

A DIRECTORS' FIDUCIARY DUTY OF DISCLOSURE: THE CASE(S) AGAINST

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I INTRODUCTION

Directors owe a significant number of duties to their company – at common law, in equity and according to the *Corporations Act 2001* (Cth) ('*Corporations Act*'). Within the field of equity, the director-company relationship is recognised as founding a presumption of a fiduciary obligation flowing from the director to the company. Despite High Court authority and significant academic debate as to the precise and proscriptive content of this obligation in equity, over the past two decades case law has emerged suggesting that directors owe a 'fiduciary duty of disclosure'. With appropriate and timely disclosure being an important element of corporate governance, and imposed through a variety of other well-recognised and widely-debated mechanisms, close inspection of this development is warranted.

This article undertakes a detailed analysis of the first case to raise the duty, *Fraser v NRMA Holdings Ltd*.¹ Through careful consideration of that case and the authorities it cites, this article argues that there has either been a conflation of the words 'equity' and 'fiduciary' or, more likely, a misstatement of the only defence available to a challenge of fiduciary breach – that of fully informed consent. The article charts the cases which follow *Fraser v NRMA*, and confirms that the disclosure discussed is either grounded in equity more generally, or specifically as a defence to a claim of breach of fiduciary obligation.

II DIRECTORS' DISCLOSURE OBLIGATIONS

Disclosure is clearly required of directors through sections 191(1), 195 and 208 of the *Corporations Act*, although the precise scope and nature of the disclosure required remains a current issue.² It also exists indirectly through the

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1 (1995) 55 FCR 452 ('*Fraser v NRMA*').

2 See, eg, *Duncan v Independent Commission Against Corruption* (2014) 311 ALR 750.

application of sections 180–3 of the *Corporations Act*.³ A number of other Acts which can regulate the behaviour of directors also require disclosure, such as the *Australian Consumer Law*, section 18.⁴ Despite the variety of legislative provisions regarding disclosure, a number of decisions have chosen to consider a fiduciary duty of disclosure, which has led to the examination which takes place in this article.

In order to examine the potential for a positive fiduciary duty of disclosure, it is necessary to first refer to the long-lived debate as to the precise nature of fiduciary obligations under Australian law. This article will briefly canvas the position of fiduciary obligations in current law and, in particular, their role in the director-company relationship, before turning to the broader argument as to the particular impact of the High Court decision in *Breen v Williams*.⁵ There is debate as to whether the judgment in *Breen v Williams* intended to: first, disapprove a broad prescriptive fiduciary duty to act in the best interests of the beneficiary; secondly, more generally require fiduciary obligations to be proscriptive in nature with no further restriction; or thirdly, to recognise only the obligations to avoid profits and conflicts.⁶ In light of this uncertainty, the mooted fiduciary duty of disclosure warrants closer attention, as under the first or second categories above, it might survive scrutiny despite initially appearing at odds with the current mainstream of fiduciary law. The three cases which have been seen as affirming this concept in particular are *Fraser v NRMA*, *ENT Pty Ltd v Sunraysia Television Ltd*,⁷ and *Commonwealth Bank of Australia v Fernandez*,⁸ which this article will examine in particular. These cases appear to indicate an expansion of the accepted proscriptive fiduciary obligations by establishing a positive obligation on directors to disclose information in certain circumstances. There is no question that such a positive obligation can be found within the *Corporations Act*: for example, in relation to disclosure for related party transactions in sections 218–19, and the penalty for providing false information is clear in section 1309. Further, there is no debate that disclosure on the whole can be a mechanism for effective corporate governance.⁹ However, the discussion here focuses on the questionable labelling of the duty as ‘fiduciary’, and whether the cases do in fact argue for such an obligation.

3 The precise scope and nature of the disclosure required under those provisions is also an ongoing question before the courts: see, eg, *Australian Securities and Investment Commission v Soust* (2010) 183 FCR 21; *Australian Securities and Investment Commission v Soust [No 2]* (2010) 78 ACSR 1.

4 The *Australian Consumer Law* is contained in *Competition and Consumer Act 2010* (Cth) sch 2. (1996) 186 CLR 71.

6 See, eg, Rosemary Teele Langford, ‘The Duty of Directors to Act Bona Fide in the Interests of the Company: A Positive Fiduciary Duty? Australia and the UK Compared’ (2011) 11 *Journal of Corporate Law Studies* 215, 228; see generally J D Heydon, M J Leeming and P G Turner, *Meagher, Gummow and Lehane’s Equity: Doctrines and Remedies* (LexisNexis Butterworths, 5th ed, 2015) 210 [5-380] ff.

7 (2007) 61 ACSR 626 (*ENT v Sunraysia*).

8 (2010) 81 ACSR 262 (*CBA v Fernandez*).

9 Ian M Ramsay and Richard Hoad, ‘Disclosure of Corporate Governance Practices by Australian Companies’ (1997) 15 *Company and Securities Law Journal* 454, 456.

III THE FIDUCIARY OBLIGATION

Significant scholarly work has been dedicated to the fiduciary obligation within Australian law,¹⁰ and although this article does not mean to replicate it, a brief overview is necessary. The current 'accepted mainstream' of the fiduciary obligation revolves around the duties of good faith imposed to exact standards of good conduct from persons unable to deal with each other at an arm's length due to their relationship.¹¹ As the relationship between the parties plays a pivotal role in attracting the supervision of equity through the fiduciary obligation, it has been said that the obligation itself may vary depending on the nature of the underlying relationship.¹²

Although the relationship plays a pivotal role in attracting the supervision of equity through the fiduciary obligation, a finding that one party is a fiduciary does not consequently mean that all or potentially any other obligations arising from the relationship will be fiduciary in nature.¹³ This is central to the issue this article considers.

