make discretionary judgments as to the best interests of the company.[44]

The *Corporations Act* makes it clear that the statutory duties in the Act do not exclude the operation of other laws, including the general law.[45] Under the general law, directors are obliged to act in the interests of 'the company as a whole'. As we shall see, this phrase has been interpreted to mean the financial well-being of the shareholders as a general body.[46] Some commentators have argued that the current formulation of this directors' duty embodies a time-factor which arguably protects employees (albeit not in express terms), in the sense that the directors may, and indeed must, direct their efforts towards securing the continued prosperity of the company's enterprise (i.e. of the company as an ongoing concern). Peter Xuereb posits that it is arguable that in doing this the law requires, at the least, that the directors ensure that there is an entity in existence on a continuing basis, thus offering employment and also furthering or protecting the interests of the general body of the company's employees.[47] At the broadest level of principle then, it may be said that as most stakeholders have an interest in the commercial well-being of the company in the long run, the formulation of directors' duties is consistent with a minimal stakeholder approach. Joseph Fuller and Michael Jensen, for instance, argue that 'enlightened value maximisation uses much of the structure of stakeholder theory but accepts maximisation for the long-run value of the firm as the criterion for making the requisite tradeoffs among its stakeholders'.[48]

We now examine the case law to assess whether this view is supported by the courts' interpretation of directors' duties. The courts have held as a general rule

---

44 Ibid at 436-438.

45 Section 185. Section 9 of the *Corporations Act* defines the general law to mean the principles and rules of the common law and equity.

46 See *Greenhalgh v Arderne Cinemas* [1950] 2 All ER 1120. See also *Gaiman v National Association for Mental Health* [1971] Ch 317.

47 P. Xuereb, 'Juridification of Industrial Relations through Company Law Reform' (1988) 51 *Modern Law Review* 157 at 165.

48 J. Fuller and M. Jensen, 'Just Say No to Wall Street: Putting a Stop to the Earnings Game' (2002) 14 *Journal of Applied Corporate Finance* 41.

that the powers of directors are entrusted to them for the benefit of the company, namely, for the benefit of the shareholders as a whole, and not for the benefit of the directors themselves, or of a group of shareholders of the company, or of outsiders: *Parke v Daily News Ltd*.[49] The interests of the company as a whole have been said to require the directors to have regard to 'the interests of the members of the company, as well as having regard to the interests of the company as a commercial entity': *Darvall v North Sydney Brick & Tile Co Ltd*.[50] This idea of the company as a commercial entity may thus support claims that an 'enlightened value maximisation' approach is possible under Australian case law.

When we further consider the case law we see that the interests of the company as a whole may vary according to the stage in a company's life.[51] Whilst the duty to consider the interests of the company as a whole may be considered co-terminus with the interests of shareholders when the company's financial health is buoyant, it may not be true when the company is in financial difficulty. Sheldon Leader, for instance, points to the fact that at the point of insolvency directors are sometimes said to owe a duty to the company's creditors. It is possible for a creditor to have a derivative interest in seeing the company remain healthy and capable of paying its debt fully.[52] It was on this basis, for example, that the court acted in favour of creditors in *Standard Chartered Bank v Walker*.[53] In this case the interests of the creditors and those of the company coincided. In the Australian context, Mason J in *Walker v Wimborne*,[54] held that 'directors of a company in discharging their duty to the company must take account of the interests of its shareholders and its creditors' because failure to do so 'will have adverse consequences for the company as well as for them.' Subsequent cases demonstrate that when a company is approaching insolvency a director is not only obliged to consider the interests of creditors as part of the discharge of his or her duty to the company itself but that the interests of creditors may become more important than the interests of shareholders. In *Chew v R,*[55] Malcolm CJ cited *Kinsela v Russell Kinsela Pty Ltd (in liq),*[56] as standing for the principle that, if a company's financial position is precarious, the interests of creditors may become the dominant factor in what constitutes the 'benefit of the company as a whole'.[57] In *Nicholson v Permakraft (NZ) Ltd (in liq)*,[58] it was suggested that creditors might have an action against directors of a company for

---

49 [1962] 1 Ch 927. See also *Charterbridge Corporation Ltd v Lloyds Bank Ltd* [1970] 1 Ch 62; *Levin v Clark* [1962] NSWR 686.

50 (1987) 16 NSWLR 212; 12 ACLR 537; 6 ACLC 154.

51 *Kinsela v Russell Kinsela Pty Ltd (in liq)* (1986) 4 ACLC 215 at 221.

52 Under Australian law, directors do not have any direct duty to creditors and no such duty is enforceable by the creditors other than in cases where a special responsibility has arisen or under statutory provisions dealing with liquidation: *Sycotex Pty Ltd v Baseler* (1994) 122 ALR 531; 13 ACSR 766; 12 ACLC 494. This interpretation was subsequently endorsed by the High Court in *Spies v R* (2000) 201 CLR 603; 173 ALR 529; 35 ACSR 500; [2000] HCA 43. See also *Geneva Finance Ltd v Resource and Industry Ltd* (2002) 169 FLR 152; 20 ACLC 1427; [2002] WASC 121 at 6.

53 [1992] BCLC 602.

54 (1976) 50 ALJR 446 at 446.

55 (1991) 5 ACSR 473.

56 (1986) 4 NSWLR 722.

57 See also the discussion of *The Bell Group Ltd (in liq) v Westpac Banking Corporation [No 9]* WASC 239 at nn 35-40 and accompanying text.

58 [1985] 1 NZLR 242 at 249; (1985) 3 ACLC 453 at 459.

breach of duty based on a duty owed by directors to creditors. However this approach was rejected in *Sycotex Pty Ltd v Baseler,*[59] and by the High Court in *Spies v R.*[60]

These cases clash with the idea that the interests of a company for the purpose of directors' duties can only be the interests of shareholders. It is on this basis that Leader argues that there is a constantly shifting set of interests of stakeholders to be satisfied by the company if it is to function successfully, and the notion of its independent interests serves to define the fixing of the priorities within that shifting field at any particular point of time.[61] As such, it is not possible to say that a company's interest is reducible to the 'sum' of the interests of different constituencies, since the notion of a sum fails to convey the fact that there is no stable, single way of aggregating these interests over time. The company therefore remains independent of any single set of stakeholders affected by it.

Extending this general principle, Robert Sadler argues that to fail to take account of employees' interests, also, can have adverse consequences for corporations, as a result of, for example, prolonged industrial unrest.[62] Therefore, the principle articulated in *Walker v Wimborne*[63] could logically be extended to employees. Australian case law shows there are limits to the application of this argument. Directors have scope to take into account employee and other stakeholder interests unless they clash with the interests of shareholders.

It is generally accepted that employees' interests cannot be placed ahead of those of shareholders, unless this is necessary to ensure that the company meets its obligations to employees under employment, industrial or occupational health and safety laws.[64] Where the interests of employees are given priority over shareholders by directors, the courts have indicated that directors are in contravention of their duties. In *Parke v Daily News Ltd*, counsel for Daily News Ltd submitted that although the directors' principal duty must be to the shareholders, boards of directors must also consider their duties to employees.[65] Plowman J quashed any hope for the privileging of employees' interests by stating that:

> . . . no authority to support that proposition as a proposition of law was cited to me; we know of none and in my judgment such is not the law.[66]

---

59 (1994) 122 ALR 531; 13 ACSR 766; 12 ACLC 494.

60 (2000) 201 CLR 603; 173 ALR 529; 35 ACSR 500; [2000] HCA 43.

61 Leader, above n 31 at 86.

62 R. Sadler, 'Employee Representatives on Boards of Directors: Limiting Directors' Fiduciary Duties' (1982) *Journal of Industrial Relations* 282 at 283.

63 Above n 54.

64 Ensuring compliance with such laws forms part of directors' common law and statutory duties to act with due care and diligence; see, e.g., Justice S. Whelan and L. Zwier, *Employee Entitlements and Corporate Insolvency and Reconstruction*, Research Paper, Centre for Corporate Law and Securities Regulation, University of Melbourne, 2005, at 10.

65 The issue of the stage in the company's life may have been important in *Parke v Daily News Ltd* [1962] Ch 927, in which the court held invalid a board of directors' decision to set aside the entire net proceeds of 1,572,500 pounds from the sale of the London News Chronicle as a fund for severance pay to employees.

66 Ibid at 963.

In another rejection of the proposition that employees' interests may be privileged, in *Re William Brooks & Co Ltd,*[67] the court ordered the company to be wound up because the directors had acted improperly by giving priority to employee interests over those of shareholders.[68]

In any case, the extension of *duties* of directors has not been attended by the extension of *rights* for stakeholders. For instance, the courts have stopped short of perfecting a duty to consider the interests of creditors at the point of insolvency with an accompanying right of enforcement even though their interests may be important for the company's ongoing commercial survival. Their interests are derivative. Employees are said to be 'outsiders' for the purposes of directors' duties.[69] The discussion in this part of the paper has shown that employees' interests may only be taken into account for the purposes of directors' duties where it is in the interests of the shareholders, unless otherwise dictated by law. For some commentators, the problem of enforcement is one which diminishes claims that directors' duties have been meaningfully broadened. Although fiduciary discourse is celebrated for its significant socialising and educational role in corporate governance,[70] without an element of enforceability, fiduciary law does not increase the 'stake' of the employee in the company in the manner envisaged by stakeholder theorists as expounded in Part 2 of this paper. Katherine Stone remarks that:

> By linking decision making power over major issues of corporate policy to equity, traditional corporate law theory says that labor has no role to play in corporate decision making. Instead, it treats labor like suppliers and customers, who contract *with* the company but are not *of* it.[71]

This examination of Australian corporate law has shown that directors are able to exercise significant discretion in executing their duties. This may be consistent with an 'enlightened shareholder value' approach [72] and thus a limited stakeholder approach to corporate governance. However, it falls short of a fuller stakeholder approach which would allow directors to treat the discharge of employee and other stakeholder rights and interests as an end in itself, not as a means to some other ends, namely long term shareholder wealth creation.

---

67 [1962] NSWR 142.

68 See also *Lyford v Commonwealth Bank of Australia* (1995) 130 ALR 267; 17 ACSR 211; 13 ACLC 900.

69 Bercusson uses the 'insider/outsider' terminology in B. Bercusson, 'Workers, Corporate Enterprise and the Law' in R. Lewis (ed.), *Labour Law in Britain*, Oxford, Blackwell, 1986, at 139.

70 M. O'Connor, 'How Should We Talk About Fiduciary Duty? Directors' Conflict-Of-Interest Transactions and the ALI's Principles of Corporate Governance' (1993) *George Washington Law Review* 954 at 968.

71 K. Stone, 'Labor and the Corporate Structure: Changing Conceptions and Emerging Possibilities' (1988) *University of Chicago Law Review* 73 at 151.

72 See discussion of this phrase in the context of s 172 of the UK *Companies Act 2006*: nn 79-90 and accompanying text.

4. International Developments

The idea that directors owe special responsibilities to employees and other stakeholders has been explicitly recognised in corporate statutes in some jurisdictions. In this part of the paper we examine some examples of these statutes in the US, the UK and other jurisdictions. We also discuss the recent decision of the Supreme Court of Canada in BCE Inc and contrast this with US case law.

