Directors' duties to the company and minority shareholder environmental activism

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The ideological chasm between environmentalism and a profit driven corporate agenda at times seems insurmountable. Environmental regulation at present is highly reliant upon statutory regulation and governmental intervention whilst corporations law is based to the greatest extent possible on an ideology of non-interventionist, free-market, profit driven capitalism. Despite this, company law remedies, largely unexplored by environmentalists, may provide novel scope to challenge the poor environmental behaviour of directors of corporations. This article examines the possible ways in which standard common law and statutory remedies in company law can be called in aid of the environment.

INTRODUCTION

Environmental law in its current form provides limited scope for individuals to achieve goals of conservation and ecologically sustainable development[1] in relation to the activities of large public corporations. It has thus far been contained within public law models of criminal law or at least quasi-criminal regulation[2] or through planning regimes administered by authorities. One of the chief legal impediments facing environmentalists has been that the public nature of environmental concerns has caused legislators and the judiciary to perceive environmental law as lying almost exclusively within the province of public law. Within this context environmentalists have experienced difficulties in establishing standing or causes of action to bring private enforcement proceedings.

The use of quasi-criminal law in particular has led to frustrations for environmentalists because, as third parties, they have little or no influence over prosecutorial discretions and often perceive too close a relationship developing between regulators and the regulated. Furthermore as David Farrier points out, the use of quasi-criminal law against industry makes it possible for industry to resort to the rhetoric of due process in its own defence, which has led him to suggest "that the use of criminal law in its deterrent mode is not only non productive but counter productive".[3]

Planning law as a focus for environmental enforcement by third parties has yielded far more successful results, partly as a result of the open standing provisions often included within planning statutes, but recent experience in New South Wales in relation to forestry disputes demonstrates that these rights are vulnerable to legislative removal especially where they have been used to effect by environmental advocates.[4]

In response to the existing impediments to environmental enforcement by third parties, environmentalists need to consider strategies that maximise the use of the principles and remedies within other branches of the law. Whilst private enforcement is sometimes available in tort law

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[1] Ecologically Sustainable Development originated in the World Commission on Environment and Development, *Our Common Future*, Brundtland Report, 1987. Development was defined as sustainable "if it meets the needs of the present without compromising the ability of future generations to meet their own needs", Rosemarin A, in Bedder S, *The Nature of Sustainable Development* (Scribe Publications, 1993).

[2] Farrier D, in Bonyhady T (ed), *Environmental Protection and Legal Change* (Federation Press, 1992) pp 80-83.

[3] Farrier, n 2, p 108.

[4] Ricketts A and Rogers N, "Third Party Rights in NSW Environmental Legislation: the Backlash" (1999) 16 EPLJ 157.

through actions in private nuisance, public nuisance or negligence in relation to environmental concerns,[5] the issue of locus standi continues to strictly limit the scope for such actions.

Corporations law remains a hitherto largely unexplored field which offers unique solutions to questions of locus standi for environmental advocates, and provides powerful internal mechanisms for the enforcement of environmental regulation. Corporate law principles dealing with the rights of minority shareholders and the notions of participatory corporate governance, in theory, provide small shareholders with access to the courts, whilst the law governing the duties of directors provides powerful means for enforcing compliance with external environmental standards. For environmentalists, the issue of corporate governance becomes all the more crucial as the national and international agenda of privatisation continues apace, and activities formerly considered core activities of government are increasingly administered by the private sector.[6]

Objectives

This article investigates the use of the *Corporations Act 2001* (Cth) and the common law that applies to companies as mechanisms to discourage environmentally destructive activities of corporations. Specific questions to be addressed are:

- Are directors breaching their statutory or general law duties *to the company* by not taking all steps to prevent the company from breaching environmental laws or by causing the company to breach those laws?
- What lawful means exist in corporations law to allow environmentalists to challenge conduct of corporations which they perceive as harming the environment (whether or not these activities constitute breaches of environmental statutes)?

Embodied in corporations law is a tense balance of power between the general meeting and the board.[7] Notwithstanding certain rights afforded to minority shareholders, the corporations law strongly reflects majority rule. This is magnified through *Foss v Harbottle* (1843) 2 Hare 461; 67 ER 189 and constitutional clauses typified by the replaceable rule in s 198A of the Act, which ensures company business is to be managed by or under the control of the directors and not by directors acting as agents of the shareholders.[8] Any argument that this is undemocratic is circumvented by the conferral of powers to remove a director: ss 203C, 203D. Therefore the holder of a majority shareholding can expect to elect the whole board and thus control the company. It has been said:

> the legal model of the company, which separates ownership and management but still asserts ultimate control resides with the owners of the company no longer corresponds to the realities of the modern large public company … in reality the managers of a large public company wield power, which is unconstrained by the shareholders.[9]

A central theme of this article is that this brings a commensurate level of accountability by the managers to the company including a clear obligation to protect the company from harm such as being put in breach of a statute, and a further obligation to sustain the company's future throughout its projected life.

Two central relational tenets of corporations law are that directors owe fiduciary duties to the company[10] and that the company is a separate legal identity. A director does not owe duties to the

[5] See, eg, *Van Son v Forestry Commission* (unreported, Sup Ct, NSW, 3 February 1995) and *Dagi v Broken Hill Proprietary Co Ltd; Gagarimabu v Broken Hill Proprietary Co Ltd* [2000] VSC 486.
[6] Mayer Carl J, "Personalising the Impersonal: Corporations and the Bill of Rights" (1990) 41 *Hastings Law Journal* 642.
[7] Tomasic R, Jackson J and Woellner R, *Corporations Law: Principles, Policy and Process* (4th ed, Butterworths, 2002) p 369.
[8] *Automatic Self-Cleansing Filter Syndicate Co Ltd v Cunningham* [1906] 2 Ch D 34; *The Commissioner of Taxation of the Commonwealth of Australia v Commonwealth Aluminium Corporation Ltd* (1980) 143 CLR 646.
[9] Stokes M, "Company Law and Legal Theory", in Twining W (ed), *Legal Theory and Common Law* (Basil Blackwell, 1986) pp 166-168.
[10] *Cook v Deeks* [1917] All ER Rep 285; *Regal (Hastings) Ltd v Gulliver* [1942] 1 All ER Rep 378; *Furs v Tomkies* (1936) 54 CLR 583; *Whitehouse v Carlton Hotel Pty Ltd* (1987) 162 CLR 285; 70 ALR 251 and *Howard Smith Ltd v Ampol Petroleum Ltd* [1974] 1 All ER 1126.

shareholders per se[11] and much of the relationship between the directors and the shareholders has been relegated to general meetings. This along with commercial reality[12] has manifested schools of conventional corporate thought that sees the shareholder as a mere investor in the corporation whose "rightful" position is entirely separate from control of the company which is in the hands of management.[13]

On occasions the courts have championed the position of shareholders in the corporation and in the landmark case of *Gambotto v WCP Ltd* (1995) 182 CLR 432[14] elevated and empowered the position of minority shareholders and privileged the proprietary rights of minority shareholders over the corporate pursuit of group profits. Paradoxically environmentalists can utilise these private property rights (that in other contexts so often provide impediments to environmental outcomes) in the achievement of environmental outcomes within the corporate structure. Lipman urges the adoption of pro-active programs to prevent environmental crime before it occurs and suggests commitment to the precautionary principle[15] and clean production.[16] In many circumstances environmentalists may feel compelled to examine non-traditional environmental remedies in order to defend or advocate on behalf of the environment. Below we consider some available possibilities.

Leane states that what we call environmental law in Western liberal democracies is not in reality "environmental" at all.[17] It is suggested that the body of environmental law that has developed in Australia does not challenge, but rather operates within a development paradigm[18] because any talk of environmental protection is accompanied by a perceived need to balance economic development.[19] In the industrialised democracies it has been claimed the ruling bias is toward economic growth[20] and the modern large public corporation is seen and relied upon as the vehicle for the creation of economic growth. When this growth is at the expense of and to the detriment of the environment, remedies additional to those available under environmental law may be required.[21]

Notwithstanding the separate legal entity theory of corporations law,[22] environmental law has responded to offending activities of corporations through, inter alia, the imposition of civil and

[11] In *Allen v Hyatt* (1914) 30 TLR 444 directors were found to have acted as agents for specific shareholders resulting in a fiduciary relationship. In *Darvall v North Sydney Brick and Tile Co Ltd* (1986) 6 ACLC 154 at 176 it was stated that in relation to directors and shareholders: "it is proper to have regard to all the members of the company, as well as having regard to the interests of the company as a commercial entity ... It is proper to have regard to the interests of present and future members of the company, on the footing that it would be continued as a going concern."

[12] Commercial reality here is explained in the sense that intra-group loans and debt have replaced equity issues in the hierarchy of preferred sources of corporate financing: see Walton R, "Gambotto v WCP Ltd: A Justified Step Reassertion of Minority Shareholder Rights or Unwelcomed Step Back in Time" (2000) 12 AJCL 20 at 40 and Hill J, "Public Beginnings, Private Ends – Should Corporate Law Privilege the Interests of Shareholders?" (1998) 9 AJCL 21 at 26.

[13] "With the notable exception of the High Court decision in *Gambotto v WCP Ltd*, it is generally accepted that the days of viewing shareholders as corporate owners with full blown proprietary rights are long passed": Hill, n 12 at 24. See generally Walton, n 12.

[14] For discussion and criticism of this case see Whincop M, "Gambotto v WCP Ltd: An Economic Analysis of Alterations to Articles and Expropriation Articles" (1995) 23 ABLR 276; Wishart D, "Does the High Court Understand Corporations Law?" (1996) 6 AJCL 424; Walton, n 12.

[15] The precautionary principle being one of the principles of ecologically sustainable development, namely, that if there are threats of serious or irreversible environmental damage, lack of full scientific certainty should not be used as a reason for postponing measures to prevent environmental degradation. Farrier D et al, *The Environmental Law Handbook* (3rd ed, Redfern Legal Centre Publishing, 1999) p 6.