As yet, there is no universally accepted definition of which relationship will attract fiduciary obligations,¹⁴ nor a universally accepted test for determining when a fiduciary obligation will attach to a relationship.¹⁵ Instead, the courts list relationships which have been accepted as including fiduciary obligations in the past and which give rise to a presumption of fiduciary obligations,¹⁶ and deal with new relationships by drawing analogies to that list. Despite valid and longstanding criticisms of this 'list method',¹⁷ it remains the approach of choice for the High Court.¹⁸

10 P D Finn, *Fiduciary Obligations* (Law Book, 1977) is one of the first texts dedicated to the obligation, which has been recognised in the courts since the 1700s, from early English decisions such as *Keech v Sandford* (1726) Sel Cas Ch 61; 25 ER 223, to recognition in Australia in *Moss v Moss [No 2]* (1900) 21 LR (NSW) Eq 253, and in depth treatment in the High Court of Australia in *Chan v Zacharia* (1984) 154 CLR 178, *Hospital Products Ltd v United States Surgical Corp* (1984) 156 CLR 41 ('*Hospital Products*') and *Breen v Williams* (1996) 186 CLR 71. See also Sir Anthony Mason, 'Themes and Prospects' in P D Finn (ed), *Essays in Equity* (Law Book Co, 1985) 242; P D Finn, 'The Fiduciary Principle' in T G Youdan (ed), *Equity, Fiduciaries and Trusts* (Carswell, 1989) 1; Matthew Conaglen, *Fiduciary Loyalty: Protecting the Due Performance of Non-Fiduciary Duties* (Hart Publishing, 2010).

11 Finn, *Fiduciary Obligations*, above n 10, 78.

12 *Chan v Zacharia* (1984) 154 CLR 178, 195 (Deane J).

13 *The Bell Group Ltd (in liq) v Westpac Banking Corporation [No 9]* (2009) 225 FLR 1, 493 (Owen J).

14 *Ibid* 489 (Owen J). At least one academic argues that, according to case law, the outcome is not uncertain at all – it is simply a matter of courts and then later academics failing to articulate a coherent conceptual position: Robert Flannigan, 'The Core Nature of Fiduciary Accountability' [2009] *New Zealand Law Review* 375, 400.

15 For example, whether it is a legal response to the causative events of consent or the commission of a wrong under Birks' taxonomy as discussed by Mitchell McInnes, 'Taxonomic Lessons for the Supreme Court of Canada' in Charles Rickett and Ross Grantham (eds), *Structure and Justification in Private Law: Essays for Peter Birks* (Hart Publishing, 2008) 77.

16 See, eg, *Hospital Products* (1984) 156 CLR 41, 68 (Gibbs CJ), 96 (Mason J).

17 Ernest J Weinrib, 'The Fiduciary Obligation' (1975) 25 *University of Toronto Law Journal* 1, 5; Michael Kirby, 'Equity's Australian Isolationism' (2008) 8 *Queensland University of Technology Law and Justice Journal* 444, 457–8.

18 *John Alexander's Clubs Pty Ltd v White City Tennis Club Ltd* (2010) 241 CLR 1, 34–5 (The Court).

Pertinent to this discussion, since the decision of *Hospital Products* the director-company relationship is recognised as founding a presumption of fiduciary obligations.¹⁹ Parties to relationships which are considered to be analogous to those contained within the list, such as officer-company,²⁰ promoter-company, or new relationships entirely, can still find themselves bound by fiduciary obligations on an ad hoc basis.²¹

The presumption created by the existence of the relationship that there is a fiduciary obligation owed is a rebuttable one. Finn also cautions that being fiduciary for one obligation is not ipso facto fiduciary for all, or potentially any, other obligations,²² and that the finding of a fiduciary relationship only marks the beginning of the enquiry.²³ This is eminently logical.

A The Content of the Fiduciary Obligation

The formulation of the fiduciary obligation itself is also not entirely without controversy,²⁴ although the ‘bedrock of the two negative principles’²⁵ is generally accepted. A person who owes a fiduciary obligation to another (‘the fiduciary’) must not place themselves in a position where their personal interests or duties conflict with, or may possibly conflict with, the interests of the person to whom the duty is owed (‘the beneficiary’),²⁶ nor may they secretly profit from the relationship.²⁷ These prohibitions are known more colloquially in Australian law as the ‘no conflict’ and ‘no profit’ rules. It is not necessary for the fiduciary to act *mala fide* to breach the ‘no conflict’ rule, which maintains the strict nature the obligation derives from its early sources, removing the fruit of temptation entirely rather than merely moving it to a higher shelf.²⁸

19 (1984) 156 CLR 41, 68 (Gibbs CJ), 96 (Mason J); *Lac Minerals Ltd v International Corona Resources Ltd* [1989] 2 SCR 574, 597 (Sopinka J).

20 Which can arguably fall into another nominate category as well, that of employee-employer: *C & KA Flanagan Sailmakers Pty Ltd v Walker* [2002] NSWSC 1125, [44] (Macready AJ). There is some debate as to whether or not employee-employer falls on the nominate category list. The majority of commentators and the High Court in both *Hospital Products* (1984) 156 CLR 41, 96 (Mason J), 141 (Dawson J) and *John Alexander’s Clubs Pty Ltd v White City Tennis Club Ltd* (2010) 241 CLR 1, 35 (The Court) included that relationship on the status-based list (*contra* G E Dal Pont, *Equity and Trusts in Australia* (Lawbook, 5th ed, 2011) 111–12). For officer-company, see also *Canadian Aero Service Ltd v O’Malley* (1973) 40 DLR (3d) 371, 381 (Laskin J); *Avtex Airservices Pty Ltd v Bartsch* (1992) 107 ALR 539, 560–2 (Hill J); *Minlabs Pty Ltd v Assaycorp Pty Ltd* (2001) 37 ACSR 509, 517 (Roberts-Smith J).

21 *Wingecarribee Shire Council v Lehman Brothers Australia Ltd (in liq)* (2012) 301 ALR 1.

22 Finn, *Fiduciary Obligations*, above n 10, 2.

23 Paul Finn, ‘Fiduciary Law and the Modern Commercial World’ in Ewan McKendrick (ed), *Commercial Aspects of Trusts and Fiduciary Obligations* (Clarendon Press, 1992) 7, 37.

24 See, for example, the discussion on the proscriptive/prescriptive debate which follows.

25 Charles Harpum, ‘Fiduciary Obligations and Fiduciary Powers – Where Are We Going?’ in Peter Birks (ed), *Privacy and Loyalty* (Oxford University Press, 1997) 145, 147.