Stakeholder statutes and related initiatives

The United States

Starting with Pennsylvania in 1986, more than half of the state governments of the United States of America have passed stakeholder statutes, which propose a corporate governance model different from the classic or conventional corporate law paradigm of the director-manager acting for the shareholder-owner. These statutes, called non-shareholder constituency statutes, can be divided into two main categories: permissive statutes and mandatory statutes. Permissive statutes *allow,* but do not *require,* directors to take the interests of employees and other stakeholders into account when making strategic-level decisions.[73] An example of the former is Pennsylvania, where the board *may* consider 'the effects of any action upon...employees' An example of the latter is Connecticut, where directors are required to consider (inter alia) 'the interests of the corporation's employees'.[74]

The following states have permissive statutes: Florida, Georgia, Hawaii, Idaho, Illinois, Iowa, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Minnesota, Mississippi, Missouri, Nevada, New Jersey, New Mexico, New York, North Dakota, Ohio, Oregon, Rhode Island, South Dakota, Tennessee, Vermont, Wisconsin, and Wyoming.[75] Most of the statutes allow directors to consider stakeholder interests in any circumstances however 19 states only allow stakeholder consideration during takeover or change of control situations.[76] There is also a difference amongst the statutes as to what the directors are permitted to take into account. Some statutes permit directors to consider the 'effects' of their decisions on stakeholders whilst others only permit directors to take into account the 'interests' of stakeholders. Most statutes allow for the consideration of both long and short-term interests.[77] Indiana and Pennsylvania have statutes that explicitly provide that the claims of shareholders need not be held above those of other stakeholders. These statutes presume the validity of a directors' determination to

[73] J. Hanks, Jr, 'Playing with Fire: Nonshareholder Constituency Statutes in the 1990s' (1991) 21 *Stetson Law Review* 97 at 103.

[74] A. Reynolds 'Do ESOPS Strengthen Employee Stakeholder Interest?' (2001) 13 *Bond Law Review* 95.

[75] J. Hanks, Jr, 'Non-Stockholder Constituency Statutes: An Idea Whose Time Should Never Have Come' *Insights*, December 1989, 20- 26.

[76] K. Hale, 'Corporate Law and Stakeholders: Moving Beyond Stakeholder Statutes' (2003) 45 *Arizona Law Review* 823 at 836.

[77] Ibid.

consider non-shareholder interests if approved by a majority of disinterested directors unless it is proven after reasonable investigation that the disinterested directors did not act in good faith.

Two states, Connecticut and Arizona, have enacted *mandatory* statutes that require directors to consider the interests of other constituencies. Connecticut requires directors to consider the interests of the corporation's employees, customers, creditors, suppliers, 'community and societal considerations', as well as long-term and short-term interests of the corporation and of the shareholders, 'including the possibility that those interests may be best served by the continued independence of the corporation'.[78]

United Kingdom

Until 2006, s 309 of the *Companies Act 1985* provided that 'the matters to which the directors are to have regard in the performance of their functions shall include the interests of the company's employees in general as well as the interests of its members.'[79] This was limited by s 309(2) which expressly stated that the duty was to be owed to the company and enforceable as such. In 2006 the UK enacted its much debated *Companies Act 2006.* Section 172(1) imposes a duty upon a director to act in the way he or she considers, in good faith, would be most likely to promote the success of the company for the benefit of its members as a whole, and in doing so have regard (amongst other matters) to (a) the likely consequences of any decision in the long term, (b) the interests of the company's employees, (c) the need to foster the company's business relationships with suppliers, customers and others, (d) the impact of the company's operations on the community and the environment, (e) the desirability of the company maintaining a reputation for high standards of business conduct, and (f) the need to act fairly as between members of the company. Section 172(1) is limited by
s172(2) which specifies that this list of purposes 'has effect as if the reference to promoting the success of the company for the benefit of its members were to achieving those purposes'.

It can be seen that among other effects, this duty aims to introduce wider corporate social responsibility into a director's decision making process. Whilst the section makes it clear that the directors owe a duty to promote the success of the company for the benefit of its members, it seeks to provide a broader context for fulfilling that duty.[80] According to a member of the UK Company Law Review Steering Group which drafted the changes, the laws reflect an 'enlightened shareholder value' approach. Section 172(1) is intended to articulate the common law view that 'the company' means its shareholders as a whole. The phrase 'in the interests of the company' was intentionally omitted as being meaningless.[81] Section 172(1)(b)-(e)

---

78 Hanks, above n 73.

79 This is known as the 'regard clause': A. Conard, 'Corporate Constituencies in Western Europe' (1991) 21 *Stetson Law Review* 71; Xuereb, above n 47. The provision may be traced to the 1970s industrial democracy movement: P. Redmond (ed.), *Companies and Securities Law: Commentary and Materials*, 2nd edition, The Law Book Company, 1992, at 412.

80 *CAMAC Report,* above n 7 at 103.

81 P. Davies, 'Enlightened Shareholder Value and the New Responsibilities of Directors',

seek to make clear that although shareholder interests are predominant, the promotion of these interests does not require 'riding roughshod' over the interests of other groups on whose activities the business of the company depends for success.[82]

There are further key provisions that place new responsibilities on companies in relation to their social and environmental impact. The *Companies Act 2006* brings together elements of the previous operating and financial review and the requirements of the EU Accounts Modernization Directive. Under the Act, all companies other than small companies must produce a business review as part of the directors' report which contains a fair review of the company's business and principal risks and uncertainties. This must include information about the environment, employees and social and community issues to the extent necessary for an understanding of the business.[83] The business review must be audited. The *Companies Act 2006* also includes a reserve power to allow the government to require institutional investors to disclose how they have voted at annual meetings. This was included for the purpose of fostering voluntary disclosure. The resort to law will take place only if investors 'fail to come clean on their voting records voluntarily'.[84] McBarnet observes that: 'In effect, while supporting a voluntary approach to CSR, UK government strategy . . . has been to legislatively support and strengthen the market pressures on companies to pay attention to CSR issues'.[85]

The changes to directors' duties under the UK *Companies Act 2006* came into force in October 2007. Recent commentaries on the Act continue to speculate about its possible effects on company directors' decision-making, and question whether this form of regulation is best placed to foster the enlightened shareholder value approach in UK companies.[86] An immediate result of the changes agreed upon by most commentators is that directors will take greater precaution to evidence their consideration of s 172(1) stakeholders in decision-making because of perceived risks of being censured by a regulatory body, or of facing a derivative action brought by a shareholder. Legal commentary on the changes contemplates much use of the derivative action provisions by activist shareholders.[87] However, since the Act has come into force, little evidence of such a trend has arisen. Loughrey, Keay and Cerioni have considered the legal profession's reaction to the Act and suggest that the lack of shareholder derivative actions may stem from lawyers who

---

W.E. Hearn Lecture at the University of Melbourne Law School, 2 October 2005.

82 Ibid.

83 *CAMAC Report,* above n 7 at 130-131.

84 *Financial Times*, 6 June 2006, quoting Alastair Darling, Trade and Industry Secretary, cited in D. McBarnet, 'Corporate Social Responsibility Beyond Law, Through Law, for Law: The New Corporate Accountability' in D. McBarnet, A. Voiculescu and T. Campbell (eds.), *The New Corporate Accountability: Corporate Social Responsibility and the Law*, Cambridge University Press, 2007, at 35.

85 McBarnet, ibid, at 35.

86 See A. Keay, 'Tackling the Issue of the Corporate Objective: An Analysis of the United Kingdom's 'Enlightened Shareholder Value Approach' (2007) 29 *Sydney Law Review* 577 who argues that the enlightened shareholder value approach in s 172 is a little different from the shareholder value approach.

87 N. Mirchandani, and R.Huntsman, 'Directors Cut' (2008) 21 (45) *Lawyer* 31; 'New derivative action may lead to increased claims against directors' (2007) 28 *Credit Control* 92.

have stated that they would advise shareholder clients of the difficulties at succeeding with a derivative action, and discourage them from proceeding.[88] Most supporters of CSR expect that the changes will have little impact initially. Charles Wynn-Evans posits that as a stakeholder group, employees may be worse off under the changes as they have no enforceable rights, and their concerns may be deemphasised if considered equally with the other s 172(1) stakeholders.[89] However he agrees with the views of other commentators that anything that will assist directors to internalise CSR considerations may have real benefits for stakeholders in the future.[90]

Other jurisdictions

Several African countries have in their corporate law statutes provisions that mention employees in the context of directors' duties. The Zimbabwe Companies Amendment Act 1993, which was the first major amendment of the principal Act for many years, enables directors to take account of the interests of their employees as well as those of their shareholders.[91] The Ghanian Companies Code s 203(3) states that:

> In considering whether a particular transaction or course of action is in the best interest of the company as a whole a director may have regard to the interests of the employees, as well as members, of the company, and, when appointed by, or as a representative of, a special class of members, employees, or creditors may give special, but not exclusive, consideration to the interests of that class.[92]

Due to fundamental differences between Member States' traditions in the company law field, it appears unlikely that any similar development will occur in the EU in the near future.[93] The EU Draft Fifth Directive on Company Law, which provided that each member of the supervisory board, management board or administrative organ, as the case may be, has the same duty at law and shall exercise his or her functions 'in the interests of the company, having regard to the interests of the

---

88 J. Loughrey, A. Keay, and L. Cerioni, 'Legal Practitioners, Enlightened Shareholder Value and the Shaping of Corporate Governance' (2008) 8 *Journal of Corporate Law Studies* 79 at 111.

89 C. Wynn-Evans, 'The Companies Act 2006 and the Interests of Employees' (2007) 36 *Industrial Law Journal* 188 at 192.

90 Wynn-Evans, ibid at 192; P. Yeoh, 'The Direction and Control of Corporations: Law or Strategy?' (2007) 49 *Managerial Law* 37; L. Cerioni, 'The Success of the Company in s. 172(1) of the U.K. *Companies Act 2006*: Towards an 'Enlightened Directors Primacy'?' (2008) 4 *Original Law Review* 1 at 31.

91 (1994) 20 (1) *Commonwealth Law Bulletin* 5-6. In South Africa, cl 76 (3)(b) of the Companies Bill 2008 provides that a director must act 'in the best interests of the company'. For discussion of the South African position, see I. Esser and J. du Plessis, 'The Stakeholder Debate and Directors' Fiduciary Duties' (2007) 19 *South African Mercantile Law Journal* 346. The authors observe that courts in South Africa have interpreted the company to mean the shareholders collectively: ibid at 357.

92 The Code has been criticised for failing to give greater direction as to what degree of consideration is 'special but not exclusive' (Sadler, above n 62 at 285.)

93 Activities of the European Union, Summaries of Legislation, http://europa.eu/scadplus/leg/en/lvb/l26002.htm,

shareholders and of the employees',[94] was withdrawn by the Commission in December 2001 because of political deadlock.

The limitations of stakeholder statutes

Over the 20 or so years since stakeholder statutes have been enacted, their effect would seem to be relatively insignificant. It is suggested that although these statutes lay a good foundation for stakeholder interests they cannot achieve very much on their own. Commentators disagree about whether stakeholder statutes represent radical changes in the law of ownership rights in corporations or whether they merely codify pre-existing corporate law doctrine. Some commentators have interpreted the US stakeholder statutes as demonstrating that directors do not owe duties exclusively to shareholders; rather, they play the role of mediators between different corporate constituencies.[95] Others believe the statutes are so limited as to the rights they create as to make very little concrete difference.[96]

There appear to be three main conflicting views of the stakeholder statutes in the US: (a) they create no enforceable rights of action on the part of stakeholders but do authorise directors to make trade-offs between shareholder and stakeholder interests, including the right to reduce shareholder gains for enhanced stakeholder welfare; (b) they create an implied right of action; and (c) they probably do not create an implied right of action, but even if they do create an implied right of action, in practice they will only have the effect of entrenching managerial power.