[16] Lipman Z, "Institutional Reform: The New South Wales EPA" (1992) 9 EPLJ 445.

[17] Leane G, "Environmental Law's Liberal Roots: (Not) a Green Paradigm" in Rogers N (ed), *Green Paradigms and the Law* (Southern Cross University Press, 1998) pp 1-12.

[18] Leane, n 17 at 1-12.

[19] Godden L, "Incorporating the Environment in the Utilitarian Calculus of the Greatest Good" in Rogers N, n 17, p 65.

[20] Leane, n 17, p 5.

[21] CSIRO Futurecorp Forum, "Shaping Australian Business for 21st Century Conditions", 17 October 2001, Parliament House, http://www.bml.csiro.au/NetwkL2E.pdf, viewed 22 May 2002.

[22] *Salomon v Salomon & Co Ltd* [1897] AC 22; *Lee v Lee's Air Farming Ltd* [1961] AC 12; *Hamilton v Whitehead* (1998) 14 ACLR 493.

criminal liability on those personally responsible for environmental damage.[23] However, there is evidence to suggest that the application of criminal law to corporations and their officers, particularly bigger public companies[24] in relation to environmental crime is inherently problematic. This is so especially in relation to proving the mens rea element of a criminal offence or the standard of negligence to be applied in environmental cases.[25] Furthermore there have been recent amendments to the corporations law[26] which appear to have the objective of limiting the individual directors' liabilities in order to enhance the profit generating role.[27] Despite this the *Corporations Act* contains a variety of remedies which may be useful to the environmentally active shareholder.

The emphasis on profit generation to the exclusion of other matters partly stems from attitudes such as those of the economist Milton Friedman who suggests that "few trends could so thoroughly undermine the very foundations of our free society as the acceptance by corporate officials of a social responsibility other than to make as much money as possible".[28] The quotation from Friedman seems to miss the point that this continual thirst for profit could result in high levels of short term profitability taken at the expense of long term profits or even the viability of the entity. While this may be seen as desirable from the perspective of the often short term institutional investor,[29] can representatives of these investors who sit on the boards of these companies be so cavalier if the long term profitability or survival of the corporation is at stake? This question of long versus short term profitability has been commented on by Mundheim in relation to American insurance companies:[30]

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[23] It has been suggested that this may be due to Australian authorities taking note of the approach in the USA, where 70% of cases of corporate prosecutions involved a prosecution of an individual. See Cohen M, "Environmental Crime and Punishment: Legal/Economic Theory and Empirical Evidence on Enforcement of Federal Environmental Statutes" (1992) 82 *Journal of Criminal Law and Criminology* 1054 at 1074.

[24] See Lipman Z and Roots L, "Protecting the Environment through Criminal Sanctions: the Environmental Offences and Penalties Act 1989 (NSW)" (1995) 12 EPLJ 16 and Streets S, "Prosecuting Directors and Managers in Australia: A Brave New Response to an Old Problem?" (1998) 22 MULR 693.

[25] See generally Brazil P and Boreham K, "The Liability of Company Officers for Corporate Breaches of the New Federal Environment Legislation" (2000) 19 *AMPLA Journal* 145. The authors note the difficulties for the prosecution in proving mens rea in relation to crimes against the environment and cite *EPA v N* (1992) 26 NSWLR 352 at 356. In some cases this is overcome through "imputed or constructive knowledge": s 169(1)(a), *Protection of the Environment Operations Act 1997* (NSW). Also inherent in some cases is the difficulty in the standard of negligence to be applied, be it civil or criminal standard or somewhere in between as has been suggested, see Sulan J, "Personal and Joint Venture Liability of Directors for Breaches of Environment Protection and Workplace Health and Safety Legislation", *1995 AMPLA Yearbook*, p 192. See *NSW Sugar Milling Co-op Ltd v EPA* (1992) 75 LGRA 320 at 325; Lipman and Roots, n 24; and Streets, n 24.

[26] Criminal penalties for contravention of the statutory duty of due diligence have been removed. Section 180(2) introduces a business judgment rule in relation to the care and diligence duties and common law liability in negligence. The Explanatory Memorandum to the CLERP Bill 1998 stated: "The fundamental purpose of the business judgment rule is to protect the authority of directors in the exercise of their duties, not to insulate directors from liability." Section 189 provides specific legislative authority for reliance by directors on information provided by others. Perhaps in some attempt to strike balance or compromise, Parliament amended the CLERP Bill to raise the burden of directors attempting to benefit from s 189 by making reasonable reliance premised on the director "having made an independent assessment of the information or advice, having regard to the director's knowledge of the corporation and the complexity of the structure and operations of the corporation": Ford H, Austin R, and Ramsay A, *An Introduction to the CLERP Act 1999: Australia's new company law* (Butterworths, 2000) p 5. In effect this provision may be used as evidence by a director in relation to due diligence and the mens rea requirements under environmental laws, claiming he or she was not reckless or negligent because he or she relied on information or advice provided by another person in a relevant respect.

[27] Commonwealth of Australia, Department of Treasury, *Directors' Duties and Corporate Governance, Proposals for Reform*, Paper No 3 (AGPS, Canberra, 1997) pp 8-9, in Fletcher K, "CLERP and minority shareholder rights" (2001) 13 AJCL 290 at 290-291.

[28] Friedman M, *Capitalism and Freedom*, in Lord Wedderburn, "The Social Responsibility of Companies" (1985) 15 MULR 4 at 4 and in Justice Chernov, "The Role of Corporate Governance Practices in the Development of Legal Principles Relating to Directors" in Ramsay I (ed), *Corporate Governance and the Duties of Company Directors* (Centre for Corporate Law and Securities Regulation, University of Melbourne, 1997) p 46.

[29] Justice Kirby has noted that institutional investors constituting ownership of 60% of publicly listed corporations who can "shift huge funds overnight" have "relatively little motivation to be specially concerned about 'good corporate citizenship' or to devote corporate attention to social values": Kirby M, "Corporate Governance, Corporate Law and Global Forces" in Ramsay, n 28, pp 52-53.

[30] Mundheim RH, "A Comment on the Social Responsibilities of Life Insurance Companies as Investors" (1975) 61 *Virginia Law Review* 1247.

> Long term profit maximisation would also mandate recognition of existing and emerging social demands in order to minimize costs which may be imposed on a company. A public which has come to demand socially responsible corporate action, for example may punish those enterprises perceived to be acting irresponsibly.[31]

He gives as examples an investor not financing a project where a "developer … is not adhering to existing or projected anti-pollution requirements" or where investments have been made in less profitable ventures to "forestall threatened government action" which may have impacted on long term profitability.[32] In a sense these are strategic and not uncommon decisions management is faced with and they fall within the standard rubric that it is for the directors and not the courts to manage the company.[33] The point is that adherence to the Friedman view of nothing but profits could result in short term strategies, such as heavy borrowing to pay a dividend or lack of maintenance on plant or ignoring the dictates of a costly statute, which leads to the longer term demise of the corporation or reduces its long term profitability.

In 1987 Sealy predicted that:

> The interests of consumers, the environment, welfare and the causes of equal opportunity, good race relations and so on can only be furthered by positive legislation extraneous to company law.[34]

A theme of this article is that such legislation now exists across a number of those fields, most importantly for present purposes *the environment*, and that directors who ignore the legislation may find that they have breached their duties to the company either because they have not put in place systems to prevent the company from breaching such statutes[35] or because they have taken a short term view of the corporation causing sustained and long term damage. Far worse is the possibility that dishonest directors may have consciously weighed the cost savings to be made by ignoring the statute against the risk of being caught. As discussed below such conscious illegality is a breach of their duties to the company and has criminal consequences.

DUTIES AND RESPONSIBILITIES OF DIRECTORS

Duty of care and diligence at general law

To whom owed

Much has been written about corporate citizenship, defined as the way in which a corporation responds to the interests of its multiple "stakeholders", including its workforce, consumers, the community, the physical environment and society in general.[36] Such a definition is not limited to relations between a company's board of directors and its shareholders.[37] In this post globalisation era, some authors have argued that good corporate citizenship must encompass a dialogical ethics[38] containing a rigorous environmental discourse and practice. Birch embraces this very notion when he

[31] Mundheim, n 30 at 1250.
[32] Mundheim, n 30 at 1250-1.
[33] *Shuttleworth v Cox Bros & Co (Maidenhead) Ltd* [1927] 2 KB 9; *Re Five Minute Car Wash Service Ltd* [1966] 1 All ER 242; *Re Jermyn Street Baths Ltd* [1971] 1 WLR 1042; *Wayde v New South Wales Rugby League Ltd* (1985) 180 CLR 459; 61 ALR 225.
[34] Sealy LS, "Directors' 'Wider' Responsibilities – Problems Conceptual, Practical and Procedural" (1987) 13 Mon LR 164 at 176.
[35] The existence of effective compliance programs under the *Trade Practices Act 1974* (Cth) have often been argued in mitigation of a penalty under that Act; see, eg, *TPC v CSR Ltd* [1991] ATPR 41-076. On compliance programs more generally see Australian Standard AS 3806-1998.
[36] Maitland I, "The Morality of the Corporation: An Empirical or Normative Disagreement?" (1994) 4 *Business Ethics Quarterly* 445.
[37] Corporate Footprint, "Survey on Corporate Citizenship", Glossary, http://corporatefootprint.co.za/research.html viewed 22 May 2002.
[38] Falzon C, "Ethics, Critique and Enlightenment" in Falzon C, *Foucault and Social Dialogue: Beyond Fragmentation* (Routledge, 1998) pp 57-78. "Ethics becomes an instrument, a tool a means of facilitating dialogue ... openness to the other is an instrument of resistance or freedom, a means of promoting the creative transgression, the intervention of new forms." Falzon argues openness to others promotes the transformation of prevailing forms of thought and action and the production of new forms.

writes "Corporate Citizenship, as an integral part of the New Economy, is about communication between all stakeholders in society in order to build social capital in order to build sustainable societies".[39] The idea of corporations as citizens derives from the more deeply embedded metaphor of corporations as persons. This metaphor has had a long and rhetorically persuasive influence upon the development of corporations law; unfortunately, too often the use of the metaphor has obscured the real differences between humans and business corporations as legal subjects. Concepts of corporate citizenship, and stakeholder theory generally, whilst refreshingly optimistic are essentially counter-productive because they obscure the nature of business corporations as primarily profit-seeking private bureaucracies characterised by rules of internal governance which mandate strict adherence to the pursuit of corporate self-interest.[40]

The notion of the corporate citizen may be useful occasionally as a defence in occupational health and safety matters,[41] but it does not accurately describe the extent of the obligation on directors to act in the best interests of the company. Whilst the duty to pursue corporate self-interest may not necessarily preclude *any* consideration of other "stakeholders", it nonetheless excludes consideration of them as ends in themselves. Parkinson, for example, has argued that:

> A duty to act in the interests of the enterprise could … be understood as a duty to protect the business for the benefit of those groups, in addition to the shareholders, whose interests are likely to be affected by its success.[42]

This broad definition of "the interests of the company" permits consideration of the impact of corporate activity on the general community. It would, for example, allow for consideration of the effect on the general community of polluted air or waterways. As noble as Parkinson's argument is, it does not represent the law in Australia. The legal position is that normally directors owe their duties to the company and not to broader social groups or causes such as the environment, equal opportunity or social welfare.

