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CONTENTS

Directors' statutory duty to exercise their powers 'in the best interests of the corporation (company)' can be found in s 181(1)(a) of the Corporations Act 2001 (Cth). On numerous occasions the courts, both in the United Kingdom and Australia, have held that there it is also a common law duty for directors to exercise their powers 'in the best interests of the corporation as a whole' and that 'the corporation' means 'the corporators (shareholders) as a general body'. In this article, the focus will be on these phrases and the aim is to establish whether these phrases create potentially competing duties for directors. The various interpretations of these duties have resulted in considerable complexity and legal uncertainty as far as directors' duties are concerned. The UK case of *Greenhalgh v Arderne Cinemas Ltd* and the Australian High Court case of *Ngurli Ltd v McCann* will be analysed and their impact on many other cases will be dealt with in some detail. Throughout this article the significance of the corporation as a separate legal entity will be emphasised and it will be argued that directors owe their duties towards the corporation as a separate legal entity. It follows that directors can no longer prioritise shareholder interests unless these interests align with the best interests of the corporation as a separate legal entity. Several other third party interests are represented in the corporation as a separate legal entity and it will depend on the particular circumstances to what extent these interests need to be considered when directors fulfil their duties towards the corporation.

Part 2 in this series of two articles of the relational approach constructs the principal components of the relational corporate governance approach or model and introduces the 39 governance and management structures, mechanisms, processes and protocols (called 'governance variables'). Then follows detailed analysis and justification for the four components. The 'weighing mechanism' introduced in Part 1 of this series of articles is constructed. The 'three relational axes of good governance' act as a set of scales to weigh the objectives, behaviours and positional conflict of insiders versus outsiders. The eight 'governance factors' are the 'backbone' of the relational approach. They represent the most significant and recurring firm-specific or firm-level themes or aims underpinning the four 'Key Fields' and, therefore, the 39 governance variables drawn from those Fields. The third component — the two ‘interrelationship schemes’ in Figures 2.6 and 2.7 — represent the hypothesised interrelationships between the eight governance factors. These schemes are used to construct the fourth component — a ‘relational effect path’ for each governance variable. This path depicts the number and identity of governance factors affected by each governance variable and the direction of the effect. The construction of the relational model in Part 2 culminates with a diagram of the overall ‘relational corporate governance framework’ of the relational approach in Figure 2.8. The hypothesised interrelationships between the governance variables and governance factors depicted in the relational effect paths are constructed in this Part 2 article in two operational tables. The first table — the Coverage Table — displays the number and identity of each governance factor affected by a governance variable and the direction of the effect. The second table — the Relational Proximity Table — arranges the 39 governance variables in order or groups of descending relative importance (known as ‘relational proximity rating’ or ‘rprox’) in affecting agency costs and the long-term efficiency and survival/sustainability of the firm.

In order for s 180(1) of the Corporations Act 2001 (Cth) to fulfill its policy mandate of striking a balance between encouraging legitimate entrepreneurialism and discouraging negligent behavior, the provision must be interpreted correctly. In recent years the Australian Securities and Investments Commission has adopted an approach to proving breaches of s 180(1) dubbed the ‘stepping stone’ approach, by which corporate liability is used as a ‘step stone’ to prove directorial liability. This article argues that one is not a precursor to the other; for the reasons outlined, the stepping stone approach works against the objective of s 180(1). After considering the legal foundations of s 180(1) and the related concept of ‘corporate fault’, the article outlines four arguments that undermine the stepping stone approach. In short, the stepping stone approach: (i) is inconsistent with the proper construction of s 180(1); (ii) risks the imposition of ‘backdoor liability’ on directors; (iii) is prohibitively restrictive by falsely connecting recklessness/negligence with corporate fault; and (iv) is unnecessarily ambiguous, particularly where it intersects with the business judgment rule. For these reasons, the stepping stone approach should be abandoned by litigators and courts.

A successful corporate rescue will usually require retaining at least some of the value of contracts for supplying goods and services to the company being restructured as well as contracts that that company has with its customers. Ipso facto clauses make restructuring more difficult because they give the contractual counterparties leverage over the restructuring effort which can give the counterparty an advantage over other creditors. In an attempt to facilitate restructuring, the Parliament has introduced amendments to stay ipso facto clauses during restructuring efforts. However, this article argues that rather than encouraging and supporting restructuring efforts, the complex amendments are likely to make restructuring less certain and more difficult.