The first view is held by Stephen Bainbridge.[97] Alternatively, some commentators, such as Lawrence Mitchell, argue that stakeholder statutes should be interpreted to create enforceable obligations for non-shareholder constituency groups. Although none of these laws provide for an explicit right of action, Mitchell argues that there are implied rights. He argues that the legislative intent was to grant a right of action, because the legislature would not have believed that it is likely that directors are generally motivated by a sincere interest in protecting employee and community interests. Instead, he argues that stakeholder statutes would have no significance in the absence of enforceable private rights of action, other than granting uncontrolled discretion to directors - a goal that cannot plausibly be accepted as a legitimate legislative purpose that legislators would willingly use to justify publicly their support for the statute. He concludes that courts should interpret stakeholder laws to contain private rights of action on the part of their intended beneficiaries.

Others, such as Katherine Stone, reject the implied right of action argument. With the exception of the Connecticut and Arizona statutes, all the statutes speak in permissive tones. They say directors *may* consider the interests of other constituencies, making the likelihood of enforceability even less. Given the

---

94 Articles 10(e) and 21(q). O.J. No. C240/2, 9.9.83.

95 R. Karmel, 'Implications of the Stakeholder Model' (1993) 61 *George Washington Law Review* 1156 at 1157.

96 M. Polonksy and P. Ryan, 'The Implications of Stakeholder Statutes for Socially Responsible Managers' (1996) 15 *Business & Professional Ethics Journal* 3 at 16, cited in *CAMAC Report*, above n 7 at 102.

97 S. Bainbridge, 'Interpreting Nonshareholder Constituency Statutes' (1992) 19 *Pepperdine Law Review* 971.

business judgment rule, the range of stakeholder interests, and the conflict between them, the statutes would merely amplify managerial discretion.[98] No stakeholder statute has yet been interpreted to contain implied rights of action.[99]

In addition, there are practical considerations that may inhibit application of the law, as employees have, in the past, been less likely to access court based remedies to the same extent as management or shareholders. The expense for individual employees to bring the legal actions necessary to vindicate statutory rights is often prohibitive, and thus, even if there was a right of action, most breaches would go unremedied.[100] There are some signs that unions are becoming more willing to found actions of this nature on behalf of employees, which may assist in overcoming individual problems of access to courts. Union assistance will not overcome the barriers created by ambiguity as to the existence of an implied right of action.

This seems to be the general conclusion reached by other commentators. Jonathan Macey and Geoffrey Miller believe that:

> [I]t seems patently clear that the true purpose of these statutes is to benefit a single non-shareholder constituency, namely the top managers of publicly held corporations who want still another weapon in their arsenal of anti-takeover protection devices. There is a risk, therefore, that non-shareholder constituency statutes do not benefit the interests or groups that they ostensibly are intended to benefit and instead assist a well organised, highly influential special-interest group, namely the top managers of large, publicly held corporations who wish to terminate the market for corporate control.[101]

Evidence suggests that directors sometimes invoke the interests of employees when it serves their interests in answering claims by shareholders that they have failed adequately to serve the interests of the corporation. However, during instances of conflict between the interests of employees and either shareholders or managers, the interests of employees are difficult to enforce using stakeholder statutes.[102]

---

98 K. Stone, 'Policing Employment Contracts within the Nexus-of-Contracts Firm' (1993) 43 *University of Toronto Law Journal* 353 at 375.

99 J. Singer, 'Jobs and Justice: Rethinking the Stakeholder Debate' (1993) 43 *University of Toronto Law Journal* 475 at 503.

100 A study by the Rand Institute for Civil Justice of 120 wrongful discharge cases brought in California between 1980 and 1986 found that over 53 per cent were brought by executives or middle management: J. Dertouzoso, E. Holland and P. Ebener, 'The Legal and Economic Consequences of Wrongful Termination', Rand Corp, 1988, 19-21, cited by K. Stone, above n 98, at 375.

101 J. Macey and G. Miller, 'Corporate Stakeholders: A Contractual Perspective' (1993) 43 *University of Toronto Law Journal* 401 at 405.

102 Singer, above n 99 at 503. Some commentators have pointed out that the US statutes were, in fact, not intended to increase the power of the constituencies directly, but were passed as a result of pressure from managers, employees, and municipalities to counter hostile take-overs, which these groups perceived to be inimical to the public welfare. The purpose was to protect managerial power, in order to increase stability. A few of the statutes therefore are limited to decision making regarding takeovers. These include the statutes of Connecticut, Iowa, Kentucky, Louisiana, Missouri, Oregon, Rhode Island, and Tennessee: L. Johnson and D. Millon, 'Missing the Point About State Takeover Statutes' (1989) 87

Based on empirical research on the operation of stakeholder statutes, Springer concludes that 'Directors appear to invoke constituency statutes more as a rationalization for deferring to their discretion than as a principled justification for consideration of constituent interests'.[103] In any case, it may be that in some instances the gap between the stakeholders and the corporate decision makers is too broad to allow the corporate officers to really understand and take into account the interests of the various stakeholders.[104] More conservative critics of the laws have also argued that the statutes convert directors into 'unelected civil servants' with a responsibility for determining the public interest.[105]

A further reason stakeholder statutes, even in their broad and mandatory form, fail to give rise to enforceable rights, as Joseph Singer observes, is that courts are likely to be reluctant to 'second-guess' managerial decisions.[106] Because judges are likely to see managers as 'experts' in business matters they are usually reluctant to substitute their judgments for those of management.[107] Further, despite recent descriptions of corporations as a 'nexus of contracts' or as 'social entities', traditional views of shareholders as the 'owners' of the corporation are likely to exert a powerful influence on judges' perceptions of managerial activity. Studies have concluded that the statutes did little to alter the centrality of shareholder primacy in US corporate law.[108]

In practice, the permissive provisions appear to have been utilised primarily in the context of takeover defences. According to Polonsky and Ryan, in the small number of US cases that referred to stakeholder statutes in the early years of their operation, none insisted that directors demonstrate that they in fact deliberated about or balanced stakeholder interests to gain the protection of the statute.[109] As a result, the American Bar Association Committee on Corporate Laws may be correct in stating that the stakeholder statutes mainly confirm the common law position:

> [D]irectors may take into account the interests of other constituencies but only as and to the extent that the directors are acting in the best interests, long as well as short term, of the shareholders of the corporation.[110]

Michigan Law Review 846.

103 J.D. Springer, 'Corporate Law and Constituency Statutes: Hollow Hopes and False Fears' (1999) *New York University Annual Survey of American Law* 85.

104 Hale above n 76 at 842.

105 J. Macey, 'An Economic Analysis of the Various Rationales for Making Shareholders the Exclusive Beneficiaries of Corporate Fiduciary Duties' (1991) 21 *Stetson Law Review* 23, cited in *CAMAC Report*, above n 7 at 102.

106 Singer, above n 99.

107 Further, most of the statutes use the words 'may consider'. It is not clear what 'may consider' means. Does it mean that directors should consider the interests of employees, but then decide they should act in the shareholders' interest anyway, even though the two sets of interests conflict? For this type of criticism of stakeholder statutes from the perspective of shareholders see Hanks, above n 73 at 116.

108 Springer, above n 103 at 122.

109 M. Polonksy and P. Ryan, 'The Implications of Stakeholder Statutes for Socially Responsible Managers', above, n.96.

110 American Bar Association Committee on Corporate Laws, 'Other Constituencies Statutes: Potential for Confusion' (1990) 45 *Business Law* 2253 at 2269, cited in *CAMAC Report*, above n 7 at 101.

Similar problems existed in relation to s 309 of the UK *Companies Act* prior to the enactment of the *Companies Act 2006*. Section 309 gave the employee no remedy.

We can conclude, from this discussion of the evidence at hand, that US stakeholder laws do not generally strengthen the stakeholder rights of employees in an enforceable manner. This is partly due to the fact that the stakeholder laws modify only a small aspect of corporate law. Shareholders alone continue to have the power to vote for the board of directors. Indeed, one American critic has argued that, if anything, the stakeholder laws have detracted from the need for real changes in corporate law that address stakeholder needs.[111]

Recent UK reform has avoided using the words 'in the interests of the company as a whole' and has instead used the words 'be most likely to promote the success of the company for the benefit of its members as a whole'. Regardless of this difference, the reform was nevertheless conceived of as encoding the existing 'enlightened shareholder' common law interpretation of directors' duties, rather than mandating a 'pluralist' conception of the company which gives stakeholders similar rights to those of shareholders.

Canadian and US cases compared

Courts in both Canada and the US have grappled with the question of the interests that may be considered by directors in compliance with their duties. The most recent judgment is that of the Supreme Court of Canada in *BCE Inc v 1976 Debentureholders*.[112] The court made the following observations:

- the fiduciary duty of directors is a duty to act in the best interests of the corporation;
- often the interests of shareholders and stakeholders are co-extensive with the interests of the corporation but if they conflict, the directors' duty is to the corporation; and
- the duty is not confined to short-term profit or share value. Where the corporation is an ongoing concern, the duty looks to the long-term interests of the corporation.[113]

The court also stated:

> In considering what is in the best interests of the corporation, directors may look to the interests of, *inter alia*, shareholders, employees, creditors, consumers, governments and the environment to inform their decision.[114]
> …
> The cases on oppression, taken as a whole, confirm that the duty of the directors to act in the best interests of the corporation comprehends a duty to treat individual stakeholders affected by corporate actions equitably and fairly. There are no absolute rules. In each case, the question is whether, in all

---

111 Springer, above n 103 at 122.
112 [2008] SCC 69, date of judgment: 20 June 2008; reasons delivered: 19 December 2008.
113 Ibid at [37] and [38].
114 Ibid at [4].

> the circumstances, the directors acted in the best interests of the corporation, having regard to all relevant considerations, including, but not confined to, the need to treat affected stakeholders in a fair manner, commensurate with the corporation's duties as a responsible corporate citizen.[115]

In relation to what, if any, interests of stakeholders are to be preferred, the court stated:

> Directors may find themselves in a situation where it is impossible to please all stakeholders…There is no principle that one set of interests – for example the interests of shareholders – should prevail over another set of interests. Everything depends on the particular situation faced by the directors and whether, having regard to that situation, they exercised business judgment in a responsible way.[116]

The court referred to the 'Revlon line' of takeover cases from Delaware and noted that it had been argued that these cases support the principle that where the interests of shareholders conflict with the interests of creditors, the interests of shareholders should prevail.[117] The Canadian Court summarised these cases in the following way:

> In both cases, the issue was how directors should react to a hostile takeover bid. Revlon suggests that in such circumstances, shareholder interests should prevail over those of other stakeholders, such as creditors. Unocal tied this approach to situations where the corporation will not continue as a going concern, holding that although a board facing a hostile takeover 'may have regard for various constituencies in discharging its responsibilities, ... such concern for non-stockholder interests is inappropriate when . . . the object no longer is to protect or maintain the corporate enterprise but to sell it to the highest bidder'.

It may be possible to reconcile the Canadian and Delaware decisions. According to the Supreme Court of Canada, there is no rule that the interests of one group of stakeholders is to prevail over another. What set of interests will be paramount will depend on the particular circumstances. In the context of the decision in Unocal where the company was being sold to the highest bidder, then the interests of shareholders are paramount according to the Delaware court. Perhaps the Canadian court would have reached the same decision as the Delaware court if faced with the same set of facts. However, it is notable that the Delaware court states that consideration of non-shareholder interests is inappropriate in the particular situation of the company being sold to the highest bidder. In other words, it is not a situation of the board balancing the interests of different groups of stakeholders and determining that the interests of shareholders are paramount. It may be that the Canadian court would allow a wider range of interests to be considered in this situation than the Delaware court. After all, in the situation of the company being

---

115 Ibid at [82].

116 Ibid at [83] and [84].

117 *Revlon Inc v MacAndrews & Forbes Holdings Inc*, 506 A.2d 173 (Del 1985) and *Unocal Corp v Mesa Petroleum Co*, 493 A.2d 946 (Del 1985).

sold to the highest bidder, the directors may want to consider the interests of stakeholders other than shareholders, such as employees. However, the decision of the Supreme Court of Canada, while allowing the interests of a range of stakeholders to be considered, does not provide guidance on the weight to be given to these interests by the directors.