Recent suggestions that there may be a broader duty to one group of stakeholders, namely creditors,[43] have been laid to rest by the comments of Gaudron, McHugh, Gummow and Hayne JJ in the High Court decision in *Spies v The Queen* (2000) 201 CLR 603; 173 ALR 529 at [95]:

> In so far as remarks in *Grove v Flavel* (1986) 43 SASR 410 [see also remarks in *Nicholson v Permakraft (NZ) Ltd* [1985] 1 NZLR 242] suggest that the directors owe an independent duty to, and enforceable by, the creditors by reason of their position as directors, they are contrary to principle and later authority (*Kuwait Asia Bank EC v National Mutual Life Nominees Ltd* [1991] 1 AC 187; *Re New World Alliance Pty Ltd; Sycotex Pty Ltd v Baseler* (1994) 51 FCR 425. See also *Farrar's Company Law*, 4th ed (1998) pp 382-385) and do not correctly state the law.

Given such a clear affirmation of the traditional position this article does not claim a broadening of the classes of persons to whom the duty is owed or seek to rely on the company meeting some theoretical test of good citizenship. On the contrary, any attempt to uncover strategic ways in which existing corporations law can be used to pursue environmental outcomes needs to be grounded in a robustly empirical view of the nature of corporations. Ironically, it is the very fact that the pursuit of self-interest is mandatory within corporate bureaucracies that gives rise to the opportunity for shareholders to enforce compliance with external environmental standards. Directors who allow their companies to engage in violations of environmental law may be negligent in their duties *to the company* at common law, in breach of their duties of good faith *to the company* as fiduciaries, and/or

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[39] Birch D, *Shareholder-Corporate Relations in Australia: Some New Economics, Corporate Citizenship and Sustainable Capitalism Perspectives Draft Only* (Corporate Citizen Research Unit, Deakin University, 2001).

[40] Ricketts A, *Stretching the Metaphor: The Political Rights of the Corporate 'Person'* (unpublished Masters of Laws thesis, Queensland University of Technology Library, 2001) p 129.

[41] See, eg, *Inspector Paul Mansell v Orica Australia Pty Ltd* [2002] NSWIRComm 155 (12 July 2002) at [61]; *Pretorius v Venture Stores (Retailers) Pty Ltd* [1992] ATPR 41-166; *Inspector Michael Dall v D F McCloy Pty Ltd* [2002] NSWIRComm 51 at [24]. It has also been argued in environmental cases, though not always successfully, see, eg, *Environment Protection Authority v Van Hessen Australia Pty Ltd* [1998] NSWLEC 57 (17 April 1998).

[42] Parkinson J, *Corporate Power and Responsibility- Issues in the Theory of Company Law* (Clarendon Press, 1993) p 79.

[43] See, eg, Wedderburn, n 28; Keay A, "The Director's Duty to Take into Account the Interests of Company Creditors: When is it Triggered?" (2001) 25 MULR 315.

in breach of their duties *to the company* under ss 180 and 181 of the *Corporations Act*. Put in these terms we are not faced with the hurdle of extending the law beyond its established boundaries, but rather with an attempt simply to re-focus the application of existing rules and remedies

Nature of directors' duties

The authority at general law regarding directors' duties of care and diligence was traditionally *Re City Equitable Fire Insurance Co* [1925] 1 Ch 407. Speaking of a duty to the company, Romer J set out several well-known propositions relating to directors' duties. He stated (at 428) that a director must take "reasonable care to be measured by the care that an ordinary man [or woman] might be expected to take in the circumstances on his [or her] own behalf". However this was qualified by further propositions. First, "[a] director need not exhibit in the performance of his [or her] duties a greater degree of skill than may reasonably be expected from a person of his [or her] knowledge or experience" (at 428). Second, "[a] director is not bound to give continuous attention to the affairs of his [or her] company. His [or her] duties are of an intermittent nature to be performed at periodical board meetings, and at meetings of any committee of the board upon which he [or she] happens to be placed" (at 429). Third, "[i]n respect of all duties that, having regard to the exigencies of business, and the articles of association, may properly be left to some other official, a director is, in the absence of grounds for suspicion, justified in trusting that official to perform such duties honestly" (at 429). These tests have been criticised for imposing unacceptably weak standards on directors and it is suggested that the New South Wales Supreme Court decision of *Daniels v Anderson* (1995) 13 ACLC 614 now imposes a more appropriate and relevant standard at general law.[44]

In *Daniels v Anderson* (1995) 13 ACLC 614, Clarke and Sheller JJA held that directors are subject to a duty of care to the company at common law (at 655). Clarke and Sheller JJA noted that a common law duty of care "rests in the relationship of proximity" (at 655) and considered that company directors satisfy such a proximity test (at 655). They held that "in accepting the office directors assume the responsibility of exercising a reasonable degree of care and diligence in the performance of the office" (at 655).

Clarke and Sheller JJA stated that "ignorance is no longer necessarily a defence to proceedings brought against a director. In some respects, at least, the director must inform himself or herself about the affairs of the company" (at 662). They held that "a director, whatever his or her background, has a duty greater than that of simply representing a particular field of experience. That duty involves becoming familiar with the business of the company and how it is run and ensuring that the board has available means to audit the management of the company so that it can satisfy itself that the company is being properly run" (at 662). They noted "the responsibilities of directors require that they take reasonable steps to place themselves in a position to guide and monitor the management of the company" (at 662). Clarke and Sheller JJA found that a "director's duty of care is not merely subjective, limited by the director's knowledge and experience or ignorance or inaction" (at 664). They adopted the judgment of Pollock J in the American decision *Francis v United Jersey Bank* 432 A 2d 814 at 821-823 (1981) where Pollock J stated:

> As a general rule, a director should acquire at least a rudimentary understanding of the business of the corporation … Because directors are bound to exercise ordinary care, they cannot set up as a defence lack of the knowledge needed to exercise the requisite degree of care. If one "feels that he [or she] has not had sufficient business experience to qualify him [or her] to perform the duties of a director, he [or she] should either acquire the knowledge by inquiry, or refuse to act". Directors are under a continuing obligation to keep informed about the activities of the corporation … Directors may not shut their eyes to corporate misconduct and then claim that because they did not see the misconduct, they did not have a duty to look … Directorial management does not require a detailed inspection of day-to-day activities, but rather a general monitoring of corporate affairs and policies … [D]irectors … should maintain familiarity with the financial status of the corporation by a regular review of financial statements … The review of financial statements … may give rise to duty to inquire further into matters revealed by those statements … Upon discovery of an illegal course of action, a director has a duty to object and, if the corporation does not correct the conduct, to resign … A director is not an

[44] Law L, "The Business Judgment Rule in Australia" (1997) 15 C&SLJ 174 at 182.

> ornament, but an essential component of corporate governance. Consequently, a director cannot protect himself [or herself] behind a paper shield bearing the motto "dummy director".

Clarke and Sheller JJA went on to say that the concept of negligence at common law requires that the relevant conduct be judged by "what the reasonable [person] of ordinary prudence would do in the circumstances" (at 655). On the facts, the judges concluded that the company could bring an action for breach of the duty of care owed by the directors to the company (at 656).[45]

Statutory violation as evidence of negligence

The profits-at-any-cost view described earlier in this article may well ignore the fact that corporations have to exist and operate lawfully within society. Like all natural persons, corporations are subject to the law[46] and should obey it. Whilst a natural person is entitled to take a principled or even unprincipled stance upon whether they obey a particular law (and personally suffer any consequences) the company director is subject to a further layer of accountability and enforcement in relation to their specific duties to the company. Furthermore there are profit incentives for corporations to engage in good corporate conduct: "[i]f a company is perceived otherwise than as a good corporate citizen, people will be turned away from company products".[47] But this view may not always appeal to directors faced with very strong pressure to produce profits to enable the payment of this year's dividend. Such directors may choose to cut corners, ignoring environmental statutes that may reduce the bottom line.

The circumstances referred to in the judgment of Pollock J as supported by Clarke and Sheller JJA gave examples of situations where the directors will fail to adequately monitor the affairs of the company. For example, mention is made of the director who is aware that the company is engaging in illegal activity, but who fails to object or resign if the corporation does not correct the illegal conduct. Directors who ignore the illegality and continue to work for the corporation may well be in breach of their duty to take reasonable care in the performance of their office. In such a situation the court will examine what a reasonable person of ordinary prudence would do on becoming aware that the corporation was engaging in illegal activity.