26 This party is sometimes referred to as ‘the principal’: see, eg, *Blackmagic Design Pty Ltd v Overliese* (2011) 191 FCR 1 (‘*Blackmagic Design v Overliese*’); Langford, ‘The Duty of Directors’, above n 6.

27 *Moss v Moss [No 2]* (1900) 21 LR (NSW) Eq 253, 258 (Simpson CJ in Eq). Although the two concepts emerge separately from the case law, they are collectively known as the fiduciary obligations.

28 Leonard I Rotman, *Fiduciary Law* (Thomson Carswell, 2005) 64.

As the obligation is formulated to protect the beneficiary, the fiduciary may be excused by obtaining fully informed consent from the beneficiary,²⁹ either prior to a potential breach, or via retrospective absolution.³⁰ The onus of proving the beneficiary's fully informed consent naturally rests on the fiduciary.³¹ It is this defence to a claim of breach that is at the heart of the issue raised in cases like *Fraser v NRMA* and addressed by this article. The remedies for a breach of a fiduciary obligation include the traditional equitable remedies of injunction, constructive trust, account of profits, rescission, tracing and equitable compensation.

Although the bedrock of two negative principles is generally accepted, there is a great deal of debate as to whether fiduciary obligations impose proscriptive (negative) duties or prescriptive (positive) duties.³² The High Court in *Breen v Williams*, one year after the decision in *Fraser v NRMA*, emphasises that in Australia fiduciary duties are proscriptive or prohibitive in nature.³³ One commentator interprets this as the Court marking a line between the domain of contract and tort law on the one hand, and the fiduciary obligation on the other.³⁴ To impose fiduciary obligations in a prescriptive manner would place a positive duty to act in the interests of the person to whom the duty is owed, which the Court deems undesirable for a fiduciary obligation.³⁵ Another sees the two proscriptive duties described above as the method of ensuring effective performance of the prescriptive duties of fiduciaries, such as the general obligation to act in the best interests of the beneficiary.³⁶ Currently, the position propounded in High Court authority is that fiduciary obligation is a form of negative assurance or protection, in that it prohibits the fiduciary from acting inconsistently with the interests of the beneficiary of the duty.³⁷ There is academic support for this judicial reasoning, founded not only on the practical

29 See, eg, *Boardman v Phipps* [1967] 2 AC 46, 93 (Viscount Dilhorne), 104 (Lord Cohen), 109 (Lord Hodson), 117 (Lord Guest).

30 *Bamford v Bamford* [1970] Ch 212, 238 (Harman LJ); *Winthrop Investments Ltd v Winns Ltd* [1975] 2 NSWLR 666, 672 (Glass JA). In relation to timing of consent, and commercial knowledge, see also *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* (2007) 230 CLR 89, 138–9 (The Court).

31 *Maguire v Makaronis* (1997) 188 CLR 449, 466–7 (Brennan CJ, Gaudron, McHugh and Gummow J).

32 See generally Heydon, Leeming and Turner, above n 6, 210–18 [5-380]–[5-400].

33 (1996) 186 CLR 71, 113 (Gaudron and McHugh JJ), 95 (Dawson and Toohey JJ). See also *Aequitas Ltd v AEFCL Leasing Pty Ltd* (2001) 19 ACLC 1006; *Pilmer v Duke Group Ltd (in liq)* (2001) 207 CLR 165, 197–9; *Fitzwood Pty Ltd v Unique Goal Pty Ltd (in liq)* (2001) 188 ALR 566; *Youyang Pty Ltd v Minter Ellison Morris Fletcher* (2003) 212 CLR 484; *Australian Securities and Investment Commission v Citigroup Global Markets Australia Pty Ltd [No 4]* (2007) 160 FCR 35; *Friend v Booker* (2009) 239 CLR 129; *Blackmagic Design v Overliese* (2011) 191 FCR 1.

34 Dal Pont, above n 20, 99–100.

35 *Breen v Williams* (1996) 186 CLR 71, 95 (Dawson and Toohey JJ), 113 (Gaudron and McHugh JJ). See also *Pilmer v Duke Group Ltd (in liq)* (2001) 207 CLR 165, 198 (McHugh, Gummow, Hayne and Callinan JJ).

36 See generally Conaglen, above n 10. See especially: at 59–105, 185–7.

37 See above n 33 for a list of authority. A similar position is developing within the Canadian Supreme Court, seeking to 'debunk the view, arguably open on some of the language appearing in [their] case law, that fiduciary duties equate to a duty to act in [the beneficiary's] best interests': Dal Pont, above n 20, 146. *Contra* the English position under the *Companies Act 2006* (UK) c 46, s 172(1), which is suggested to be reflective of a fiduciary obligation: Langford, 'The Duty of Directors' above n 6, 223–4.

difficulty of *ex ante* constraints on conduct which can be performed in a variety of unobjectionable ways,³⁸ but also on the potentially ‘chilling effect on entrepreneurial activity that imposing strict duties of care and skill would have and to avoid the uncertainty of application that imposing broad prescriptive duties would involve’.³⁹ Analysis of the Bell Group cases suggests that, along with many academics, the intermediate courts are prepared to query the rigidity of this proscriptive/prescriptive distinction.⁴⁰ Consideration of positive fiduciary obligations arose in those decisions because the liquidators sought to rely on *Barnes v Addy*⁴¹ to recover money received by banks who had enforced their securities when various companies within the Bell Group were placed into liquidation. *Barnes v Addy* permits liability for a breach of trust to be extended to those who either knowingly receive trust property or knowingly assist in a breach of trust.⁴² It has been ‘assumed, but rarely if at all decided’, that this ability to make a third party liable for breach is not limited to breach of trust alone, but that it extends to fiduciary breach more generally.⁴³ It does not, however, extend to non-fiduciaries, and so the Court was required to determine whether the duties breached by the directors were fiduciary in nature, thereby attracting the remedial approach of *Barnes v Addy*. Owen J at first instance, and the Court of Appeal in three separate judgments, were prepared to find various positive duties of the directors fiduciary, and consequently permit the liquidator to utilise a *Barnes v Addy* argument against the banks who had notice of the directors’ breaches.⁴⁴ The Bell Group litigation settled in the same month that the scheduled appeal was to be heard in the High Court,⁴⁵ leaving the position in *Breen v Williams* unchanged as binding authority in favour of proscriptive duties. This remains a particular hurdle for a fiduciary duty of disclosure as expressed in *Fraser v NRMA*.