5. Two Recent Australian Inquiries into Corporate Governance

In this part of the paper we review two recent Australian inquiries into corporate governance which had overlapping purposes. The first of these is the Corporations and Markets Advisory Committee (CAMAC) inquiry; the second is the Parliamentary Joint Committee on Corporations and Financial Services (PJC) inquiry. We document and then analyse the different interpretations of the duty to act in the best interests of the company adopted by the two inquires.

CAMAC Social Responsibility of Corporations Report

On 23 March 2005 the Parliamentary Secretary to the Treasurer requested CAMAC to provide him with advice concerning to what extent the *Corporations Act 2001* should include corporate social responsibilities or explicit obligations to take account of the interest of certain classes of stakeholders other than shareholders.[118] The relevant questions CAMAC was requested to report on for our purposes are as follows:

- Should the *Corporations Act* be revised to clarify the extent to which directors may take into account the interests of specific classes of stakeholders or the broader community when making corporate decisions?
- Should the *Corporations Act* be revised to require directors to take into account the
  interests of specific classes of stakeholders or the broader community when making corporate decisions?

CAMAC's report, 'The Social Responsibility of Corporations' (CAMAC Report) was released in December 2006. Here, we focus on CAMAC's recommendations regarding whether the duties of directors under the *Corporations Act* should be amended to require directors to take into account the interests of employees and other stakeholders.

Ultimately, CAMAC decided no reform was required. However, in the course of its deliberations CAMAC identified its preferred interpretation of the scope of directors' duties based on the existing case law. CAMAC stated that:[119]

- the phrase 'the interests of the company as a whole' under the common law of directors' duties means the financial well-being of the shareholders as a general

118 *CAMAC Report*, above n 7.

119 The following list is extracted from the *CAMAC Report,* above n 7 at 84-85, 86, 91-92, and 106-107.

body. The overriding test is the well-being of the company and therefore the shareholders generally;

- the phrase 'the best interests of the corporation' in s 181 of the *Corporations Act* obliges directors to act in the best interests of the shareholders generally. However, directors may take into account a range of factors external to shareholders if this benefits the shareholders as a whole;
- directors are also obliged to consider the financial interests of creditors when the company is insolvent or near-insolvent, though they have no direct fiduciary duty to creditors;
- directors are not confined in law to short-term considerations in their decision-making, such as maximising profit or share price returns. The interests of a company can include its continued long-term well-being; and
- directors have considerable discretion over the factors they may choose to take into account in determining what will benefit the company. Although there may be no direct legal obligation in company law to take the interests of stakeholders other than shareholders into account (compared to statutes dealing with other areas of the law), this does not preclude directors from choosing to do so.

CAMAC also considered a number of possible approaches to the reform of directors' duties to take into account stakeholder interests. It grouped the possible approaches proposed in submissions and other jurisdictions under three categories: a 'pluralist approach', an 'elaborated shareholder benefit approach' and a 'business approach'.[120] The various views grouped under the 'pluralist approach' shared the opinion that the *Corporations Act* should be amended so as to permit or require directors to serve a wider range of interests in their decision-making, not subordinate to, or merely as a means of achieving, shareholder well-being.[121] The 'pluralist' approach is thus closest to a stakeholder model of corporate governance amongst the options considered by CAMAC. The 'elaborated shareholder benefit' approach considers that current laws be extended so as to expressly refer to various considerations that directors should take into account in determining what is for the benefit of shareholder generally (as has been done in the UK *Companies Act 2006*, s 172).[122]

Submissions to CAMAC for legislative change under the auspices of the pluralist and elaborated shareholder benefit approach which would alter directors' duties included:[123]

- a provision (possibly an amendment to s 181 of the *Corporations Act*) that would expressly permit or mandate directors to take into account the interests of specific classes of stakeholders, extending beyond shareholders, or the broader community;[124]

---

120 Ibid at 108-109; see also 109-110 for a complete list of all the approaches considered by the Committee.

121 Ibid at 96-102.

122 Ibid at 102-108.

123 These proposals are noted in *CAMAC Report,* ibid at 109–110.

124 Support for this proposal was expressed by the NSW Lawyers Association (submission 44) and the Public Interest Law Clearing House (Submission 22): CAMAC *Summary of Submissions* at 32-33.

- an amended business judgment defence, either to liberalise the defence to give greater protection to directors and officers who choose to take various stakeholder interests into account or, alternatively, to impose additional requirements on directors and officers to take stakeholder interests into account before they can avail themselves of the defence;
- a replaceable rule permitting directors to take account of the interests of stakeholders other than shareholders;
- an ethical judgment rule designed to afford directors some protection from liability in the event that their ethical decision causes a detrimental impact on the financial interests of the company as a whole.

The main concerns voiced regarding these approaches was how to identify relevant classes of stakeholders; which stakeholders would have standing to enforce duties; whether courts might become involved in making commercial decisions if called upon to balance or weigh up competing stakeholder interests; and whether criminal or civil enforcement of directors' duties would be compromised if directors could refer to a range of competing or conflicting stakeholder interests in defending claims of breach of duty. For instance, the Law Council of Australia argued that amendments to the *Corporations Act* of the type noted above would reduce flexibility, potentially increase the range of persons who can sue directors, reduce directors' accountability, likely increase red tape, be of uncertain scope and have a disincentive effect.[125] Others were of the view that environmental and social concerns should be addressed through specific legislation on those matters rather than by amending directors' duties contained in the *Corporations Act*.

The majority of submissions could be grouped under the 'business approach' as they shared the view that the existing law of directors' duties provides sufficient scope for directors to choose to take into account a range of factors external to shareholders if this benefits the shareholders collectively.[126] There was particular concern for the maintenance of directors' accountability as was highlighted in the submissions of H Bosch (Submission 51) and ASIC (Submission 55). In particular, there was a shared view that companies are already subject to a range of Federal, State and Territory laws that are designed to protect various stakeholder groups, and directors cannot lawfully ignore or subordinate these corporate obligations because of a notion of shareholder interests. In any case, it is likely to be in a company's own interests, at least over the long term, to take into account the environmental and social context in which it operates due to concerns regarding value enhancement, risk management, including reputational risk and regulatory risk.

Doubts were expressed about the effectiveness of the business approach in some submissions. One respondent (Rupu Tex, Submission 47), for instance, argued that

---

125 CAMAC, *Summary of Submissions* at 29-30.

126 Support for this view is found in the submissions of the Business Council of Australia (Submission 57), Australian Institute of Company Directors (AICD) (Submission 43), National Australia Bank (Submission 45), the Australian Shareholders Association (Submission 3) and the Australian Bankers Association (Submission 49) to name a few. All these submissions supported the view that legislative change to the *Corporations Act* was not desirable.

currently not all companies recognise CSR issues as a potential material risk to shareholders or the company as a whole and there remains a focus on short-term indicators at the expense of the long-term sustainability of the company. The NSW Attorney General put forward the strongest critique of the business approach in relation to the James Hardie experience.[127] The submission stated:

> I believe prudent directors already consider broader interests in performing their duties. I do not suggest that we need legislative reforms to change the behaviour of prudent directors. However, reform is necessary to compel directors who may not always follow prudent practices, to adhere to appropriate standards of corporate social responsibility. Voluntary reforms or directors' education initiatives may be effective in enhancing the behaviour of prudent directors, but they will not be effective in regulating all directors. Legislative reform is required.

CAMAC rejected proposals for changes to the *Corporations Act*. The Committee took the view that:

> the current common law and statutory requirements on directors and others to act in the interests of their companies are sufficiently broad to enable corporate decision-makers to take into account the environmental and other social impacts of their decisions, including changes in societal expectations about the role of companies and how they should conduct their affairs.[128]

CAMAC noted that a company may already choose (by resolution of shareholders) to hold itself to a particular approach to the conduct of its business by adopting some form of 'social responsibility' charter in its constitution. CAMAC concluded that a 'non-exhaustive catalogue' of interests to be taken into account would serve little useful purpose for directors and as such rejected the pluralist and elaborated shareholder benefit approaches. CAMAC therefore considered that amendments to the *Corporations Act* to have regard to certain matters of interest could be counterproductive and blur rather than clarify the purposes that directors are expected to serve.

Parliamentary Joint Committee on Corporations and Financial Services Corporate Responsibility Report

In June 2005, the Parliamentary Joint Committee on Corporations and Financial Services (PJC) resolved to inquire into corporate responsibility. Its inquiry had particular reference to a number of questions which are relevant to this paper. These are as follows:

- The extent to which organisational decision-makers have an existing regard for the interests of stakeholders other than shareholders, and the broader community.
- The extent to which organisational decision-makers should have regard for the interests of stakeholders other than shareholders, and the broader community.

[127] Submission 53.
[128] *CAMAC Report*, above n 7 at 111.

- The extent to which the current legal framework governing directors' duties encourages or discourages directors from having regard for the interests of stakeholders other than shareholders, and the broader community.
- Whether revisions to the legal framework, particularly to the *Corporations Act*, are required to enable or encourage incorporated entities or directors to have regard for the interests of stakeholders other than shareholders, and the broader community. In considering this matter, the Committee will also have regard to obligations that exist in laws other than the *Corporations Act*.
- Any alternative mechanisms, including voluntary measures that may enhance consideration of stakeholder interests by incorporated entities and/or their directors.
- The appropriateness of reporting requirements associated with these issues.
- Whether regulatory, legislative or other policy approaches in other countries could be adopted or adapted for Australia.

The PJC's report, 'Corporate Responsibility: Managing Risk and Creating Value'[129] was published in June 2006. The PJC concluded that no compelling case for change to directors' duties was presented during the inquiry. Further, the PJC considered that the existing network of social and environmental legislation provided sufficient regulation of the social and environmental performance of companies.

The PJC identified its preferred interpretation of the scope of directors' duties, although it is arguable that the PJC interpretation is different to that provided by CAMAC. The PJC stated:

> Directors' duties as they currently stand have a focus on increasing shareholder value. This is important, because the provision is first and foremost intended to protect those investors who trust company directors with their savings and other investment funds. Directors' duties enable such investors to have some confidence that their funds will be used in order to increase the income and value of the company they part-own.[130]

This resembles, to some extent, the interpretation of CAMAC – that the interests of the company are generally those of its shareholders. However, the PJC explicitly rejected what it termed the 'shareholders first' interpretation of directors' duties. The PJC defined this interpretation as follows: 'there is no particular objection to directors considering the interests of stakeholders other than shareholders, but the interests of shareholders must be the clear priority'.[131] The PJC stated that this interpretation of directors' duties is too constrained and stated that, in the view of the Committee, acting in the best interests of the corporation and acting in the best interests of the shareholders does not inevitably amount to the same thing.[132]

---

129 *Corporate Responsibility: Managing Risk and Creating Value,* June 2006, can be accessed at http://www.aph.gov.au/Senate/committee/corporations_ctte/corporate_responsibility/tor.htm .