Others have suggested that a statutory violation may be evidence of negligence.[48] Fleming states "whenever a penal statute lays down a standard of conduct for the purpose of preventing injury or loss, non-compliance is at least admissible as *evidence* of negligence (breach of the common law duty of care)".[49] Clearly environmental legislation is designed to prevent injury to the environment and accordingly non-compliance with environmental legislation should therefore be admitted as evidence of negligence. In *Anderson v Corporation of the City of Enfield* (1983) 34 SASR 472 at 480 it was accepted that a manufacturer who failed to comply with regulations was negligent.[50] Also, in *Fox v Hack* [1984] 1 Qd R 391 industrial safety award provisions having the force of legislation were relied upon in determining what was "reasonably required of an employer when involving his employee in a particular task" (at 394). In a similar way environmental legislation could be seen as imposing certain standards of reasonable conduct on directors in the context of their duty (described above) to the company to ensure its compliance with the law.

In the United States breaches of banking legislation have been seen as sufficient to warrant the removal of directors of financial institutions. In *Brickner and Hackl v Federal Deposit Insurance*

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[45] There has been further judicial support for the principles developed in *Daniels v Anderson* in *Re Property Force Consultants Pty Ltd* (1995) 13 ACLC 1051, *Gamble v Hoffman* (1997) 24 ACSR 369 and in *ASIC v Adler* (2002) 168 FLR 253; 41 ACSR 72; [2002] NSWSC 171.

[46] Berns S and Baron P, *Company Law and Governance – An Australian Perspective* (Oxford University Press, 1998) p 116; Ford H, Austin R, and Ramsay I, *Ford's Principles of Corporations Law* (10th ed, Butterworths, 2001) p 323; and Corcoran S, "The Corporation as Citizen and as Government: Social Responsibility and Corporate Morality" (1997) 2(1) *Flinders Journal of Law Reform* 53 at 63.

[47] Tomasic R and Bottomley S, "Corporate Governance and the Impact of Legal Obligations on Decision Making in Corporate Australia" (1991) 1 AJCL 55 at 57.

[48] Fleming J, *The Law of Torts* (9th ed, LBC Information Services, 1998) p 137 and McGlone G, *Outline of Torts* (2nd ed, Butterworths, 1998) p 273.

[49] Fleming, n 48, p 137.

[50] See McGlone, n 48, p 273.

Corporation 747 F 2d 1198 (1984) unauthorised extensions of credit to a bankrupt bank customer through improper means and in excess of the bank's legal lending limit was seen as a statutory violation warranting the removal of the directors who were responsible for ensuring compliance with the relevant legislation (at 1198 and 1200). Similarly, in *Hutensky v Federal Deposit Insurance Corporation* 82 F 3d 1234 (1996) the violation of loan regulations was held to warrant the removal of Hutensky as a bank director.

The propositions described above have been generally supported by Ford, Austin, and Ramsay who note:

> Of course, laws on conditions of labour, consumer protection and such community matters as environmental protection apply as much to companies as other legal persons. Directors who have to make decisions for companies can be in breach of their duty to the company if their decisions put the company in breach of any such law.[51]

The authors do not cite authority for this proposition but as noted above there is strong obiter to that effect in *Daniels v Anderson* in negligence law. It will be demonstrated shortly that the proposition can also be established under fiduciary law and s 181 of the *Corporations Act*.

Duty of care and diligence under statute

Directors also have a duty of care and diligence under s 180 of the *Corporations Act*. The reference to "the degree of care and diligence that a reasonable person would exercise" in s 180(1) shows that this is an objective standard. The care and diligence is that of "a director or officer of a corporation in the corporation's circumstances" (s 180(1)(a)) who "occupied the office held by, and had the same responsibilities within the corporation as, the director or officer" (s 180(1)(b)).

Section 180 has recently been discussed in the decision of *ASIC v Adler* (2002) 168 FLR 253; 41 ACSR 72; [2002] NSWSC 171. In that case various breaches of the *Corporations Act* were alleged against directors of HIH. One of the factors that Santow J held to be relevant when considering whether the duty of care and diligence had been complied with was the failure of a director to put in place controls to avoid unlawful investments being made. Santow J stated (at [453]):

> The fact of the matter was that Mr Williams did not ensure that the company complied with its own safeguards laid down for approval of such a mandate by its Investment Committee, nor did he put in place safeguards to avoid investments being made which were in breach of the law and which, directly or indirectly, advantaged Mr Adler, Adler Corporation and PEE and were not reasonable in the circumstances even if HIHC and PEE had been dealing at arm's length.

This failure was considered to be not reasonable (at [453]). Similarly the directors of a company which has breached environmental statutes blatantly or continually may be acting in disregard of their duty of care and diligence under s 180, as these breaches could indicate that adequate safeguards have not been put in place and that the company does not have an appropriate environmental compliance program.

Environmental legislation often provides for such compliance programs. Section 169(1)(c) of the *Protection of the Environment Operations Act 1997* (NSW) deals with offences by corporations and provides a defence of due diligence as does s 496 of the *Environment Protection and Biodiversity Conservation Act 1999* (Cth).[52] In the Canadian case *R v Bata Industries Ltd (No 2)* (1992) 70 CCC (3rd) 394 at 429, the court said, inter alia, that when relying on the defence of due diligence it is relevant to consider whether the director helped establish or had established a pollution prevention system; whether the company reported periodically to the board any substantial non-compliance, and whether immediate personal action was taken when systems failed. The point that is being made in this article is that in addition to any such obligations in the environmental statute, the *Corporations Act* (together with the common law) also contains remedies and penalties when directors fail in their duty to ensure corporate compliance with an environmental law.

[51] Ford et al, n 46, p 323.

[52] Lipman and Roots, n 24 at 27; Brazil P and Boreham K, "The Liability of Company Officers for Corporate Breaches of the New Federal Environment Legislation" (2000) 19 *AMPLA Journal* 145 at 156.

Business judgment rule

Directors of a company in potential breach of their common law or s 180 duties will seek to rely on the business judgment rule to avoid liability. The business judgment rule is contained in s 180(2). Under s 180(2) directors are taken to have met the standard of care and diligence under s 180(1) and equivalent duties at common law or in equity if they:

(a) make the judgment in good faith for a proper purpose; and

(b) do not have a material personal interest in the subject matter of the judgment; and

(c) inform themselves about the subject matter of the judgment to the extent they reasonably believe to be appropriate; and

(d) rationally believe that the judgment is in the best interests of the corporation.

Section 180(2) states that the "director's … belief that the judgment is in the best interests of the corporation is a rational one unless the belief is one that no reasonable person in their position would hold". The requirement in s 180(2)(d) is therefore linked with reasonableness, indicating that it is an objective test.[53] A belief will not be deemed rational if no reasonable person in the director's position would hold that it was a rational belief.

It is important to note that the judgment rule only applies to a business judgment.[54] It will therefore not protect directors where they have neglected to make a decision.[55] Under s 180(3) "business judgment" is defined as "any decision to take or not take action in respect of a matter relevant to the business operations of the corporation". The business judgment rule therefore will not cover a director who fails to ensure that adequate safeguards are in place to prevent a breach of the law. In *ASIC v Adler* (2002) 168 FLR 253; 41 ACSR 72; [2002] NSWSC 171 at [372], Santow J stated:

> For the purposes of s 180(1) and relevantly in the present case, failing to ensure that a company makes loans only in accordance with its authorised practices and failing to ensure that the company has a proper system of controls and audit in its business to avoid any defalcation by officers and employees may amount to breaches of the statutory duty of care and diligence: *Cashflow Finance Pty Ltd v Westpac Banking Corp* [1999] NSWSC 671 per Einstein J.

On the facts in that case the business judgment rule could not be applied to protect the directors.

To gain the protection a business judgment must be made in good faith, and for a proper purpose. As will be demonstrated in the context of s 181 these words as a minimum must, inter alia, mean a lawful purpose and an absence of any criminal intent, otherwise the statute itself would be assisting the furtherance of a criminal offence.

Another aspect of the test is that the director must rationally believe that the judgment is in the best interests of the corporation. If the directors made a decision to ignore the requirements of environmental law or to only partly comply, they could not be described as possessing a rational belief that such a decision was made in the best interests of the corporation. It would not be a rational decision because it would result in the corporation being in breach of its duty to obey the law placing the director in breach of his/her duty to the company. It is significant that in *ASIC v Adler* (2002) 168 FLR 253; 41 ACSR 72; [2002] NSWSC 171 at [453] Santow J considered that a director was not acting reasonably when he failed to put in place safeguards to ensure that the law was not being breached. If a director made a decision not to engage in regular maintenance of equipment, it is highly likely that such a decision could not be seen as a rational decision made in the best interests of the corporation.

Accordingly a director who has the responsibility to monitor compliance with environmental protection legislation will for various reasons fail to gain any protection from the business judgment rule if that responsibility is not properly exercised.

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[53] Kyrou E, "Directors' Duties, Defences, Indemnities, Access to Board Papers and D & O Insurance Post CLERPA" (2000) 18 C&SLJ 555 at 561.
[54] *ASIC v Adler* (2002) 168 FLR 253; 41 ACSR 72; [2002] NSWSC 171 at [372].
[55] Kyrou, n 53 at 561.

Duty to act in good faith in the best interests of the corporation

The duty to act "in good faith in the best interests of the corporation" is contained in s 181(1) of the *Corporations Act* which states:

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

Generally, the duty to act in good faith requires

> that directors exercise their powers only for proper corporate purposes; avoid actual or potential conflicts between their duties to the company and their personal interests or duties to others; and account to the company for business opportunities which come to them by reason of or in the course of holding office as a director.[56]

Whether a director has acted in the best interests of the corporation will be assessed objectively by the court.[57] This point was made clear by Santow J:

> I consider that the standard of behaviour required by s 181(1) is not complied with by subjective good faith or by a mere subjective belief by a director that his purpose was proper, certainly if no reasonable director coud have reached that conclusion. This is made clear by the new provisions in s 184(1) which by contrast imposes the additional elements of being "intentionally dishonest" or "reckless" for the purpose of criminal sanctions.
>
> *ASIC v Adler* (2002) 168 FLR 253; 41 ACSR 72; [2002] NSWSC 171 at [738]

Two matters must be considered in determining what is in the best interests of the corporation; first it must be established who the corporation is and, second, one must examine what the "best interests of the corporation" entails.