B The Director as Fiduciary

The current position regarding the fiduciary obligation owed by directors to the corporation flows from the historical development of the corporate form. The precursor to the modern company was the joint stock company, which was

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- 38 R C Nolan, ‘The Legal Control of Directors’ Conflicts of Interest in the United Kingdom: Non-Executive Directors Following the Higgs Report’ (2005) 6 *Theoretical Inquiries in Law* 413, 422–3.
- 39 Andrew Tuch, ‘Obligation of Financial Advisors in Change-of-Control Transactions: Fiduciary and Other Questions’ (2006) 24 *Company and Securities Law Journal* 488, 496.
- 40 *The Bell Group Ltd (in liq) v Westpac Banking Corporation [No 9]* (2009) 225 FLR 1, [4574]–[4582] (Owen J); *Westpac Banking Corporation v The Bell Group Ltd (in liq) [No 3]* (2012) 270 FLR 1, [921], [932] (Lee AJA), [1956], [1978] (Drummond AJA), [2728], [2733] (Carr AJA). See also *Duncan v Independent Commission Against Corruption* [2016] NSWCA 143, [620]–[624] (Basten JA).
- 41 (1874) LR 9 Ch App 244.
- 42 *Ibid* 251–2 (Lord Selborne LC).
- 43 *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* (2007) 230 CLR 89, 141 [113] (The Court). See also, Heydon, Leeming and Turner, above n 6, 219 [5-405]. There is no High Court authority to confirm, in ratio, that the two limbs of *Barnes v Addy* apply beyond a breach of trust.
- 44 It is beyond the scope of this particular article to consider the approaches of the four judgments in detail. See generally Heydon, Leeming and Turner, above n 6, 219–23 [5-405]–[5-425].
- 45 Richard Gluyas, ‘Banks in Bell Group Settlement’, *The Australian* (online), 18 September 2013 <<http://www.theaustralian.com.au/business/financial-services/banks-in-bell-group-settlement/story-fn91wd6x-1226721294746>>.

legally a partnership. The stockholders were status fiduciaries to each other under either of two traditional analyses: partners were deemed to be agents of one another and therefore attracted fiduciary obligations, or they attracted fiduciary obligations because they were joint principals in a business undertaking.⁴⁶ When joint stock companies assumed corporate status, this naturally changed the legal circumstances, including the basis for fiduciary obligations. Upon incorporation, a new legal person entered the relationship – the company. The stockholders were no longer principals in relation to the business; their ‘partner’ status was replaced with ‘shareholder’ status as defined by statute. This transformation shifted contractual and vicarious liability to the new corporate entity, granting the shareholders limited liability in companies of that form, with the company now contracting as principal and assuming responsibility for the torts of its employees. It also erased the fiduciary obligations that the former stockholders had owed to each other upon their conversion to statutory investors of equity capital in the business of the corporation.⁴⁷ Managing partners, who became directors of the company, continued to owe fiduciary obligations to the owner of the business, which was now the company. Consequently there is still a fiduciary obligation owed by those who act on behalf of another. All that has changed is the identity of the party to whom those obligations are owed.

The management of the company is typically vested in a board of directors.⁴⁸ It is argued that it is because the powers of management and control of the company’s affairs and its assets are vested in its directors, that the law imposes statutory, common law and equitable duties upon those directors.⁴⁹ The company director is ‘undoubtedly’ a holder of fiduciary office, which attracts the application of fiduciary obligations to their behaviour.⁵⁰ But the beneficiary to whom the director owes fiduciary obligations is the company.⁵¹

Finn places the rationale for equity’s supervision of directors on the basis of their autonomy: ‘The freedom which they enjoy in their decision-making, the lack of direct control by their respective beneficiaries, has attracted Equity’s supervision’.⁵² This sentiment is also voiced by Laskin J from the Canadian Supreme Court in *Canadian Aero Service Ltd v O’Malley*:

Strict application [of fiduciary obligations] against directors and senior management officials is simply recognition of the degree of control which their positions give them in corporate operations, a control which rises above day-to-

46 Robert Flannigan, ‘Fiduciary Duties of Shareholders and Directors’ [2004] *Journal of Business Law* 277, 279.

47 *Ibid* 279–80.

48 *Corporations Act 2001* (Cth) s 198A (a replaceable rule).

49 Julian Svehla, ‘Director’s Fiduciary Duties’ (2006) 27 *Australian Bar Review* 192, 192.

50 Finn, *Fiduciary Obligations*, above n 10, 8.

51 See, eg, *Percival v Wright* [1902] 2 Ch 421, 426 (Swinfen Eady J), although the principle has been present since *Aberdeen Railway Company v Blaikie Brothers* (1854) 1 Macq 461. There are accepted exceptions to this position: where directors explicitly hold themselves out as agents of the shareholders; where a director purchases shares from a shareholder; where a company is about to be wound up; improper use of the share issue power; and in closely held companies: Beth Nosworthy, ‘Directors’ Fiduciary Obligations: Is the Shareholder an Appropriate Beneficiary?’ (2010) 24 *Australian Journal of Corporate Law* 282, 298–9.