130 Ibid at 59.

131 Ibid at 51.

132 Ibid at 52.

Here we detect a difference with the interpretation of directors' duties adopted by CAMAC because CAMAC defined the best interests of the company as the best interests of the shareholders – while acknowledging that directors could take into account the interest of other stakeholders if this benefits the shareholders.[133]

The PJC preferred what it termed the 'enlightened self-interest' interpretation of directors' duties. The PJC defined this as follows:

> The enlightened self-interest interpretation of directors' duties acknowledges that investments in corporate responsibility and corporate philanthropy can contribute to the long term viability of a company even where they do not generate immediate profit. Under this interpretation directors may consider and act upon the legitimate interests of stakeholders to the extent that these interests are relevant to the corporation. Chapter 3 of this report included discussion of the factors that drive corporate responsibility…These driving factors demonstrate how forward thinking directors, motivated by an enlightened approach to the company's self interest, can undertake activities which contribute to social wellbeing and environmental protection, and which are clearly in the best interests of the company from a commercial perspective.
>
> …
>
> The committee considers that the most appropriate perspective for directors to take is that of enlightened self-interest. Corporations and their directors should act in a socially and environmentally responsible manner at least in part because such conduct is likely to lead to the long term growth of their enterprise.[134]

An important observation to be made about the interpretation of directors' duties adopted by the PJC is that the Committee does not define what it means by the company. According to the PJC, the enlightened self-interest interpretation of directors' duties focuses on 'the long term viability' of the company and the 'best interests of the company from a commercial perspective'. CAMAC defined the best interests of the company as those of its shareholders, basing this interpretation on existing case law. The PJC does not define what it means by the best interests of the company and therefore the Committee does not engage with the important question that arises concerning what stakeholders' interests receive priority if there are conflicting interests among stakeholders. The CAMAC definition does provide an answer to this question if (a) the conflict is between the interests of shareholders and some other stakeholder group, (b) the company is solvent, and (c) the conflict is to be resolved under the law of directors' duties and there are no relevant statutes other than the *Corporations Act* that impact upon the decision of directors.

---

[133] See the text accompanying n 119 above. The statement by the PJC that acting in the best interests of the corporation and acting in the best interests of the shareholders is not the same thing could be reconciled with the view of CAMAC if the PJC was commenting on a company that is insolvent or nearly insolvent. In this situation, as we have seen, directors must consider the interests of creditors and the interests of creditors may receive a higher priority than the interests of shareholders. However, the PJC does not limit its statement to this situation.

[134] Ibid at 52 and 53.

It may be that one way to understand the interpretation of directors' duties adopted by the PJC is that it presents the company as an independent entity with its own interests that are separate to those of its stakeholders. Whether this has a sound basis in law is subject to some doubt. In *Greenhalgh v Arderne Cinemas Ltd,*[135] Evershed MR stated that the benefit of the company as a whole 'does not (at any rate in such a case at the present) mean the company as a commercial entity, distinct from the corporators: it means the corporators as a general body'. This statement was quoted with approval by the High Court of Australia in *Ngurli Ltd v McCann.*[136] The reference by Evershed MR to the case before him leaves open the possibility of the interests of the company as a commercial entity being a relevant consideration for directors. This was acknowledged by Hodgson J in *Darvall v North Sydney Brick & Tile Co Ltd,*[137] where he stated:

> In my view, it is proper to have regard to the interests of the members of the company, as well as having regard to the interests of the company as a commercial entity. Indeed, it is proper also to have regard to the interests of the creditors of the company. I think it is proper to have regard to the interests of present and future members of the company, on the footing that it would be continuing as a going concern.

Hodgson J here indicates that the interests of the company as a commercial entity are one of a set of interests that directors may consider, depending on the circumstances, although he does not indicate what priority each of these interests should receive.

On appeal, the decision of Hodgson J was affirmed. Only one judge, Kirby P, commented on the meaning of the interests of the company, and he stated that 'the court is not obliged to look at the company as in some way disembodied from its members'[138] which perhaps may be viewed as casting doubt on the view that the interests of the company can be viewed as a commercial entity separate to the shareholders of the company.

In *Kirwan v Cresvale Far East Ltd (in liq)*,[139] Giles JJA also expressed reservations about the interests of the company being the company as a separate enitity:

> The description of the power as a fiduciary power is because it must be exercised in the interests of another or others. Who or what is or are the other or others? To refer to the company as a whole leaves much unanswered. In law the company has an existence separate from its shareholders. But, as the passage from *Greenhalgh v Arderne Cinemas Ltd* [1951] Ch 286 at 291; [1950] 2 All ER 1120 at 1123 approved in *Ngurli Ltd v McCann* shows … the directors do not exercise their power according to the

[135] [1951] Ch 286 at 291.

[136] (1953) 90 CLR 425 at 438; [1953] HCA 39.

[137] (1987) 16 NSWLR 212 at 239-240; 12 ACLR 537; 6 ACLC 154.

[138] (1989) 16 NSWLR 260 at 281; 15 ACLR 230; 7 ACLC 659.

[139] (2002) 44 ACSR 21 at 56; [2002] NSWCA 395.

> interests of the company as a separate commercial entity. To refer to the corporators as a general body, however, is obscure and incomplete guidance to the interests.

If it is correct that the PJC interpretation is one that views the company as an independent entity with its own interests, this would mean that in some circumstances the directors would be able to make a decision that is in the interests of the company, as a separate entity, even where this decision went against the interests of one or more groups of stakeholders, including shareholders, creditors and employees. However, the PJC does not elaborate on the definition of directors' duties it prefers, so it is only possible to speculate concerning the content and meaning of this interpretation of directors' duties.

While providing its own interpretation of the scope of directors' duties, the PJC noted there is a wide variety of interpretations of the scope for directors to take into account stakeholder interests under the current law which leads to uncertainty for directors about the appropriate behaviour with regard to CSR strategies. The PJC described these different interpretations as follows (in addition to the 'shareholders first' interpretation discussed above): the *directors' restrictive interpretation*, under which directors claim that they are unable to undertake activities based on corporate social responsibility because such activities may not be directly 'in the best interests of the corporation'; the *shareholders' restrictive interpretation*, which objects to corporations providing philanthropic funds or acting with deliberate corporate responsibility because those funds could be invested in wealth generation (and thus returns to the shareholders); the *short term interests interpretation*, which allows that investment in corporate responsibility may be appropriate, but only if it can be justified on the basis of annual return on investment (competing with other possible investments); and the *enlightened self-interest interpretation*, which holds that careful and appropriate corporate responsibility is almost always in the interests of the corporation, and thus falls well within the behaviours permitted to directors under current legal duties.[140]

The PJC considered that directors who adopt a 'restrictive interpretation' approach to the current law are misinterpreting the law:

> The current directors' duties were intended to provide protection for shareholders, not to create a safe harbour for corporate irresponsibility. However, the committee also came to the view that this interpretation is relatively uncommon in corporate Australia. Most directors appear to readily accept that the current directors' duties allow them some leeway for corporate responsibility and philanthropy.[141]

The PJC also noted that where directors are uncertain about the proper course with regard to the adoption of a CSR strategy which would entail taking into account the interests of stakeholders' interests or corporate philanthropy, the directors could put the board policy to a shareholder vote. The PJC thus considered that those directors who adopt the 'directors' restrictive interpretation', the 'shareholders' restrictive

---

[140] Above n 129 at 46.
[141] Ibid at 49-50.

interpretation' or the 'short term interests interpretation' are adopting an interpretation of the scope of directors' duties that is too constrained. The PJC did not agree that 'acting in the best interests of the corporation and acting in the best interests of the shareholders inevitably amounts to the same thing'.[142] Instead, the PJC preferred the 'enlightened self-interest interpretation' of directors' duties under the current law which acknowledges that investments in corporate social responsibility can contribute to the long term viability of the company even where they do not generate immediate profit. Under this interpretation directors may consider and act upon the legitimate interests of stakeholders to the extent that these interests are relevant to the corporation.[143] As a consequence of seeing this as the preferred interpretation of the current law, the PJC saw no reason to recommend reform of directors' duties.

Conclusions regarding recent inquiries in Australia

As we have seen, both recent inquiries into whether reforms to directors' duties are required decided in the negative. Both did so on the basis that current corporate law is sufficiently permissive for directors to take into account non-shareholder interests. However, we also saw that the two inquiries adopted different interpretations of the scope of the duty to act in the best interests of the company.

6. Empirical Evidence in Australia

Other than the submissions of various companies and interest groups, the two Australian inquiries considered in the previous part of this paper lacked empirical evidence regarding how directors understand their obligations. Their determinations were based on whether the law reflected what directors ought to be doing, or the scope of the discretion that directors ought to have to make business decisions. They had no sense of whether the law was out of step with wider practice or consistent with it. A survey of Australian directors conducted by the Corporate Governance and Workplace Partnerships project[144] sheds light on these questions.

Methodology

The survey was undertaken using a self-completion, mail out survey form which was sent to 4000 company directors. Our sample was drawn from the Dun and Bradstreet 'Business Who's Who'.[145] Company directors were selected based on the following criteria:

- a roughly equal distribution of directors from companies in three sizes (by employee numbers): 50-100 employees; 101-250 employees and 250+ employees;

---

142 Ibid at 52.

143 Ibid at 52.

144 The website of the project is: http://cclsr.law.unimelb.edu.au/go/centre-activities/research/corporate-governance-and-workplace-partnerships-project/index.cfm.

145 This database can be accessed in book form as a yearly volume: *The Business Who's Who of Australia*, Sydney : R.G. Riddell, or as a website http://bww.dnb.com.au/advancedsearch.asp

- a random mix from all states; and
- a random mix of all industries.

We achieved a final sample of 375 usable completed surveys. This is a low response rate but not uncharacteristically low for surveys of this kind, i.e. of 'elite personnel'.[146] Around 200 surveys were returned due to incomplete or incorrect mailing details. A further 50 responded with apologies based on lack of availability of the directors or stated that company policy precluded the completion of surveys. The responses were from a cross section of small and large companies based on employee numbers and income, and a mix of listed and unlisted public companies and proprietary limited companies: 75.5 per cent of respondents were from proprietary limited companies rather than public companies, and only 16.5 per cent of respondents were from listed companies. Twenty-eight per cent had earnings of less than $20 million in the last financial year, 28.1 per cent had between $20 and $50 million, 12.7 per cent earned between $50 and $100 million, and 30.8 per cent had more than $100 million in earnings. Thirty two per cent of companies surveyed had less than 100 employees, 40 per cent had between 101 and 1000, and 30 per cent had more than 1000. Eighty three per cent of companies had no foreign ownership and 95.3 per cent had their company headquarters in Australia.[147]

Directors' understanding of their duties as directors

One of the central aims of the survey was to explore directors' understandings of their legal obligations and the way this might affect their approach to stakeholders. We were particularly interested in the extent to which shareholders were perceived to be the most important among several stakeholders. Do directors perceive that their primary obligation is to shareholders, either in the short term or long term, and, if so, is this partly a result of their understanding of the legal duties?

We asked directors to indicate which of four statements best represented their understanding of their obligation to act in the best interests of the company. We also asked them to indicate whether they believed the law required them to act only in the interests of shareholders or whether it allowed them to consider a broader range of stakeholders. Table 1 sets out the responses for these questions. A majority of directors understood that their primary obligation to act in the best interests of the company meant that they should balance the interests of all stakeholders (55 per cent). A further 38.2 per cent believed that they must, by means of acting in the interests of all stakeholders, ensure the long-term interests of shareholders. No directors believed that they were required to act in the short term interests of shareholders only and only a very small proportion (6.6 per cent) believed that they were required to act in the long term interests of shareholders only.

---

[146] See S. Jacoby, E. M. Nason and K. Saguchi, 'The Role of the Senior HR Executive in Japan and the United States: Employment Relations, Corporate Governance and Value' (2005) 44 *Industrial Relations* 207 at 216, and B. Agle, R. K. Mitchell and J. Sonnenfeld, 'Who Matters to CEOs? An Investigation of Stakeholder Attributes and Salience, Corporate Performance and CEO Values' (1999) 42 *Academy of Management Journal* 507 at 513.