Farrar has stated that the company includes "the shareholders as a general body".[58] It is arguable that the company, by definition, includes the present and future shareholders.[59]

> It has been said that "the company" does not mean "the sectional interest of some (it may be a majority) of the present members or even … of all the present members, but of present and future members of the company … on the footing that it would be continued as a going concern, [balancing] a long-term view against short term interests of present members".[60]

At minimum it can be said that directors have a duty to take into consideration "a long term view of shareholder welfare".[61] Directors clearly have a duty to "act for the benefit of existing members having regard to their future interests as well as their existing interests".[62] A duty to consider long term shareholder welfare means that directors ought to make decisions that ensure the long term viability of the corporation. The long term viability of a corporation may be threatened where a corporation engages in repetitive breaches of environmental legislation, but it may also, in some situations, be threatened by actions, which although not technically unlawful, involve serious environmental impacts which will continue to be associated with the company in the future. Parkinson contends that "a reputation for inflicting environmental damage will be harmful to profits".[63] Clearly directors have a duty not to depreciate the value of a corporation.[64]

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[56] "Duty of Good Faith", *Aust Corp Law – Principles and Practice* (Butterworths, subscription service) at [3.2.0395], http://80-www.butterworthsonline.com.ezproxy.scu.edu.au/lpBin20/lpext.dll?f=templates&fn=bwaltmain-hit-j.htm&2.0 viewed 22 May 2002.

[57] *ASIC v Adler* (2002) 168 FLR 253; 41 ACSR 72; [2002] NSWSC 171 at [740].

[58] Farrar J, *Corporate Governance in Australia and New Zealand* (Oxford University Press, 2001) p 106.

[59] Gower L, *Gower's Principles of Modern Company Law* (4th ed, Stevens & Sons, 1979) pp 577-578, and Ford et al, n 46, p 319.

[60] Counsel's advice to the directors in the *Savoy Hotel case*, cited in Gower, n 59, pp 577-578.

[61] Ford et al, n 46, p 319.

[62] Ford et al, n 62, p 319.

[63] Parkinson, n 42, p 82.

[64] Guild W, "Companies – Directors – Fiduciary Duties – Duty not to Depreciate Value of Business – Causing Business to Cease and Setting up Business in Competition – Assessment of Damages for Breach of Trust" (1989) 63 ALJ 134 at 134.

Directors may often feel compelled to maximise short term profits, which could lead to environmental degradation, at the expense of ensuring the long term viability of the company. However, directors would be advised not to engage in activities which, although promising higher short term profits, could have serious implications regarding a corporation's long term viability. It may be that in pursuing short term profits at the expense of long term sustainability, directors will be in breach of their duty to act in the best interests of the corporation under s 181. This means that the directors of a company could be in breach of their duty to act in the best interests of the corporation under s 181 if they skimped on maintenance in order to merely maximise short term profits. It is arguable that in pursuing the best interests of the corporation directors ought to be giving adequate consideration to "projects with a future pay-off".[65] Parkinson points out that

> directors are … not obliged to maximize current profits in order to satisfy short term demands for dividends at the expense of a growth in profitability over a longer period. They are entitled … to regard the members' interest in the company as being in general a continuing one.[66]

Failure to obey a law and s 181

Earlier it was argued that directors who disregard an environmental law may find themselves liable in negligence under the *Daniels v Anderson* principle. This may also amount to a breach of a director's fiduciary duty and also a breach of s 181.

The first proposition in this argument is that all citizens are bound to comply with the law; such an obligation to the law is paramount[67] and will override considerations such as codes of conduct or ethics[68] or, by extension, the constitutions of organisations or privately made rules. Obviously, natural persons may choose to ignore the law on moral grounds, or take a financial risk that the price of punishment is less than the costs of compliance, and accept the punishment of the state for disobeying the law if caught. Private citizens are entitled to risk their own personal reputation in that way. The situation is more complex for a corporation because it can only act through agents who owe it fiduciary duties.[69] Like a natural person, a corporation is also bound to obey the law; however, a corporation does not have any legal capacity to not obey it.

Under s 124(1) a corporation is to have the legal capacity and powers of an individual. Section 124(3) provides:

> For the avoidance of doubt, this section does not:
>
> (a) authorise a company to do an act that is prohibited by a law of a State or Territory; or
>
> (b) give a company a right that a law of a State or Territory denies to the company.

Section 124(3)(a) which is new, may well have only been included out of abundant caution for constitutional reasons when the Act became a federal one. Nevertheless it serves another and very useful purpose for our present argument, making it very clear that a corporation as a creation of the law must also obey the law.

The second proposition is that s 124(3) appears within the context of s 124(1), the major section conferring power and capacity on corporations, and makes it clear that a company is given neither power nor capacity to break the law. It follows that the board of directors of a company *cannot* have the power or capacity to cause the company to break a law. Therefore if they choose to deliberately ignore a statute causing the company to commit a crime the board does so without power and in breach of their fiduciary duties to the company. The corporation must obey the laws of the state. It follows that its agents, the directors, are duty bound to ensure it does so. They do not have:

- legal authority on behalf of the corporation to choose to ignore the law; or
- the moral privilege possessed by natural persons as a conscientious objector to make a personal choice to disobey a particular law (and accept the consequences); or

[65] Parkinson, n 42, p 91.
[66] Parkinson, n 42, p 81.
[67] *Independent Commission against Corruption v Cornwall* (1993) 38 NSWLR 207 at 234; 116 ALR 97.
[68] *Independent Commission against Corruption v Cornwall* (1993) 38 NSWLR 207 at 234; 116 ALR 97.
[69] Ford H, Austin R and Ramsay I, *Ford's Principles of Corporations Law* (11th ed, Butterworths, Sydney, 2003) at [8.130].

- any legal or moral right on economically rationalist grounds to disobey the law. Accordingly, at law, the directors of a company must ensure it obeys the statute requiring the corporation to insert a $50 million filter on the factory's smokestack, and cannot merely choose to pay the $25 fine for non compliance.

REMEDIES AND STRATEGIES: MINORITY PROVISIONS AND SHAREHOLDER ACTIVISM

In this section we consider the specific litigious remedies that flow from the law described above together with a non-litigious strategy available to environmentalist shareholders.

Remedies for breach of ss 180 and 181

Sections 180 and 181 are civil penalty provisions under s 1317E of the *Corporations Act*. If the court determines that a civil penalty provision has been breached the person breaching the section is potentially liable to a pecuniary penalty of up to $200,000 under s 1317G or a compensation order under s 1317H. The corporation itself may apply for a compensation order under s 1317J(2) or intervene in contravention or pecuniary penalty order applications: s 1317J(3). This becomes important in the context of s 236 considered below.

A person breaching a civil penalty provision may also be disqualified from managing a corporation for a period that the court considers appropriate where ASIC apply to the court for such a disqualification order under s 206C.

Damages under the general law

If directors were found negligent under the principles in *Daniels v Anderson* they could personally be liable for damages. This may include reimbursement to the company for the payment of fines and damages for loss to reputation or for economic loss.[70]

Statutory derivative action

Without a mechanism to get standing in a court, the common law and statutory remedies described above will be of little use. Those in control of the company will also be the wrongdoers and will be inclined to dismiss environmental breaches as part of the cost of business and not a matter demonstrating their negligence or breach of the *Corporations Act*. To avoid this form of dilemma the common law created the derivative action and using the exceptions to the rule in *Foss v Harbottle* (providing one applied) so that disgruntled minorities could have their day in court. Under statute the matter is covered by s 236. The section is new and replaces the common law derivative action and its attendant *Foss v Harbottle* problems.[71] A shareholder or former shareholder can bring proceedings on behalf of the company in the name of the company against the directors under s 236 of the *Corporations Act*, provided that the requirements of s 237 are satisfied. The relevant parts of this section provide:

(1) A person may bring proceedings on behalf of a company ... if:

  (a) the person is:

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

    (ii) an officer or former officer of the company; and

  (b) the person is acting with leave granted under section 237.

(2) Proceedings brought on behalf of a company must be brought in the company's name.

(3) The right of a person at general law to bring, or intervene in, proceedings on behalf of a company is abolished.

[70] Webster J, "The AWA Case" (1995) 13 C&SLJ 396 at 398; and Baxt B, "Defining Directors' Duties" (1995) 66 *Charter* 30 at 32.
[71] *Metyor Inc v Queensland Electronic Switching Pty Ltd* (2002) 42 ACSR 398 per McPherson J at 403.

The critical parts of Section 237 provide:

(1) A person referred to in paragraph 236(1)(a) may apply to the Court for leave to bring, or to intervene in, proceedings.

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

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

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

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

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

The first element in s 237(2)(a) should present no difficulties in the types of matters described in this article, given that it is the directors who are the likely wrong doers and will not cause the company to proceed against themselves. It will be more problematic if the board is new and independent of the previous wrongdoing board which, having examined the matter, has chosen not to proceed. This could also create a difficulty under s 237(2)(c) – it would be more difficult to establish that it is in the best interests of the company to grant the application if in fact an independent board has chosen not to do so.