52 Finn, *Fiduciary Obligations*, above n 10, 3.

day accountability to owning shareholders and which comes under some scrutiny only at annual general or at special meetings.⁵³

Another justification is suggested by Spigelman CJ, discussing the ability of the directors to dispose of company property as being justification to apply the same stringent test with respect to the exercise of fiduciary power to dispose of property as is applied to trustees of a traditional trust.⁵⁴ This analysis is perhaps simply a specific example of the first justification above, as discussed by Mason J in *Hospital Products*:

The relationship between the parties is therefore one which gives the fiduciary a special opportunity to exercise the power or discretion to the detriment of that other person who is accordingly vulnerable to abuse by the fiduciary of his position.⁵⁵

This discussion of whether it is a question of autonomy, access to property, or vulnerability which attracts equity's attention to the director is simply a reconsideration of the earlier debate as to the fundamental principle underlying all relationships where a fiduciary obligation operates. Ultimately, it is recognised at law in Australia that directors are within the accepted nominate categories in which fiduciary obligations are owed.⁵⁶ Further, as noted above, outside of the nominate categories a number of similar relationships regularly attract fiduciary obligations, catching high level employees such as officers of the company, and persons acting, but not officially appointed as, directors.⁵⁷

IV *FRASER V NRMA*

Fraser v NRMA concerned a booklet of information distributed to the members of two companies limited by guarantee which were to undergo a complex demutualisation to convert from companies operated for the mutual benefit of their members, to corporations limited by shares.⁵⁸ The companies concerned were sizeable, in both membership and asset value. The membership of NRMA Ltd was over 1.8 million, with assets valued at over \$457 million. The membership of the second company limited by guarantee, NRMA Insurance Ltd, was over 1.3 million members with assets under its control valued at over \$4.401

53 *Canadian Aero Service Ltd v O'Malley* [1974] SCR 592, 610.

54 *O'Halloran v RT Thomas & Family Pty Ltd* (1998) 45 NSWLR 262, 277. This is also discussed as the foundation for a category of fiduciary obligations: see L S Sealy, 'Fiduciary Relationships' (1962) *Cambridge Law Journal* 69, 64. Analogies are often made between directors and trustees, but this has been criticised as a distraction: Flannigan, 'Fiduciary Duties of Shareholders and Directors', above n 46, 284; Robert Flannigan, 'The Adulteration of Fiduciary Doctrine in Corporate Law' [2006] *Law Quarterly Review* 449, 450–1.

55 (1984) 156 CLR 41, 97.

56 *Ibid* 68 (Gibbs CJ), 96 (Mason J). In other jurisdictions, see, eg, *Lac Minerals Ltd v International Corona Resources Ltd* [1989] 2 SCR 574, 597 (Sopinka J).

57 Including executive and non-executive directors, de facto and shadow directors, and officers of the company: R P Austin, H A J Ford and I M Ramsay, *Company Directors: Principles of Law and Corporate Governance* (LexisNexis, 2005) 213–23.

58 (1995) 55 FCR 452, 455–6 (The Court).

billion.⁵⁹ The booklet distributed to the members emphasised that conversion to a company limited by shares would 'permit members to share in the wealth and future financial successes of the organisation' through the provision of 'Free Shares', and provided little by way of detail regarding the different bodies to be demutualised, or the rights and benefits of their membership prior to demutualisation which would be surrendered in exchange for the 'Free Shares'.⁶⁰ The contents of that booklet, and what it omitted, were found at first instance to be misleading and deceptive under the then section 52 of the *Trade Practices Act 1974* (Cth).⁶¹

On appeal, the Full Federal Court engaged in a discussion of the disclosure required from directors, including its source at law, and breadth once operational. The Court held that, as part of the fiduciary duties owed by directors to the company and its members⁶² in relation to proposals to be considered in general meeting, there is a fiduciary duty to provide such material information as will fully and fairly inform members of what is to be considered at the meeting.⁶³ Further, the proper discharge of this fiduciary duty may require that the directors take reasonable steps to ascertain relevant information to give to the members if that information is not already known to the board, and they must not consciously refrain from seeking such information, nor be wilfully blind to such material which contradicts or qualifies any position advocated for by the directors.⁶⁴ This statement sits distinctly at odds with the wider understanding of the content of the fiduciary obligation in Australian law.

The Full Federal Court commences the discussion of disclosure required from directors – including its source at law and breadth once operational – with reference to the '*Bulfin v Bebarfald's* duty', an equitable duty to make proper and accurate disclosure to the members, most particularly where the interests of the directors may be adverse to those of the members whom they are advising.⁶⁵ In the case from which that duty emanates, Long Innes CJ, sitting in equity, makes no mention of it being fiduciary in nature. If this were the original source of law for a 'fiduciary duty of disclosure', it seems unlikely that his Honour, as a judge sitting in an equitable jurisdiction (which still existed as a separate jurisdiction in New South Wales at that time) would have failed to mention or discuss this fact. The court in *Fraser v NRMA* then finds

[a] duty to make disclosure of relevant information arises as part of the fiduciary duties of the directors to the company and its members in relation to proposals to be considered in general meeting ... The fiduciary duty is a duty to provide such

59 Ibid 455 (The Court).

60 Ibid 458–9 (The Court).

61 Ibid 460–2 (The Court). The equivalent provision is now found in the *Australian Consumer Law* as contained in *Competition and Consumer Act 2010* (Cth) sch 2.

62 In general, fiduciary obligations will be owed to the company, and not to the members, according to *Percival v Wright* [1902] 2 Ch 421. However, in limited circumstances, including when the directors are providing advice to the members, the obligation may extend beyond the company to the members more generally, which is a question that goes beyond the scope of this particular article.

63 *Fraser v NRMA* (1995) 55 FCR 452, 466 (The Court).

64 Ibid.

65 *Bulfin v Bebarfald's Ltd* (1938) 38 SR (NSW) 423, 429, 432 (Long Innes CJ in Eq).

material information as will fully and fairly inform members of what is to be considered at the meeting and for which their proxy may be sought.⁶⁶

There is no immediate citation at that point of the judgment, but further on in the same paragraph, the Court relies on a history of United Kingdom and Canadian cases.⁶⁷

None of these early cases cited by the Full Federal Court directly discuss a ‘fiduciary’ duty to disclose relevant information.⁶⁸ The cases do discuss such a duty existing at equity, but the words ‘fiduciary’ and ‘equitable’ are not interchangeable.⁶⁹ This article will now examine the authorities cited by the Full Federal Court in detail, to determine whether they support the proposition of a fiduciary duty to disclose.