[147] All of the survey findings are available as a research report at: http://cclsr.law.unimelb.edu.au/index.cfm?objectid=E3D38F25-B0D0-AB80-E2F1BF648C87997F.

On directors' understanding of the parameters of their obligation, it is very clear (as shown in the bottom of Table 1) that most directors take a broad view. Nearly all directors (94.3 per cent) believed that the law is broad enough to allow them to take the interests of stakeholders other than shareholders into account.

Table 1: Directors' Understanding of the Scope of Directors' Duties

Primary Obligation: I must act in the best interests of the company and this means acting in the….	Per cent Yes
Short term interests of shareholders only	0.0
Long term interests of shareholders only	6.6
Interests of all stakeholders to achieve short term interests of shareholders	0.3
Interests of all stakeholders to achieve long term interests of shareholders	38.2
Balancing the interests of all stakeholders	55
Parameters of Law on Directors' Duties	**Per cent Yes**
I must only be concerned with shareholders' interests	5.7
Allows me to take account of interests other than shareholders	94.3

n=368

These findings are in certain respects both consistent with *and* inconsistent with the PJC and CAMAC determinations. On the one hand, they indicate that both Committees were correct in stating that the current law is not inhibiting the pursuit of stakeholder interests by directors. Almost all respondents thought the law allowed them to take account of interests other than shareholders. Based on our assessment (in Part 3 of this paper) and also in the view of both inquiries, the respondents were justified in holding this opinion. On the other hand, it is the second most popularly held conception of directors' obligations that appears most consistent with the 'elaborated shareholder benefit' approach or the 'business' approach preferred by CAMAC. The understanding of obligations held by the majority of respondents to the survey (55 per cent) would seem to go beyond the preferred approach of CAMAC and possibly align more with the 'enlightened self interest' interpretation of directors' duties preferred by the PJC.

The survey instrument did not allow for an 'open ended' inquiry into what exactly

respondents had in mind by identifying ‘balancing the interests of all stakeholders’ in relation to a concrete business practice. The results reported in the following sections provide some insights, however.

Stakeholder ranking

An important question is whether directors acknowledge a primary obligation to the interests of shareholders. We tested this assumption in a number of ways. First, using a ranking exercise adapted from the Francis study[148] we asked directors to rank stakeholders in the order in which those stakeholders’ interests were prioritised. Second, we utilised a scale to assess the relative influence of key stakeholders over the decision making of directors. Third, we asked directors about the priority they assigned to certain specific shareholder-oriented matters such as dividend policy, share price and special dividends. These three tests enabled us to form an assessment of the shareholder orientation of the surveyed group.

Table 2 sets out the average ranking given to each stakeholder group, the percentage of directors who ranked that stakeholder group as their number one priority and the percentage of directors who included that stakeholder group as one of their top three priorities. It indicates that shareholders were most commonly ranked number one, followed closely by ‘the company’ according to both the average ranking and the percentage who ranked that group as their number one priority. These results differ from earlier research conducted, from which this ranking exercise was drawn. In 1997, Francis surveyed Australian and international company directors and found that a large majority of Australian directors ranked shareholders number one (74 per cent), regardless of the fact that their actual legal obligation was to the company.[149] We found that employees were highly ranked based on the average ranking given (2.87).[150] However, very few directors (6.7 per cent) ranked employees as their number one priority.

Table 2: Priority Ranking of Company Stakeholders#

Stakeholder	Average Ranking	Percentage Ranked 1	Percentage included in Top 3
1. Shareholders	2.23	44.0	78.2
2. The Company	2.25	40.4	71.1
3. Employees	2.87	6.7	72.8
4. Customers	3.53	8.2	44.8
5. Suppliers	5.99	1.2	3.9
6. Lenders/Creditors	5.83	0.6	10.6
7. The Community	6.43	0.3	3.4
8. The Environment	7.07	0.6	2.0
9. The Country	8.41	0.3	1.1

[148] I. Francis, *Future Direction: The Power of the Competitive Board*, FT Pitman Publishing, Melbourne 1997.

[149] Ibid at 354.

[150] Francis (ibid) also conducted the ranking exercise in the US and Japan. The rankings made by respondents to our Australian survey sit somewhere between US and Japanese rankings. According to Francis, eight out of ten US directors gave shareholders a number one ranking compared with one out of nine Japanese directors.

n= 356
# Directors were asked to rank the list of stakeholders in order of priority between 1 and 9 with 1 being highest priority. The smaller the average rank, the higher the priority.

These findings indicate that although directors believe their obligation is to balance the interests of all stakeholders, they nonetheless rank shareholders first amongst those stakeholders.

Stakeholder 'salience'

In order to obtain further information about what it means that shareholders are the highest ranking stakeholders we measured the influence of shareholders, employees and creditors using a scale devised in research conducted in the US by Agle, Mitchell and Sonnenfeld into which stakeholders matter most to CEOs.[151] Agle et al sought to move beyond the assumption that stakeholders have a fixed position of influence in relation to the company and devised a model of salience (as they call it) or influence which is based on the assumption that salience depends upon managers' perceptions of the power, urgency and legitimacy of stakeholders.

Modifying Agle et al's test somewhat, a series of propositions was presented to the surveyed group concerning the relative influence of shareholders, employees and creditors. The scale was comprised of seven items: directors were asked to rate the extent to which they agreed or disagreed with certain statements on a scale of 1 (strongly agree) to 5 (strongly disagree). Table 3 sets out both the proportion of directors who agreed with each proposition (in relation to shareholders) and the mean score for that proposition for shareholders, employees and creditors.

[151] B. R. Agle, R.K. Mitchell and J.A. Sonnenfeld, 'Who Matters to CEOs? An Investigation of Stakeholder Attributes and Salience, Corporate Performance and CEO Values' (1999) 42 *Academy of Management Journal* 507-525, Special Research Forum on Stakeholders, Social Responsibility and Performance, Appendix, Table A (with minor modification – some of the items were removed because of duplication).

Table 3: Comparison of Shareholders, Employees and Creditors Salience

Statement	S/H per cent of Directors Agree*	S/H Mean score#	Emp'ees per cent of Directors Agree*	Emp'ees Mean score#	Cred's per cent of Directors Agree*	Cred's Mean Score#
Had the power to influence management	81.2	4.03	78.0	3.74	23.6	2.44
Were active in pursuing demands or wishes which they felt were important	66.5	3.61	65.4	3.48	20.3	2.37
Actively sought the attention of our management team	64.6	3.54	70.5	3.60	21.6	2.39
Urgently communicated their demands or wishes to our company	48.8	3.20	47.0	3.14	19.6	2.35
Demands or wishes were viewed by our management team as legitimate	78.7	3.88	76.7	3.83	47.3	3.17
Received a high degree of time and attention from our management team	65.0	3.61	85.9	4.03	30.4	2.63
Satisfying the demands or wishes of this stakeholder group was important to our management team	83.3	4.02	87.9	4.04	54.7	3.22

* Includes responses 'strongly agree' and 'agree'

\# In this scale 5 is strongly agree and 1 is strongly disagree

The table demonstrates that both the power of shareholders and the legitimacy of their interests remain a high priority in the perception of directors' interests. The items 'shareholders had the power to influence management' and 'satisfying the demands or wishes of shareholders was important to our management team' achieved the highest scores and had the largest proportion of directors who agreed. The item 'shareholders demands or wishes were viewed by our management team as legitimate' also scored highly. On the other hand these high levels of legitimacy and power do not seem to be associated with similarly high levels of activity on behalf of shareholders as measured by the items 'shareholders were active in pursuing demands or wishes', 'shareholders actively sought the attention of our management team' and 'shareholders urgently communicated their demands or wishes to our company'. This suggests that shareholder power and the legitimacy of shareholder interests for directors arise, at least in part, independently of any direct pressure exercised by shareholders over directors in terms of governance strategy. In other words, shareholders have a level of power that is partly independent of their specific demand activity. Taken as a whole, though, these outcomes establish that 'shareholder primacy' is prominent in the attitudes of our respondent company directors.

When we further examine the break-downs for the items in the salience scale we see that with the exception of one item, the proportions and the scores are similar for both shareholders and employees. The exception to this is the item 'received a high degree of time and attention from our management team' with which 65 per cent of directors agreed in relation to shareholders compared with 85.9 per cent in relation to employees. Creditors are the least influential of the three stakeholders groups. Significantly smaller proportions of directors agreed with all of the items that comprise the scale in relation to creditors. The items 'creditors' demands or wishes were viewed as legitimate' and 'satisfying the demands of creditors was important to our management team' had the largest proportion of directors agreeing with them and yet this was only around half of the directors (47.3 per cent and 54.7 per cent respectively). These findings suggest that creditors have some degree of legitimacy (although lower levels of legitimacy than shareholders and employees) but low levels of power and urgency.

Does high shareholder salience make a difference?

A key issue regarding the debate about the preferred formulation of directors' duties is to what extent a particular formulation affects corporate behaviour. There is very little detailed discussion on this point in policy debates and the literature does not provide much insight into whether reforms to corporate law along the lines of the US constituency statutes have resulted in changes in corporate practice. Looking behind the assertions made in the submissions to the inquiries examined in this paper, it might be said that advocates for a stakeholder conception of directors' duties believe such reforms will impact positively on corporate behaviour. This is particularly the case where directors are *required* to take account of non-shareholder stakeholder interests. Some of those who prefer the status quo with respect to directors' duties argue that reforms to directors' duties will not produce the desired results and in fact will have negative consequences.

Data from our project provide further insights which may better inform this debate. First, the data discussed thus far shows there is a certain amount of decoupling of corporate practice and formal obligations. Second, it shows that, even within the scope of formal directors' duties, directors are always juggling and balancing interests. This is at the heart of their job as the chief strategists or stewards (depending on the conception of their role in the company) of the business. Third, there is no reason to assume coherence within companies in relation to ranking stakeholders. In the course of case studies associated with the research we repeated the stakeholder ranking exercise with a range of management personnel.[152] We found no coherent approach to ranking stakeholders within any given company. For instance, the person responsible for human resource management and for ensuring that employment laws are complied with generally had a different view of obligations than the company secretary.

The results reported in this section provide further understanding of the extent to which shareholder salience (or influence) was consistent with particular business practices or priorities on behalf of directors. This is important from a public policy perspective because it is generally assumed that having a 'shareholder primacy' corporate governance strategy will result in the privileging of shareholder interests to the detriment of other stakeholders. In particular, it is assumed that those directors who prioritise shareholder interests will be less responsive to employees' needs and implement policies which are detrimental to employee consultation, as well as pay and conditions. This is one of the bases for arguing for a stakeholder approach.

We asked directors to rate a series of items on a scale indicating the importance of the items to the director.[153] Table 4 shows the items that were important to directors overall and the comparison between directors in the high range of the shareholder salience scale and those in the low range. As can be seen, there are very few differences across the groups. Ensuring that customers and clients were satisfied was the most important item to directors (97.4 percent of whole sample). Growing the business was also very important (95.4 percent of sample) as was ensuring employees are fairly treated (94.2 percent of sample), with improving productivity highly important as well (92.8 percent). Interestingly, and contrary to the assumption that the shareholder primacy model of governance would lead to the prioritisation of shareholders' interests by directors, the results show that generally the items that relate to employees' interests (morale, fair treatment, safeguarding jobs and creating more job opportunities) were rated as more important by more directors than those relating to shareholders' interests (dividend policy, share price and special dividends).