The second element, "good faith", has recently been discussed in *Herbert v Redemption Investments Ltd* [2002] QSC 340 where Mackenzie J commented (at [27]):

> With regard to good faith, in *Goozee*, Barratt J referred, with apparent approval, to the observations of Palmer J in *Swansson v Pratt* [2002] NSWSC 583 where Palmer J said that there are at least two interrelated factors to which the courts will always have regard in determining whether the good faith requirement of s 237(2)(b) is satisfied. The first is whether the applicant honestly believes that a good cause of action exists and has a reasonable prospect of success. The second is whether the applicant is seeking to bring the derivative suit for such a collateral purpose as would amount to an abuse of process. He went on to say that those two factors will in most but not all cases overlap entirely. If the court is not satisfied that the applicant actually holds the requisite belief, that fact alone would be sufficient to lead to the conclusion that the application must be made for a collateral purpose, so as to be an abuse of process. The applicant may however believe that the company has a good cause of action with a reasonable prospect of success but nevertheless may be intent on bringing the derivative action not to prosecute it to a conclusion, but to use it as a means of obtaining some advantage for which the action was not designed or for some collateral advantage beyond what the law offers. If that is shown the application and the derivatives suit itself would be an abuse of the court's process.

Mackenzie J went on to make the point (at [29]) that it would not "be an abuse of process even if the applicant is spurred on by intense personal animosity, even malice against the defendant" though an action brought by a shareholder with a history of grievances may simply represent a private vendetta and accordingly not be brought in good faith.

Environmentalist shareholders on the right facts should face no particular difficulty in showing that their views are honestly held and face a good chance of success in accordance with Mackenzie J's tests. The second element identified in the extract related to abuse of process. An argument could be mounted that the use of s 236 derivative proceedings is an abuse of process because the appropriate remedy for an environmental breach is to be found in an environmental statute and not a corporate one, and accordingly the advantage sought was collateral to and beyond the purposes of s 236. The argument has superficial attraction and may convince some judges, but it is submitted that the better view is that the members of the corporate community, in this case the shareholders, should have every right to seek to restrain their corporation from breaching a law, and both bring about the punishment of those within the organisation who caused that breach and seek compensation for the corporation for damages caused by the breach. In this sense the members themselves are not abusing process but assisting the enforcement of the law, especially in cases where a public authority, such as an environmental protection agency is either unaware of the breach or unwilling, perhaps because of budgetary constraints, to pursue the breach.

These same arguments would also go to satisfying the third and fourth elements in s 237(2), that it is in the best interests of the company that leave to proceed be granted, namely to ensure the company complies with the law, and that there is a serious question to be tried.

Injunction under s 1324

If a director continued to engage in or was proposing to engage in conduct in breach of the *Corporations Act* then a shareholder of the corporation may seek to obtain an injunction under s 1324(1) to restrain further negligent conduct and an award of damages to the company under s 1324(10). However, the nature of the relief in this section and precisely who may seek to use it is in doubt:

> There are now several decisions on the question whether s 1324 gives rise to a civil cause of action for damages on the part of a person aggrieved by contravention of s 232(2), (4) and (6). See especially *Mesenberg v Cord Industrial Recruiters Pty Ltd* (1996) 14 ACLC 519. In that case, Young J held, in the Supreme Court of New South Wales, that except insofar as s 1324 can be used by the Commission in aid of its rights under Part 9.4B, or insofar as a delegate of the Minister is a person affected, there is no longer any right for a person affected (not being the Commission or person referred to in s 1317EB) to seek an injunction in respect of an alleged contravention of s 232. That decision was doubted in *Airpeak Pty Ltd v Jetstream Aircraft Ltd* (1997) 15 ACLC 715 by Einfeld J in the Federal Court. See also *Allen v Atalay* (1993) 11 ACSR 753; 12 ACLC 7. In my opinion, the nature of the relief that may be claimed under s 1324 and who may claim that relief is not definitely settled.[72]

Given this doubt a shareholder may be better advised to use s 236.

Oppression

The statutory oppression remedy provided in ss 232 – 235 should be considered, but for reasons advanced below, it may be less applicable to the circumstances we have been considering in this article than s 236. Furthermore the applicants will have to show that they do not act for collateral purposes so as not to constitute an abuse of the process of the court.[73]

Unlawful conduct of the directors may be useful evidence in an oppression matter but it is not conclusive proof of oppression. In *Popovic v Tanasijevic (No 5)* (2000) 34 ACSR 1; [2000] SASC 87, Olsson J, speaking of s 61 in the *Associations Incorporation Act 1985* (SA), a section containing similar terms to s 232, said (at [505]):

> Conduct complained of must be unjustly detrimental to either individual members specifically or, alternatively, members as a whole. It is not necessary to prove lack of bona fides, but conduct beyond power or in breach of statutory, legal or financial duty may well amount to oppression.

In *Australian Securities Commission v The Multiple Sclerosis Society of Tasmania* No M421/1992 Judgment No A24/1993 Zeeman J stated (at [46]):

> The lawfulness or otherwise of the conduct complained of ought to be examined. Whilst it is not necessary for the applicant to establish that any of the conduct of the respondent was unlawful in the sense of it having been in breach of the Law, or contrary to the Articles or otherwise unlawful, if it was unlawful such unlawfulness is relevant to the question of whether such conduct falls within s 260(2)(b). An act which is otherwise prejudicial to a member may more readily be described as being unfairly so if it is an unlawful act. An act which is discriminatory against a member may more readily be said to be unfairly so if it is an unlawful act. An act may more readily be said to be contrary to the interests of the members as a whole if it is an unlawful act. Unlawfulness may more readily justify intervention under s 260 (see *Re Enterprise Gold Mines NL* (1991) 3 ACSR 531 at 538-539).

Despite Zeeman J's statements, the difficulty in seeking to apply s 232 to the conduct described in this article is that it will not be obvious that the breach of an environmental statute per se is prejudicial or unjustly detrimental to a member or to the members as a whole. The breach described in *Australian Securities Commission v The Multiple Sclerosis Society of Tasmania* went to breaches

[72] Per Anderson J in *Port Kennedy Golf Country Club Pty Ltd v Port Kennedy Resorts Pty Ltd* [1999] WASC 253.
[73] Ford et al, n 69 at [11.440] citing *Re Bellador Silk Ltd* [1965] 1 All ER 667.

of the law which were much more obviously referable to members' rights, the failure to hold a meeting of members which, on the facts, prevented the election of a particular candidate as a director. Nevertheless, this may indicate a way forward for activists, which is, request a general meeting to discuss previous or potential breaches of environmental law and if such a meeting is not held the shareholders may argue that this, together with the illegality, represents oppression. The use of statutory provisions to force the holding of meetings is discussed below.

If members were able to show that a company had a continued record of breaching environmental statutes and that this was impacting on the company as a whole and thereby its members, for example by seriously damaging its share prices, they may have a possibility of action under s 232. If the company's environmental record was such as to directly injure a shareholder, or group of shareholders, the section could be triggered. If, for example, Company A owned shares in Company B, and Company B's ongoing breach of environmental statutes was damaging the image of Company A, that company might have a case of oppression. But rarely in such situations will the connection be so obvious. Generally it would be easier to show such oppression in small companies where the name of the company is readily identifiable with the names of its majority and minority shareholding.

A breach of the law by a corporation which also put a member in breach may well attract the section's operation: *Martin v Aust Squash Club Pty Ltd* (1996) 14 ACLC 452; however, this will rarely be the case in environmental matters.

In many cases applicants will seek to combine an oppression action with statutory derivative action proceedings. In *Lakshman v Law Image Pty Ltd* [2002] NSWSC 888, Windeyer J reluctantly followed earlier decisions[74] allowing s 236 or s 237 proceedings to be brought in the same action as oppression matters.

Winding up

There have been cases where a public authority has successfully applied to have a company wound up on public interest grounds. Finn J reviewed the case law on this ground in *Australian Securities Commission v AS Nominees Ltd, Ample Funds Ltd, AS Securities Pty Ltd and Peter Grenfell Windsor* (1995) 18 ACSR 459 at 517. The public interest ground could be used where needed to protect investors, where there are breaches of the *Corporations Act* and where there has been misconduct in the management of the corporation. Finn J noted the public interest in ASIC securing compliance with the *Corporations Act*. In an extreme case it is possible that a recalcitrant corporate polluter could be wound up on this basis, particularly where it could be shown that the corporation readily and wilfully disobeyed environmental law and showed no inclination to obey it and where no other remedy or control was working. However, the cases where ASIC have intervened have been in the nature of investor protection and not of this type.

It is unlikely that the matters under discussion in this article would ground a successful winding up application by members. Petitioners would be met with the objection that winding up should not be ordered of a solvent company where other remedies exist, to seek an order in such circumstances is unreasonable under s 467(4) and that a public authority such as the EPA has at hand its own penalties for continuing corporate offenders. As demonstrated above, s 236 provides other opportunities to the minority to enforce the law against corporate wrongdoers.

Non-litigious remedies: Case study: Jabiluka and North shareholder campaign

In recent years environmental activists have begun to investigate private law avenues for seeking to influence corporate decision making in regard to environmental management. This new focus has come about partly through a recognition of the limited role of traditional political lobbying and public law enforcement, and partly out of a recognition of the growing importance of corporate governance in determining environmental and social outcomes in an increasingly privatised world. Whilst the

[74] *Keyrate Pty Ltd v Hamarc Pty Ltd* (2001) 38 ACSR 396; and *Metyor Inc v Queensland Electronic Switching Pty Ltd* (2002) 42 ACSR 398.

litigious methods outlined so far can be very costly, there are non-litigious remedies that may also prove effective for environmentalist shareholders. One such example is provided by the success of minority shareholder activism in relation to the Jabiluka uranium mine.

As part of the national campaign to stop the uranium mine at Jabiluka proposed by the company Energy Resources Australia (ERA) in world heritage listed Kakadu National Park, members of the Wilderness Society utilised the opportunity afforded by s 249D and s 249N of the *Corporations Act* which requires only 100 shareholders, with as little as one share each, to requisition an extraordinary general meeting and put forward resolutions.

The Wilderness Society targeted ERA's parent company North Ltd (North) and purchased a small parcel of shares. They contacted other shareholders on the company's share registry to inform them, many of whom were completely unaware that their shares were in a company that was ultimately responsible for the mining of uranium in the world heritage listed area of Kakadu.