A *Jackson v Munster Bank*

The first authority is that of *Jackson v Munster Bank*.⁷⁰ This Irish case makes no mention of the word ‘fiduciary’ at all, let alone a ‘fiduciary’ duty of disclosure. The case concerns a circular published to convene a meeting of the shareholders at which resolutions would be proposed to alter the articles of association, authorising advances to the directors and increasing the remuneration of the directors. It included proxy forms drawn in favour of two of the directors. The plaintiffs alleged that the directors sought to indemnify themselves against, and obtain release from, breaches of trust which they had committed.⁷¹

The circular was held to contain statements by which the shareholders may have been misled and which were calculated to obtain proxies from the shareholders without their having the information which would enable them to form a just judgment as to whom to entrust their votes.⁷² The Vice-Chancellor specifically notes here, that ‘when a Chairman of a Company thinks proper to do an unnecessary act, namely, to make a commentary on the Resolutions which the Directors are about to bring forward ... it should be a fair and candid commentary’.⁷³

66 (1995) 55 FCR 452, 466 (The Court).

67 *Jackson v The Munster Bank (Ltd)* (1884) 13 LR Ir 118 (*Jackson v Munster Bank*’); *Tiessen v Henderson* [1899] 1 Ch 861; *Peel v London and North Western Railway Company* [1907] 1 Ch 5; *Baillie v Oriental Telephone and Electric Co Ltd* [1915] 1 Ch 503; *Pacific Coast Coal Mines Ltd v Arbuthnot* [1917] AC 607; *Goldex Mines Ltd v Revill* [1974] 7 OR (2d) 216 (*Goldex*). The cases are cited as a list, with only one extracted quotation from the final authority mentioned, *Goldex* [1974] 7 OR (2d) 216, further down the same page.

68 This could arguably be due to their age, but as all cases post-date the 1850s, by which time ‘fiduciary’ could be found in fairly common use, this is not a strong argument in favour of a ‘fiduciary duty of disclosure’.

69 This would be similar to treating the words ‘tort’ and ‘negligent’ as interchangeable.

70 (1884) 13 LR Ir 118.

71 *Ibid* 130.

72 *Ibid* 134 (Vice-Chancellor Chatterton).

73 *Ibid* 137.

B *Tiessen v Henderson*

The second authority the Federal Court relies upon is *Tiessen v Henderson*.⁷⁴ The case makes no mention of a 'fiduciary' duty on the part of directors to disclose an interest to the shareholders. Instead, Kekewich J in Chancery holds that

the application of the doctrine in *Foss v Harbottle* to joint stock companies involves as a necessary corollary the proposition that the vote of the majority at a general meeting, as it binds both dissentient and absent shareholders, must be a vote given with the utmost fairness – that not only must the matter be fairly put before the meeting, but the meeting itself must be conducted in the fairest possible manner.⁷⁵

Justice Kekewich discusses the disclosure of a director's interest in the context of the fact that a shareholder may prudently leave matters in which they are not personally interested to the decision of the majority; but that in order to do so, they must have been given sufficient information to have a fair chance of determining in their own interest whether they are, in fact, disinterested.⁷⁶ Facts not stated in this circular include that two directors of the company were to have a large proportion of shares on which there was to be a call in favour of the guarantors, and that the guarantors were to be some of the directors of the company, and that they would derive a personal benefit from this.⁷⁷

C *Peel v London and North Western Railway Company*

*Peel v London and North Western Railway Company*⁷⁸ is the third authority *Fraser v NRMA* considers. This judgment, on appeal from Chancery, concerns whether it is proper for the company to pay the expenses of printing, posting and stamping a circular and proxies sent out by the directors prior to the half-yearly general meetings. The Court of Appeal discusses the duty of the directors to inform the shareholders of the facts, their policy, and the reasons why they consider that this policy should be supported by the shareholders in a general meeting, and holds that it is proper that the cost of distributing this material be borne by the company.⁷⁹ The judgments, particularly of Vaughan Williams LJ and Fletcher Moulton LJ, find a positive duty on the directors to take care that a sufficient statement of the facts and opinions of the directors be made available to the shareholders, particularly if they perceive a danger that the corporation will take a step which may be injurious to the corporation.⁸⁰ Again, there is no discussion which elevates this to the level of a fiduciary duty to inform the shareholders.

74 [1899] 1 Ch 861.

75 Ibid 866.

76 Ibid 866–7.

77 Ibid 870.

78 [1907] 1 Ch 5.

79 Ibid 12, 14 (Vaughan Williams LJ), 16–17 (Fletcher Moulton LJ), 18–19 (Buckley LJ).

80 Ibid 13–14 (Vaughan Williams LJ), 16 (Fletcher Moulton LJ).

D *Baillie v Oriental Telephone and Electric Co Ltd*

The fourth authority, another appeal from Chancery, *Baillie v Oriental Telephone and Electric Co Ltd*,⁸¹ again contains no reference to a fiduciary duty of disclosure. It concerns an extraordinary general meeting convened in a parent company to ratify the alteration of articles of association of a subsidiary company which had occurred some six years earlier. The alterations increased the remuneration of the directors and gave them a percentage of the net profits. The meeting would also authorise the directors to retain the profits received, and to alter the articles of the parent company to allow the directors to receive remuneration from subsidiary companies without being accountable, and to exercise voting powers in those companies as they saw fit. The very substantial amount of remuneration received by the directors is not disclosed to the shareholders in the notice of meeting, the circular accompanying the notice, nor when the chairman addresses the issue at the meeting itself. The Court of Appeal holds that there is a requirement for full and frank disclosure to the shareholders of the facts upon which they are asked to vote, but does not find that this flowed from a fiduciary obligation.⁸² The special resolutions which had been obtained at the meeting could not be supported, as the sanction of the shareholders had not been sought and given on a fair and reasonably full statement of the facts.⁸³

E *Pacific Coast Coal Mines Ltd v Arbuthnot*

*Pacific Coast Coal Mines Ltd v Arbuthnot*⁸⁴ is the fifth authority, and again discusses the need to put the shareholders in a position to judge for themselves whether or not to adopt a resolution at a special meeting, without indicating any fiduciary obligation. Here, the Privy Council on appeal from the Court of Appeal in British Columbia, advises that resolutions to consent to buying out the shares of the directors and releasing them from liability for any claims are ineffective due to the absence of proper notice putting each shareholder in a position to judge whether or not to consent.⁸⁵

F *Goldex Mines Ltd v Revill*

The sixth and final authority the Federal Court relies upon in *Fraser v NRMA* is *Goldex*.⁸⁶ The Ontario Court of Appeal finds that '[w]here information is sent to shareholders that is untrue or misleading, the duty to shareholders is breached, whether the senders were required by statute to send out that class of information, or whether they simply chose to do so'.⁸⁷ Interestingly, this finding is made in the context of deciding whether or not the plaintiff shareholders had standing to bring a class action against the corporation and other shareholders with adverse

81 [1915] 1 Ch 503.