It is also noteworthy that the only statistically significant difference between the

[152] *See Corporate Governance and Workplace Partnerships Case Studies* which is available at: http://cclsr.law.unimelb.edu.au/go/centre-activities/research/corporate-governance-and-workplace-partnerships-project/index.cfm

[153] This question was adapted from S. Jacoby, E. Nason and K. Saguchi, 'The Role of the Senior HR Executive in Japan and the United States: Employment Relations, Corporate Governance and Values" (2005) 44 *Industrial Relations* 207. They present results for their key executive values for Japanese directors and for Japanese human resource executives, US human resource executives, and US chief financial officers.

responses of directors was that directors in the high range of the shareholder salience scale rated ‘ensuring employees are fairly treated’ as significantly more important than did directors who were in the low range of the scale. Directors who rated shareholder salience highly were not, however, more likely to view the items relating to shareholders as more important than directors who gave it a lower rating.

Table 4: Importance to You as a Director

Item	percent of whole sample important#	percent of high shareholder salience important# (n=264)	percent of low shareholder salience important# (n=63)
Dividend Policy	41	43.7	33.3
Growing the Business	95.4	95.4	96.7
Improving Employee Morale	87.3	87.5	86.9
Creating Job Opportunities within the Company	46.3	46.7	43.3
Improving Productivity	92.8	93.8	91.8
Ensuring Customers/Clients are Satisfied	97.4	97.3	96.7
Making a Contribution to Society	32.1	31.6	26.7
Increasing Share Price	45.0	48.1	37.5
Diversifying and Expanding into New Markets	48.8	49.8	37.5
Safeguarding Existing Employee Jobs	66.2	63.8	70.0
Reducing Costs	80.1	81.1	76.7
Ensuring Employees are Fairly Treated	94.2	95.7	86.7**
Ensuring Other Stakeholders are Satisfied	67.2	68.5	60.0
Special Dividends	6.6	6.9	5.0

\# Where rated either most or very important

** Significant at 1 percent level, significant difference is between high and low shareholder groups

We tested the extent to which the company's relationship with shareholders may be affected by the degree of salience and found some statistically significant differences between the responses of directors in the high range and those in the low range of the shareholder salience scale. As would be expected, in companies where directors rated shareholder salience as high, the person who deals with shareholders does so more frequently than those in the low range of the scale. Additionally, shareholders raised particular issues more frequently in companies where shareholder salience was in the high end of the scale. Table 5 sets out the responses to this question.

Table 5: Dealing with Shareholders

Dealings with Shareholders	High shareholder salience per cent (n=264)	Low shareholder salience per cent (n=63)
Frequency of Dealing with Shareholders (per cent indicating daily or weekly contact)#	49.2	34.9*
How often issues discussed	Per cent sometimes or often	Per cent sometimes or often
Dividend Policy	51.4	47.5
Financial Performance of Company	96.2	88.3*
Social / Environmental Performance of Company	43.7	28.1*
Expenses	81.3	53.3**
Share Price	40.5	38.9
Expenditure/Investment	85.5	70.0**
New Business Strategy	83.7	78.3
Corporate Governance Concerns	52.3	42.1
Executive Remuneration	48.9	32.2*
Capital Management Strategy	68.1	50.0**
Human Resource Management Strategy	68.4	55.2

* significant at 5 per cent level, ** significant at 1 per cent level
\# Frequency with which person who deals with shareholders does so (not necessarily respondent director)

It can be seen that there were highly significant differences between the responses of directors in the high range of the shareholder salience scale and those in the low range regarding the frequency with which matters to do with expenses, expenditure or investment, and capital management strategy were raised. There were significant differences in the frequency with which financial performance of the company,

social or environmental concerns, and executive remuneration were raised – again, being more frequently raised in companies where directors were in the high range of the scale than in the low range.

It is interesting to note the relatively high proportion of each group that reported that shareholders had discussed matters to do with the company's human resources strategy with management. For directors in the high range of the shareholder salience scale, the percentage was 68.4 compared with 55.2 per cent of directors in the low range.

Another highly significant difference (which is not shown in the tables) emerges in response to the question about whether there had been areas of tension between company direction and shareholder expectations in the past twelve months. In companies where shareholder salience was rated as high, 30 per cent of directors indicated that there had been areas of tension compared with only 12.7 per cent of companies where directors were in the low range – a difference significant at the one per cent level. This probably reflects higher levels of engagement between the company and shareholders in these companies. However, there was only one significant difference in the responses indicating what the area(s) of tension were and this was that directors in the low range of the shareholder salience scale were more likely to report tension over the dividend policy or payout ratio (62.5 per cent of 'low shareholder' salience compared with 19.8 per cent of 'high shareholder' salience, significant at the one per cent level).

The three most common areas of tension indicated by directors in the high range of the shareholder salience scale were financial performance of the company (64.2 per cent of these directors indicated there had been areas of tension), new business strategy (38.3 per cent) and expenditure / investment (32.1 per cent). For directors in the low range of the shareholder salience scale, the three most common areas of tension were dividend policy (62.5 per cent of these directors indicated there had been tension), financial performance of the company (62.5 per cent) and expenditure or investment policy (25 per cent). Only a small proportion of either group reported tension over the human resources strategy, with 13.6 per cent of 'high shareholder' salience directors and 12.5 per cent of 'low shareholder' salience directors.

Having examined the relationship between directors and shareholders to assess the extent to which the respondent directors' sense of shareholder salience appears to make a difference to this relationship, we move to examine the situation in relation to employees. Just as we asked directors about the company's relationship with its shareholders, we asked about the relationship with employees. If shareholders were seen to be important and influential, then employees' interests and demands might receive a lower priority from directors. The results are presented now along with comparisons of the responses of directors in the high range of the shareholder salience scale and those in the low range.

We asked directors to indicate the issues concerning employees below executive level which had been raised at board level over the past twelve months. Table 6 shows those results.

Table 6: Human Resources Issues Raised at the Board

HR issues raised at board	Per cent of whole sample raised 3 or more times	Per cent of high shareholder salience raised 3 or more times (n=264)	Per cent of low shareholder salience raised 3 or more times (n=63)
Remuneration	37.1	37.9	35.5
Productivity	66.3	65.4	68.3
Performance Management	64.2	63.0	71.4
Industrial Disputes	10	10.2	6.5
Enterprise Bargaining	15.4	15.9	14.5
Restructuring or Retrenchments	16.1	18.9	4.8**
Employee Share Schemes	15.8	17.2	14.5
Work Organisation	56.9	57.6	61.3
Training	65.0	65.0	63.9
Occupational Health and Safety	73.3	71.6	74.2

** significant at 1 per cent level, significant difference is between high and low shareholder groups.

As can be seen, the most striking finding is that directors in the high range of the shareholder salience scale were significantly more likely to report that restructuring or retrenchments concerning employees below executive level had been considered by the board during the previous twelve months (18.9 per cent) than directors in the low range (4.8 per cent). A similarly significant and related finding (not shown in the above table) is that directors in the high range of the shareholder salience scale were more likely to report that staff numbers had decreased in the past year (20.4 per cent) than those in the low range (7.9 per cent). This finding seems to provide some support for the view that a strong shareholder orientation in companies may lead to an emphasis on costs and job reduction.

We also examined differences between stakeholder and shareholder oriented directors in relation to their beliefs about the source of their obligation to employees and the role that the law plays in relation to the human resources strategy of the company.[154] We asked directors to identify which of four possible sources was the dominant source of their obligation to employees. Most directors reported that they derive their sense of obligation toward employees from sources

[154] For this analysis we created two groups of directors. The 'stakeholder oriented directors' are those who responded that they are required to 'balance the interests of all stakeholders'. The 'shareholder oriented directors' are those who equated the best interests of the company with the long or short term interests of shareholders.

other than law. Forty-two per cent reported that it was business imperatives that underpinned their obligation to employees. A further 24.8 per cent believed that they had ethical or social responsibilities to ensure the well being of employees and this was the dominant source of obligation. A slightly higher proportion of directors (16.9 per cent) believed that their obligations stemmed primarily from corporate law, than did so in relation to labour law (15.8 per cent). We cross-tabulated these findings with data regarding directors' understanding of their obligations. Table 7 shows the responses for both stakeholder and shareholder oriented directors.

Table 7: Dominant Source of Obligation to Employees by Director's Orientation

Dominant Source of Obligation to Employees	Stakeholder Oriented Group (n=195)	Shareholder Oriented Group (n=155)
Labour Laws	14.3	17.3
Corporate Law and Directors' Duties	16.3	17.9
Business Imperatives	39.9	47.5
Ethical or Social Values	29.6	17.3**

** significant at 1 per cent level

As can be seen, the stakeholder oriented group was statistically more likely to indicate that the dominant source of obligation to employees was ethical or social values (29.6 per cent) than were shareholder oriented directors (17.3 per cent). The dominant source of obligation for both groups was business imperatives (39.9 per cent of stakeholder oriented directors and 47.5 per cent of shareholder oriented directors).

Finally, regarding the relationship with employees we asked directors whether they viewed this relationship as a partnership. Many authors suggest that groups with a stake in the company should have some ability to influence decision making in the company, not merely to have their interests taken into account by directors. Deakin et al, for instance describe the importance of partnership for stakeholders as follows:

> . . . [T]o qualify as an 'influential stakeholder group' within an enterprise, employees 'must bear significant residual risks, contribute valued resources, and have sufficient power to affect organizational outcomes'… In other words, employees must not only put valued resources at risk, in the sense of incurring costs if the enterprise fails or their relationship with it terminates; management must in return accept that employees should be able to exercise a degree of power in the context of corporate decision making. At the very least, this implies that they should be meaningfully informed and consulted when decisions over the shape and structure of the enterprise are made

(footnote omitted).[155]

In light of the importance of partnership to the concept of stakeholding, we asked our survey respondents to indicate whether they conceived of the relationship between their company and its employees as being one of partnership. We also asked them to indicate whether, if they did conceive of a partnership, it was founded on the alignment of interests between employees and the company or whether it allowed for difference of interests. If they did not think that a partnership style relationship was operating, we asked them to identify the reason for this. The responses are shown in the following tables (Table 8 contains the 'yes' responses and Table 9 contains the 'no' responses) cross-tabulated with shareholder salience findings.

Table 8: Yes to Partnership between Company and Employees

Partnership with Employees?	Per cent of Whole Sample - Yes	Per cent of High Shareholder Salience –Yes (n=264)	Per cent of Low Shareholder Salience –Yes (n=63)
Is the relationship between the company and its employees best described as one of partnership?	76.9	75.8	76.2
If yes, which of the following best describes your understanding of that partnership?			
Company and employees are parties with **separate** interests working toward common goals	29.2	30.2	25.5
Company and employees are parties with **same** interests working toward common goals	70.8	69.8	74.5

155 S. Deakin, R. Hobbs, S. Konzelmann and F. Wilkinson, *Partnership, Ownership and Control: The Impact of Corporate Governance on Employment Relations*, ESRC Centre for Business Research, University of Cambridge, 2001.

Table 9: No Partnership between Company and Employees

Partnership with Employees?	Per cent of Whole Sample - No	Per cent of High Shareholder Salience – No (n=264)	Per cent of Low Shareholder Salience – No (n=63)
Is the relationship between the company and its employees best described as one of partnership?	23.1	24.2	23.8
If no, which of the following best describes your understanding of the relationship between the company and its employees?			
Company and employees are parties with same interests, with employees working under direction to further company goals	38.3	41.3	26.7
Company and employees are parties with separate and sometimes conflicting interests	18.5	17.5	26.7
Company and employees cannot be conceived of separately – employees are part of the company	43.2	41.3	46.7

We can see that a large majority of directors conceived of the relationship between the company and its employees as being one of partnership. This did not vary between directors in the high range and those in the low range of the shareholder salience scale. In terms of the type of partnership, a large majority of directors, around 70 per cent, saw the company and its employees as parties with the same interests working toward common goals. Again, the importance of shareholders within the company did not have a significant effect on this response.