As a result the North Ethical Shareholders Group (NES) was formed.[75] The group under s 249D attempted to requisition an extraordinary general meeting (EGM) in order to put up resolutions.[76] North took one of the members of NES to the Supreme Court in Victoria after lodging an application seeking guidance on whether they needed to comply with the group's demands. The court ruled the requisitioning was legal and suggested that a negotiation process be undertaken between North and NES. Agreement was reached to hold an EGM on the same date and at the same venue as the AGM.

Pursuant to s 249P activist shareholders were able to disseminate information and statements related to the resolutions to all shareholders. This included environmental concerns, the values of Kakadu National Park, activities of ERA, uranium mining and the financial viability in an ethical context.[77] The resolutions that accompanied the EGM agenda sought a report on the financial impact of North's investment in ERA. They also requested the directors to advise why North was investing in an industry such as this. In addition, amendments to North's constitution were proposed seeking to incorporate a set of ethical principles and to limit the directors' discretion to invest in ventures such as Jabiluka.

On 29 October 1999, approximately 600 shareholders attended the EGM. The voting was done by way of a poll.[78] A total of 212 million shares were voted. Support for the resolutions ran at an average of just under 6%. The result represents some 12.6 million shares voted in favour of the resolutions. NES claimed that 75% of voters abstained,[79] notwithstanding an effort by North to encourage shareholders to vote against the resolutions. The proxy provisions[80] were of significance. It has been claimed that "roughly about 90% of the shareholders stock of any company is basically at the discretion of the board, large institutional investors tick the box that gives the board their proxy and how to vote".[81] At the EGM the chair said, "I would just like to inform you that we hold the

[75] North Ethical Shareholders in 1999 was made up of individual investors owning 414,000 shares worth $1.4million, http://www.northethical.shares.green.net.au/EGM-99-html viewed 22 May 2002.

[76] These resolutions required the company inter alia to adopt a set of principles for responsible development into the company's constitution; and to obtain an independent financial report into the viability of the Jabiluka uranium mine, http://www.wilderness.org.au/member/tws/projects/Jabiluka/northegm.html viewed 22 May 2002.

[77] Provided this information was not more than 1,000 words long or defamatory pursuant to s 249P(9).

[78] Section 250E provides a company with share capital subject to any rights or restrictions attached to any class of shares, at a meeting of members (a) on a show of hands, each member has 1 vote; and (b) on a poll, each member has 1 vote for each share they hold. Section 141 provides that s 250E is a replaceable rule, s 135 defines replaceable rules and s 135(2) provides that a company's constitution can displace or modify the rule.

[79] ABC Radio Triple J Morning Show "North Shareholder Campaign – Shareholder Nation", http://www.abc.net.au/triplej/morning/shareholdernation/activism/default.htm viewed 22 May 2002.

[80] Section 249X provides for the appointment of a proxy – this provision pursuant to s 135 is a mandatory rule for a public company. A member of a company who is entitled to attend and cast a vote at a meeting of the company's members may appoint a person as the member's proxy to attend and vote for the member at the meeting: s 249X(1). Section 249Y outlines the rights of proxies: they are entitled to speak at the meeting, vote (only to the extent allowed by the appointment) and join in a demand for a poll.

[81] Sweeney D, Australian Conservation Foundation, "The Radio-Active Show", 3CR Community Radio 8.55am, 13 November 1999, http://www.seaus.org.au/radactshow/ras991113.html viewed 22 May 2002.

overwhelming number of shares and the overwhelming number of proxies".[82] The Wilderness Society had lobbied members of superannuation funds; many superannuants were outraged that their money was funding Jabiluka. The trustees of many of the major funds were approached and asked to use the voting rights attached to their shares in North to vote in favour of the resolutions.[83]

North has since been bought out by Rio Tinto, and the campaign to stop Jabiluka continued throughout shareholder meetings in London and Sydney. Rio Tinto announced that it would cease development of the mine on environmental, social and economic grounds at least in the medium term.[84] It was said the shareholder campaign was instrumental in this decision.[85]

Buoyed by the success of the actions in relation to Jabiluka, the Wilderness Society has employed a full time corporate affairs campaigner and has continued to pursue corporate environmental accountability through similar campaigns in other companies. In particular, activists have been successful in gaining the support of small shareholders, customers and members of large institutional investors such as banks and superannuation funds. Resolutions went to the Commonwealth Bank and National Australia Bank at their AGMs in 2002, which sought to restrict the banks' rights to invest in any industry or company that impacted upon old growth forests. The resolutions managed to get support of 23% (CBA) and 22% (NAB) respectively.[86]

More recently the Wilderness Society together with ethical shareholders in Gunns Ltd have succeeded in requisitioning an EGM of Gunns Ltd, to consider that company's involvement in old growth woodchipping in Tasmania. According to the Wilderness Society, over 70% of Gunns Ltd shares are owned by institutional investors such as banks and superannuation funds.[87] Whilst the use of the requisition provisions to pursue environmental concerns remains controversial, the growing success of these campaigns indicates that environmentally active shareholders are tapping into significant levels of latent support within the general shareholder body. This fact undermines the government's portrayal of them merely as "bands of vigilantes".[88] Shareholder actions in pursuit of environmental accountability by companies and their directors have the potential to reinvigorate shareholder democracy as well as positively influence corporate governance. As evidenced in relation to the Jabiluka mine, it is not necessary for activist shareholders to actually win majority support for a resolution to have a substantial impact upon corporate agendas.

Shareholder resolutions or dialogue may contribute significantly to corporate change, yet the corporation may not credit this as being the case.[89] Empirically, sustained and strategic shareholder activism can influence corporate culture and performance.[90] Friends of the Earth International takes the view that if an environmental resolution receives a significant number of votes (10% or more), a

[82] Sweeney, n 81.

[83] The Wilderness Society, "North Limited and the EGM", http://www.wilderness.org.au/member/tws/projects/Jabiluka/northegm.html viewed 22 May 2002.

[84] Rose J, "Forget S11, try shareholder activism", *The Age* (10 August 2001) http://www.theage.com.au/news/state/2001/08/10/FFXE472T5QC.html viewed 22 May 2002.

[85] Rose, n 84.

[86] The Wilderness Society, "Tell your Bank or Superfund to Vote for the Forests", http://www.wilderness.org.au/campaigns/corporate/gunns/EGM viewed 24 July 2003.

[87] The Wilderness Society, n 86, viewed 24 July 2003.

[88] Minister for Financial Services and Regulation, Joe Hockey, "Wealth Not Politics", Press Release, 18 December 2000, http://www.minfsr.treasury.gov.au/content/pressreleases/2000/083.asp viewed 22 May 2002.

[89] Friends of the Earth International state that the purpose of activist resolutions is to pressure and persuade company managers to voluntarily change corporate practice.

[90] Friends of the Earth International and activist shareholders requisitioned an EGM of Wesfarmers in relation to their involvement with woodchipping: May L, "Active Owners", http://www.cfoweb.com.au/stories/19991101/5346.asp viewed 22 May 2002. "Various activist-shareholders forced 160 companies to divest ownership in South Africa contributing to the toppling of the apartheid regime": Morgan C, "Shareholder activism", Environmental News Network, 6 June 2000, http://www.enn.com/news/enn-stories/2001/06/06062001/shareholder_43785.asp viewed 22 May 2002. BP Amoco Arctic Campaign, 13 April 2000, resolution calling on BP to stop exploring for oil in the Arctic Sea off the North Coast of Alaska secured 13.5% of the vote. Environment News Service, "BP Amoco Takes Flak from Shareholders", http://ens.lycos.com/ens/apr2000/2000L-04-13-04.html viewed 22 May 2002.

well-governed company will address the issues at stake.[91] Shareholder activism is just one tool for the environmental activist who is embarking on corporate engagement, and it may be used in concert with consumer boycotts, direct lobbying of corporate executives, blockades, street marches, rallies, broader public education and political lobbying and, as we have seen, litigation. Diligent directors should consider the risk of encountering such strident community opposition when making investment and operational decisions.

The current Federal Government has made clear its disapproval of shareholder activism, often employing quite extreme terms more appropriate to terrorist attacks than to outbreaks of democracy to describe shareholder activism. According to the Minister for Financial Services in December 2000, for example:

> Increasingly, bands of vigilante groups – environmentalists, unionists and other political activists – have banded together and taken advantage of our corporate laws to force extraordinary general meetings.[92]

Whether utilisation of shareholder rights in this way is, as the minister polemically suggests, the actions of "bands of vigilante groups" or a strategic but thoroughly proper use of accountability procedures built into corporations law, is a question of political judgment. The current Federal Government has thus far been unsuccessful in several attempts to undermine the shareholder rights upon which the Wilderness Society has relied.

In October 1999, the Parliamentary Joint Statutory Committee on Corporations and Securities recommended that the numerical test be repealed so that the sole test to requisition an EGM would be that shareholders hold at least 5% of the issued share capital of the company.[93] This approach was endorsed by the Companies and Securities Advisory Committee.[94] The government attempted to amend the provision through regulation[95] in April 2000 to increase the threshold for the numerical test from 100 shareholders to 5% of shareholders. The Senate after voicing disapproval of the action of the government disallowed the regulation in June 2000.[96]

In December 2000, the Minister proposed an alternative approach, the "square root" rule,[97] which, he announced, would stop "political activists from *hijacking* company annual meetings" (emphasis added).[98]

In March 2003 the Federal Government circulated a proposal for a legislative amendment to the *Corporations Act* deleting s 249D(1) (b), so that a 5% shareholding would in all cases be required in order for shareholders to requisition a general meeting. At the time of writing s 249D(1)(b) has not

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[91] See Friends of the Earth International, "The Impact of Shareholder Activism", http://www.foe.org/international/shareholder/impact.html viewed 22 May 2002.

[92] Minister for Financial Services and Regulation, Hockey J, "Wealth Not Politics", Press Release, December 2000. http://www.minfsr.treasury.gov.au/content/pressreleases/2000/083.asp viewed 22 May 2002.