82 Ibid 514 (Lord Cozens-Hardy MR), 518 (Swinfen Eady LJ).

83 Ibid 514–15 (Lord Cozens-Hardy MR).

84 [1917] AC 607.

85 Ibid 618 (The Court).

86 [1974] 7 OR (2d) 216.

87 Ibid 224.

interests. The quote extracted above comes under the heading, 'The right to sue',⁸⁸ and appears to be the Canadian response to the proper plaintiff doctrine in *Foss v Harbottle*.⁸⁹ This judgment in itself seems to suffer from a similar condition to the judgment in *Fraser v NRMA*: the conflation of 'duties arising under equity' and 'fiduciary obligations' as being one and the same.⁹⁰

The Federal Court in *Fraser v NRMA*⁹¹ cites the discussion undertaken by the Ontario Court of Appeal in *Goldex* of the previous Ontario case of *Charlebois et al v Bienvenu*⁹² which ranged across the two concepts. Justice Fraser in *Charlebois* finds that calling an annual meeting and electing directors after the directors send out a misleading information circular is a breach of the directors' fiduciary duty to the company. The Court in *Goldex* then declares that

such an act is also a breach of duty to other shareholders. If the directors of a company choose, or are compelled by statute, to send information to shareholders, those shareholders have a right to expect that the information sent to them is fairly presented, reasonably accurate, and not misleading.⁹³

Although the misleading circular is a breach of the directors' fiduciary duty to the company, the Court does not clearly state that it is also a breach of a fiduciary duty the directors owe to the shareholders – merely a breach of duty. A fiduciary for one obligation is not ipso facto a fiduciary for all, or potentially any, other obligations which are owed.⁹⁴

There is mention of fiduciary obligations within *Goldex*, but it does not assist in relation to this discussion. After moving on from the discussion of *Charlebois*, the Ontario Court of Appeal in *Goldex* states:

The principle that the majority governs in corporate affairs is fundamental to corporation law, but its corollary is also important – that the majority must act fairly and honestly. Fairness is the touchstone of equitable justice, and when the test of fairness is not met, the equitable jurisdiction of the Court can be invoked to prevent or remedy the injustice which misrepresentation or other dishonesty has caused. *The category of cases in which fiduciary duties and obligations arise is not a closed one ...*⁹⁵

Until the last sentence, this statement clearly echoes the United Kingdom cases relied upon by the Federal Court in *Fraser v NRMA*, particularly the judgment of Kekewich J in *Tiessen v Henderson*.⁹⁶ The reference by the *Goldex* Court in the emphasised sentence to categories of cases in which fiduciary obligations arise comes as a surprise, given the quoted context. Fiduciary obligations, of all equitable concepts, have little to do with concepts of fairness,

88 Ibid 220.

89 (1843) 2 Hare 461; 67 ER 189.

90 However, the Canadian courts have generally been prepared to allow the fiduciary obligation a more proactive role, including prescriptive action, but this has more generally been found in other relationships than commercial ones: see, eg, parent-child and Indigenous person-Crown, as discussed in Dal Pont, above n 20, 156–8.

91 Although it is misspelled as '*Charlebois et al v Bienveau*' in the Federal Court judgment: *Fraser v NRMA* (1995) 55 FCR 452, 466 (The Court).

92 [1967] 2 OR 635 ('*Charlebois*').

93 *Goldex* [1974] 7 OR (2d) 216, 223.

94 Finn, *Fiduciary Obligations*, above n 10, 2.

95 [1974] 7 OR (2d) 216, 224 (emphasis added).

96 [1899] 1 Ch 861, 866.

and in no way rely on the kind of misrepresentation or *mala fides* the Ontario Court of Appeal was discussing immediately prior to this sentence.⁹⁷ It can potentially be concluded that this reference to fiduciary obligations is a reference back to the earlier discussion of directors' fiduciary obligations in *Charlebois*, from which the Court concluded there was a breach of duty to the shareholders, rather than suggesting that misrepresentation and dishonesty are directly linked to the fiduciary obligation.

G Conclusions on *Fraser v NRMA*

As can be seen, the cases the Federal Court refers to in *Fraser v NRMA* do not present a clear and unambiguous development of a concept of a 'fiduciary duty of disclosure', and ought not to be relied upon as such.⁹⁸ They are all extraterritorial judgments.⁹⁹ Five of them do not refer to such a duty as 'fiduciary' in any context, and the lone case which does use the word fiduciary in proximity to a discussion of a duty to the shareholders does not clearly identify this particular duty as fiduciary in nature, or attempt to provide any appropriate etymology for such a claim.

It is also not a case of a new development being only partially supported by previous cases: if read in the light suggested, *Fraser v NRMA* would inappropriately convert waiver into a prescriptive duty. Four of the cited cases do clearly involve behaviour by directors for which the company could have sued for breach of both the 'no profit' and 'no conflict' rules,¹⁰⁰ raising the potential for the directors to seek the defence of fully informed consent. However, the consent that they have sought, and in many of the cases received, was found by the courts to be of a lesser standard than fully informed, perhaps leading the courts to discuss the need for full and frank disclosure without overtly referencing the defence.

A careful analysis of the cases cited clearly shows the misconception of the 'fiduciary duty to disclose' which has arisen as a result. In light of the true nature of these decisions, it is difficult to accept that a duty to make disclosure of relevant information to the shareholders arises as part of the fiduciary obligation of the directors to the company. This is particularly so given that there was no discussion beyond mere citation for all but one of the six authorities presented by the Court immediately following that statement.¹⁰¹ This concern for correct use of

97 See, eg, that the bona fides of the fiduciary provides no protection from breach: *Boardman v Phipps* [1967] 2 AC 46; and that fairness has not been suggested as a basis for the fiduciary obligation: Nosworthy, above n 51, 288–9.