In the smaller proportion of directors who did not describe the relationship between employees and the company as being one of partnership, the most common reason identified was that employees are part of the company and so cannot be conceived of separately. There were no significant differences in this respect between directors in the high range and those in the low range of the shareholder salience scale.

Conclusions regarding survey data

To summarise, then, one of the major purposes of the survey was to determine whether directors adhere to a 'shareholder primacy' understanding of their responsibilities, as is often believed to be the case with Australian directors. We expected that this understanding would derive from a number of sources, including

understandings of legal obligations, institutional frameworks and business imperatives. Our findings in this regard were mixed, and it cannot be said that the data confirmed the 'shareholder primacy' view, regardless of how broadly 'shareholder primacy' is defined (ie, whether shareholder primacy is regarded as involving the prioritisation of shareholder interests in the short term or the long term, to the exclusion or detriment of other stakeholders' interests). The first of our findings in this regard was that the majority of directors surveyed had what might be termed a 'stakeholder' understanding of their obligations. Just over half of the respondents believed that acting in the best interests of the company meant they are required to balance the interests of all stakeholders. Furthermore, whilst 44 per cent of directors perceived shareholders as their number one priority, almost as many (40 per cent) regarded the company as their number one priority. However, questions which sought to test the shareholder primacy thesis in a more complex way did provide support for the argument that shareholder interests are prioritised over those of other stakeholders in relation to business practices. When shareholder 'salience' (influence and ability to make demands) was measured relative to the salience of other stakeholders, shareholders had a higher level of salience than employees and creditors.

One of the main concerns of advocates of a stakeholder approach to directors' duties is that where directors perceive that their primary responsibility is to shareholders, the interests of employees and other stakeholders receive a lower priority. The evidence on this matter from our survey data was mixed. Questions regarding directors' understandings of their obligations under the law did not suggest that prioritising shareholders' interests resulted in a diminution or de-prioritising of employees' interests. However, when we tested this issue using the 'salience' scale as a measure of the orientation towards shareholders and cross-tabulated it with other measures, we found some evidence that employees' interests may receive a lower priority. For instance, those directors in the high range of the shareholder salience scale were more likely to indicate that matters relating to restructuring and retrenchment had been discussed at the board level over the past year than those directors in the low range of the scale. On the other hand, dividend policy and increased share price ranked relatively poorly as against job security and employee morale in the list of specific corporate agenda items put to directors.

7. Assessment of the Reports of the Inquiries in Light of this Evidence

The question in whose interests directors of Australian companies should act is one which has not been settled satisfactorily in Australia. The CAMAC and PJC inquiries decided that maintaining the status quo was appropriate as the current law of directors' duties provides sufficient flexibility for directors to determine what they think is in the best commercial interests of the company. However, we also saw that while the two inquiries reached the same conclusion regarding whether any reform of directors' duties is needed, the two inquiries adopted different interpretations of the scope of the existing law of directors' duties. We have also seen that differences exist in the scope of directors' duties in the corporate law statutes of some other countries.

When we compare the findings of the two recent inquiries with the results of the survey data reported in this paper, a number of observations can be made:

1. The survey data indicates that 94.3 per cent of directors believe that the existing law of directors’ duties allows them to take account of the interests of stakeholders other than shareholders. This is consistent with the interpretation of directors’ duties adopted by both CAMAC and the PJC.
2. In relation to directors’ understanding of the scope of their duties, the survey data indicated that 55 per cent believe that acting in the best interests of the company means balancing the interests of all stakeholders and 38.2 per cent believe that it means acting in the interests of all stakeholders to achieve the long terms interests of shareholders. The larger group of the directors (the 55 per cent group) adopts the interpretation of directors’ duties preferred by the PJC – what the Committee referred to as the ‘enlightened self-interest interpretation’ whereby the interests of the company, arguably as an entity separate to the company’s stakeholders, are paramount. The smaller group of directors (the 38.2 per cent group) adopts the interpretation of directors’ duties preferred by CAMAC.
3. These different interpretations also appear in other data from the survey. We saw that in terms of priority ranking of interests, shareholders and ‘the company’ were ranked almost equally by directors as the most important priority.
4. Other data from the survey indicated that shareholders and employees have approximately equal influence with company management (and much more influence than creditors) although a notable difference was that employees receive significantly more time and attention from management than shareholders.
5. There is also evidence that some matters relating to the interests of employees (such as improving employee morale, ensuring employees are treated fairly, and safeguarding existing employee jobs) are rated by directors as more important than some matters relating to the interests of shareholders (such as dividend policy and increasing the company’s share price).

Do these results indicate any need for reform of directors’ duties? As we have seen, proposals for reform of directors’ duties have been widely debated. One possible approach, considered by CAMAC, is an amendment to s 181 of the *Corporations Act* that would expressly permit directors to take into account the interests of specific classes of stakeholders, extending beyond shareholders. This approach is reflected in s 172 of the UK *Companies Act*. Critics of this approach who prefer the status quo argue such reform will only confuse directors as they try to work out how to balance various interests. Our survey results demonstrate, however, that directors are already doing exactly this and they are not looking to formal rules to guide them in this process. They are guided by business imperatives and other considerations. On the other hand, reform of this minimal variety will not ‘compel directors who may not always follow prudent practices, to adhere to appropriate standards of corporate social responsibility’, as is the wish of advocates of change such as the NSW Attorney General.[156] This type of reform only permits directors to take into account the interests of non-shareholder stakeholders – something they can already do under the existing law.

[156] See n 127 above and the accompanying text.

An extended approach which compels directors to take into account the interests of non-shareholder stakeholders would require much more. Our study of the law and international developments suggest that this legal guidance would need to address a number of issues. The first amongst these is whether the statute is to create enforceable rights for certain stakeholders, and if so, which ones and how they are to be enforced (ie, as derivative rights on behalf of the company or personal rights). The literature indicates that without enforceable rights constituency statutes elsewhere in the common law world are making very little difference to stakeholders. Further, there is a risk that they simply entrench managerial power. A further challenge therefore is how to ensure that shareholder rights are not rendered less enforceable by directors being able to argue that, in making a certain decision, they were exercising their option to prefer other interests.

The main problems with expanding directors' duties were succinctly identified in 1989 by the Senate Standing Committee on Legal and Constitutional Affairs:[157]

> 2.19 To be successful, enterprises need as a rule to take into account their employees, their customers and the community, as well as their shareholders. Evidence before the Committee emphasised this: it was pointed out that, as a matter of reality, directors already take into account the various interests their decisions might affect. It was urged upon the Committee by some that the imposition of wider duties was therefore unwarranted.
>
> 2.20 To require directors to take into account the interests of a company's employees, its creditors, its customers, or the environment, as well as its shareholders, would be to require them to balance out what would on occasions be conflicting forces. To make it optional for directors to take into account the interests of a company's employees, its creditors, its customers, or the environment, as well as its shareholders, again would mean that directors would be in the position of weighing up the various factors. It would also limit the enforceability of shareholders' rights if directors were able to argue that, in making a certain decision, they had been exercising their option to prefer other interests.
>
> 2.21 If contemporary public policy requires either of these approaches, then a re-think of some of the fundamentals of company law would be required.

The fact that similar arguments were made almost 20 years later in submissions to the CAMAC and the PJC inquiries demonstrates the persistence and force of this debate.

The results of the survey indicate that directors do not typically look to the law of directors' duties for specific guidance concerning the interests they should pursue

---

[157] Senate Standing Committee on Legal and Constitutional Affairs, *Company Directors' Duties: Report on the Social and Fiduciary Duties and Obligations of Company Directors* (Australian Government Publishing Service, November 1989, see http://www.takeovers.gov.au/display.asp?ContentID=542), at 12.

as directors. Rather, that specific guidance is found in a raft of statutes other than the *Corporations Act* if they look to the law at all. In any case, they are more likely to be guided by business imperatives and ethics.

In their interpretations of directors' duties, the courts have offered flexibility to directors to consider a wide range of interests provided that the interests of shareholders are thereby served. The courts have also indicated how the interests of the company shift so that the interests of creditors can assume greater importance than the interests of shareholders when a company is insolvent or nearly insolvent.

An important finding of the study is that ambiguity exists among the directors surveyed concerning the permissible scope of their duties. We have also seen that the CAMAC and PJC inquiries adopted different interpretations of the scope of directors' duties. This may be an argument for some clarification of the law - not necessarily to have a non exhaustive list of the interests directors may consider such as the list in s 172 of the UK *Companies Act* but at least to clarify for directors which of the interpretations is to be preferred.

At the same time, we should be cognisant of what appear to be significant limitations on the influence of the duty to act in the best interests of the company on the actual decision making of directors. The fact that large proportions of directors surveyed can adopt different interpretations regarding the scope of the duty to act in the best interests of the company and yet this has not apparently lead to significant litigation or other challenges to the decisions of these directors may tell us something about the limited role of this duty compared to other obligations and duties that influence decision making by directors. The function of this duty may be to set very broad parameters within which directors operate and it will usually only be egregious cases where directors' decisions are successfully challenged under this duty. The duty therefore permits extensive balancing of stakeholders' interests by directors within the broad parameters set by the duty.

This does not mean the duty is unimportant. There are of course some notable cases concerning the duty to act in the best interests of the company. The often cited *Kinsela v Russell Kinsela Pty Ltd (in liq)*[158] is important for the significance it places on the interests of creditors when a company is insolvent or nearing insolvency.[159] There is also an important series of cases on the meaning of the interests of the company when the company in question forms part of a corporate group.[160] A notable feature of recent Australian cases in which the actions of directors have been held to breach the duty to act in the best interests of the company is that they often involve the director pursuing a personal interest at the expense of the interests of the company.[161] However, where such a personal interest

158 (1986) 4 NSWLR 722; 10 ACLR 395; 4 ACLC 215.

159 See A. Keay, 'The Director's Duty to Take Into Account the Interests of Company Creditors: When is it Triggered?' (2001) 25 *Melbourne University Law Review* 315.

160 See, for example, *Equiticorp Finance Ltd (in liq) v Bank of New Zealand* (1993) BSWLR 50; 11 ACSR 642; 11 ACLC 952; *Maronis Holdings Ltd v Nippon Credit Australia Pty Ltd* (2001) 38 ACSR 404 and *Lewis (as liq of Doran Constructions Pty Ltd (in liq) v Melwren Pty Ltd (in liq)* (2005) 54 ACSR 410.

161 Cases in this category include *Lawfund Australia Pty Ltd v Lawfund Leasing Pty Ltd* (2008) 66 ACSR 1; [2008] NSWSC 144; *Australian Securities and Investments Commission v*

is not present, courts will typically not interfere with a good faith decision of directors that balances stakeholders' interests provided the decision is within the broad parameters established by the courts. When directors privilege investor interests at critical times in the life of the company, to the detriment of other stakeholder interests, this is likely to have more to do with competitive business pressures than corporate law.

Warrenmang Ltd (2007) 63 ACSR 623; 25 ACLC 1589; [2007] FCA 973; *Kalls Enterprises Pty Ltd (in liq) v Baloglow* (2007) 63 ACSR 557; 25 ACLC 1094; [2007] NSWCA 191; *Australian Securities and Investments Commission v Maxwell* (2006) 59 ACSR 373; 24 ACLC 1308; [2006] NSWSC 1052; and *Australian Securities and Investments Commission v PFS Business Business Development Group Pty Ltd* (2006) 57 ACSR 553; [2006] VSC 192.