[93] Parliamentary Joint Standing Committee on Corporations and Securities, *Report on Matters arising from the Company Law Review Act 1998*, in Hockey J, "Labor Deceit on Company Meetings", Press Release, 28 June 2000, http://www.minfsr.treasury.gov.au/content/pressreleases/2000/034.asp viewed 22 May 2002. Note that the original 121 shareholders collectively held stock to the value of $1.5 million; this represents less than 0.5% of North's total stock issue – a long way below the proposed 5%. In fact, the likelihood of obtaining 5% of shareholders to call a meeting is extremely remote unless institutional investors instigate the procedure.

[94] Minister for Financial Services and Regulation Hockey, n 93.

[95] It was said the government acted in very poor faith in attempting to amend the corporations legislation by regulation and that it was underhanded, Labor Senator Conroy, Senate *Hansard*, 28 June 2000, p 15896.

[96] Senate *Hansard*, 28 June 2000, p 15892. While Green, Democrat and ALP senators acknowledged the potential for the abuse of the requisition procedure, they felt that the proposed threshold was too high and would prevent small shareholders from raising legitimate issues. They expressly did not consider that the requisitioning of the North EGM by the North Ethical Shareholders was an abuse of the provision and condoned the legitimacy.

[97] Minister for Financial Services and Regulation, Hockey J, "New Rule Stops Hijack of Company Meetings", Press Release, 18 December 2000, http://www.minfsr.treasury.gov.au/content/pressreleases/2000/085.asp viewed 22 May 2002. Under the Minister's proposal a share capital and numerical test would remain. While the share capital test would remain the same, the numerical threshold for calling a meeting would be calculated by determining the square root of the total number of company shareholders.

[98] Hockey, n 97.

been amended. The government's haste to discourage shareholder environmental activism has occurred in a climate in which there remains little evidence of any abuse of process. Whilst cases could occur in which the tactic was merely employed to cost the company time and money there is no evidence of capricious use of the powers in campaigns to date. Clearly in the case of both Jabiluka and the Tasmanian forests, the concerns of shareholders are genuine.

For the time being at least, the use of minority shareholder rights to requisition an EGM has proved to be a powerful tool for environmentalists and as a result its use appears set to increase. As well as the ethical arguments raised against the use of EGMs to promote environmental agendas there remain serious ethical arguments in favour of retaining the current provisions. Corporations law self-consciously maintains a delicate balance between the power of the majority and the rights and interests of dissenting minorities. This balance is of fundamental ethical importance not only within the formalised confines of shareholder democracy but also within the broader context of democratic civil society generally. On a more pragmatic note, the relatively high levels of latent shareholder support revealed in recent uses of the requisition rights suggest that such tactics are useful in providing important information to boards of directors about the sentiments of existing and potential shareholders. The importance of considering such investor sentiment is only heightened by the recent growth in retail investment generally and in institutional investors such as superannuation funds who represent large bodies of individual contributors. These types of investors have certainly been the main groups targeted in the environmental campaigns so far.

Despite the negative rhetoric employed by the current Federal Government in relation to shareholder environmental activism, it is likely that public pressure on companies and their directors for higher levels of environmental accountability will continue in the future. This being so, directors who take into account the environmental sensitivities of the public generally and of their own individual and institutional investors are far more likely to fulfil their obligations to ensure the long term viability of the enterprise. The danger of removing this opportunity for minorities to voice disapproval would be that companies would continue along potentially self-destructive paths unchecked by the interventions of socially or environmentally motivated shareholders. The Federal Government would not necessarily be doing Australian companies a favour by silencing significant minorities within the investor community.

CONCLUSIONS

Currently the only direct mention of the environment in the *Corporations Act* is s 299(1)(f) which provides that the directors' report for a financial year must inter alia give details of the entity's performance in relation to environmental regulation, where the entity's operations are subject to any particular and significant environmental regulation under a law of the Commonwealth or of a State or Territory.[99] This represents an important step in the development of corporations law and a recognition that corporate environmental performance is increasingly becoming a matter which has the capacity to affect the profitability and long term survival of a corporation, and hence its share price.

Mark Latham has observed that Australia in the next few years is likely to see a dramatic rise in shareowner power, and with that, it is generally hoped, will come significant improvements in corporate governance.[100] Through the debate on corporate governance shareholders have rising expectations about board performance in areas such as accountability to shareholders, shareholder value creation and commitment to good corporate citizenship.[101] The current notion of "triple bottom

[99] ASIC, Practice Note 68, "New Financial Reporting and Procedural Requirements", http://80-www.butterworthsonline.com.ezproxy.scu.edu.au/lpBin20/lpext.dll/bw/L8/13 viewed 22 May 2002.

[100] Latham M, "The Road to Shareholder Power", Draft, 25 May 1999, http://www.corpmon.com/Road.htm viewed 22 May 2002. Birch has commented "Such views predate the recent spate of corporate collapses in Australia, and are born, in the main, from an increased awareness in the media of institutional (and to a lesser extent, individual) shareholder activism both in Australia and overseas": Birch D, *Shareholder-Corporate Relations in Australia: Some New Economics, Corporate Citizenship and Sustainable Capitalism Perspectives* (Draft, Corporate Citizen Research Unit, Deakin University, 2001).

[101] Bradley G, "Beware Shareholder Activism" (1998) 14 *Company Director* 10 at 12.

line"[102] in relation to sustainability is a beginning to a much overdue and needed shift in corporate governance. Contemporary concepts of corporate governance transcend the law and include notions of ethics, self-regulation and business codes of practice.[103] Corporate governance has been described as "diverse and ill-defined" and its meaning is contingent upon a person's interests.[104] It is suggested that this is the reason for the lack of universal acceptance and understanding of principles of corporate governance. In search of an appropriate theoretical perspective for comparative corporate governance, Farrar has warned that "our conceptions of corporation and corporate governance are cultural constructs rooted in time and to some extent ethnocentric".[105] It is said that corporate governance refers to the process of setting policy to guide activities – as well as making sure that the systems are in place to carry out the policy.[106] It is further stated:

> the key challenge for good corporate governance is to seek an appropriate balance between enterprise (performance) and constraints (conformance), which takes into account the expectations of shareholders for reasonable capital growth and responsibility to other stakeholders (including employees, wider society and the environment).[107]

Environmentalists as stakeholders will continue their integral role in contributing to and policing the evolving principles of corporate governance. With the above principles of corporate governance in mind we have described a number of legal remedies that may be available to these people. These remedies could allow minority environmentalist shareholders to directly influence governance in their corporations by bringing directors to account for the harm they cause, *not* to the environment or to society at large, but to the corporation itself. This harm is done by the directors either deliberately ignoring environmental statutes, thereby putting the company in breach of the law, or not properly attending to matters such as routine maintenance, thus exposing the company to breach of environmental laws.

We have outlined statutory breaches, particularly ss 180 and 181 and common law negligence as representing rich pickings for activist shareholders of recalcitrant companies, particularly those with a poor environmental record. The rule in *Foss v Harbottle* creates procedural problems for shareholders given that the company is the proper plaintiff to redress wrongs done to it. Various remedies designed to circumvent this rule have been described including the use of the derivative proceedings in s 236. There is a risk that a judge might regard the use of such minority remedies as an abuse of process insisting that it is for the environmental authorities to pursue environmental breaches, not activist shareholders.[108] The shareholders' activism is more likely to be rewarded by judges who realise that quality environmental performance by directors is now a legitimate expectation of corporations and it goes directly to the profitability and long term survival of corporations. Activists will make their case more strongly when they can point to (often very easy to find) statements from the corporation itself which set up environmental performance as part of their corporate mission and by implication or expressly, good corporate governance.[109] Activists will make the point that such statements could

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[102] The Triple Bottom Line is a term coined in 2000 by John Elkington, an expert in sustainability issues and SRI of the UK based consultancy, Sustainability. The term refers to the need for companies to be accountable for their social, environmental and financial performance. Companies aiming for sustainability thus not only need to perform against a single financial bottom line, but against a triple bottom line: Corporate Footprint, n 37, viewed 22 May 2002.

[103] Farrar J, "In Pursuit of an Appropriate Theoretical Perspective and Methodology for Comparative Corporate Governance" (2001) 13 AJCL 1 at 1-2.

[104] Nicoll G, "New Age Corporate Governance" (1997) 8 AJCL 105 at 106.

[105] Farrar, n 103 at 1-2.

[106] Corporate Footprint, n 37, viewed 22 May 2002.

[107] Corporate Footprint, n 37, viewed 22 May 2002.

[108] This has not presented a problem in other areas of the law; for example, s 52 of the *Trade Practices Act 1974* (Cth) is replete with examples of corporations enforcing societal standards of non-misleading advertising on their competitors.

[109] This is commonly done; for example, the BHP Billiton Charter states: "We are BHP Billiton, a leading global resources company ... We value safety and the environment an overriding commitment to health, safety, environmental responsibility and sustainable development", http://www.bhpbilliton.com/bbContentRepository/AboutUs/Charter/Charter.pdf viewed 25 September 2003.

On its website Boral describes its Environmental Policy: "Boral is committed to pursuing industry specific best practice in environmental performance … Boral embraces the principle of sustainable development … Specifically Boral is committed to:

only have been inserted by the corporation with good intent and not as a pure marketing or public relations exercise.

The message is clear for corporations and their boards of directors that environmental laws, and the more general environmental concerns of shareholders are not peripheral to the core business of good corporate governance – they have become an integral aspect of it.

* complying with environmental legislation, regulations, standards and codes of practice relevant to the particular business as the absolute minimum requirement in each of the communities in which we operate
* conducting our operations to minimise and, wherever practicable, eliminate adverse environmental impacts
… Boral will progressively implement and maintain environmental management systems for its businesses based on the international standard ISO 14001 ("Environmental management systems – specifications with guidance for use") or its equivalent, and will also concurrently implement the Boral HSE Best Practice Elements", http://www.boral.com.au/Article/General_21112001_122857.asp?site=Boral&AUD=communityEducation viewed 25 September 2003.