98 *Contra* Rosemary Teele Langford, 'ENT Pty Ltd v Sunraysia Television Ltd: A Positive Fiduciary Duty of Disclosure' (2008) 26 *Company and Securities Law Journal* 470, 470.

99 That is not to disparage the utility of foreign judgments, but it does lessen the impact of a seemingly long string of authority.

100 *Jackson v The Munster Bank* (1884) 13 LR Ir 118; *Tiessen v Henderson* [1899] 1 Ch 861; *Baillie v Oriental Telephone and Electric Co Ltd* [1915] 1 Ch 503; *Pacific Coast Coal Mines Ltd v Arbuthnot* [1917] AC 607.

101 *Fraser v NRMA* (1995) 55 FCR 452, 466. As mentioned above, the Federal Court did quote a short extract from *Goldex* [1974] 7 OR (2d) 216, where that court discussed the case of *Charlebois* [1967] 2 OR 635.

authority should not be read as an argument that equity is incapable of bearing children,¹⁰² particularly within this field, but is a plea that if a child is to be born, there should at least be some discussion about and appropriate justification of the 'miracle'¹⁰³ of its birth.

V POST *FRASER V NRMA*

With the High Court decision in *Breen v Williams* the following year, it might seem that the fiduciary duty of disclosure, briefly enlivened in *Fraser v NRMA*, could no longer be supported under Australian law. Indeed, there was no rush to take up arms for the 'fiduciary duty of disclosure' after *Fraser v NRMA*, perhaps due to that very fact. The consequent decisions revisiting the issue of fiduciary obligations in each decade since *Breen v Williams* continue to uphold the position that the obligation is proscriptive in nature.¹⁰⁴ These decisions have broad academic support.¹⁰⁵ However, this does not mean that this misconception was consequently overcome or forgotten. The next decision to reassert the 'fiduciary duty of disclosure' comes 12 years later in *ENT v Sunraysia*, and is followed three years later by *CBA v Fernandez*. By contrast, the following year the Full Federal Court in *Blackmagic Design v Overliese* refuses to find a fiduciary duty of disclosure,¹⁰⁶ in a judgment which, excluding revisitation by the High Court, perhaps lays the matter to rest.

A *ENT v Sunraysia*

*ENT v Sunraysia*¹⁰⁷ focuses on whether the directors of Sunraysia made sufficient disclosure to the members in relation to the sale of that company's main undertaking, Swan TV. The directors unanimously recommend the sale to shareholders in an Explanatory Memorandum accompanying the Notice of General Meeting, at which the shareholders are expected to vote on the sale.¹⁰⁸ The Court ultimately finds that the material provided to the shareholders is deficient with respect to the 'material information that the ordinary shareholder needs to have in order to decide whether to approve the sale proposal, and would expect to be provided with'.¹⁰⁹

102 Adapting the metaphor used in the 2008 W A Lee Equity Lecture by Michael Kirby, originally coined by Lord Denning: Kirby, above n 17, 452–3.

103 The word miracle is not used lightly, given Kirby's discussion under the heading 'Hostility to Invention and Expansion': *ibid* 453–64.

104 *Pilmer v Duke Group Ltd (in liq)* (2001) 207 CLR 165; *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* (2007) 230 CLR 89; *Friend v Booker* (2009) 239 CLR 129; *John Alexander's Clubs Pty Ltd v White City Tennis Club Ltd* (2010) 241 CLR 1.

105 See Langford, above n 6, 228 n 63.

106 (2011) 191 FCR 1, 23 [109] (Besanko J).

107 (2007) 61 ACSR 626.

108 *Ibid* 630 (Austin J).

109 *Ibid* 644 (Austin J).

In reaching that conclusion, the Court discusses the ‘director’s duty of disclosure’,¹¹⁰ as it was contended by the plaintiff that there should be an injunction granted to halt the meeting process because the directors of Sunraysia had not discharged the ‘*Bulfin v Bebarfald’s* duty’.¹¹¹ Although, as discussed above, *Bulfin v Bebarfald’s Ltd* makes no mention of the duty being fiduciary in nature, after raising this duty the judgment in *ENT v Sunraysia* then proceeds to the ‘fiduciary obligation of the directors’¹¹² by considering the case of *Chequepoint Securities Ltd v Claremont Petroleum NL*,¹¹³ and in particular the words of McLelland J:

Where directors take it upon themselves to urge or recommend or advise members to exercise their powers in general meeting in a particular way, they are in general required to make a full and fair disclosure of all matters within their knowledge which would enable the members to make a properly informed judgment on the matters in question ...¹¹⁴

Here, McLelland J rephrases the ‘*Bulfin v Bebarfald’s* duty’ more broadly than the original case, in order to apply it to circumstances where directors volunteer advice or an opinion to members. Not only does McLelland J also not label the duty as fiduciary, but only contends that there is a requirement ‘in general’, and not even specifically in equity.¹¹⁵

The finding in *ENT v Sunraysia* of a positive fiduciary duty of disclosure is in conflict with the judgment of the High Court in *Breen v Williams*. Although the judgment refers back to *Fraser v NRMA* to establish the existence of a positive fiduciary obligation,¹¹⁶ it does not acknowledge the intervening High Court decision of *Breen v Williams*. Conaglen infers that the Court’s labelling of the duty to make full disclosure when recommending a course of action to their shareholders as fiduciary was not an intention to challenge the authority of *Breen v Williams*,¹¹⁷ but the judgment has been discussed as authority for that precise point. The remainder of the judgment in *ENT v Sunraysia* discusses the reasonable limits which must be placed on any such duty of disclosure, and does not raise any controversy.

B *CBA v Fernandez*

The description of a positive ‘fiduciary duty of disclosure’ appears again three years after *ENT v Sunraysia* in *CBA v Fernandez*.¹¹⁸ The case deals with irregularities around the first meeting of creditors in a voluntary administration, and while considering whether the administrator is compliant with his duties, the

110 Ibid 630 (Austin J), quoting the heading in the judgment, although ‘fiduciary duty of full and fair disclosure’ is the phrasing used two paragraphs earlier on the same page discussing the argument put forward on behalf of the plaintiff.

111 Ibid 430–1 (Austin J).

112 Ibid 631 (Austin J).

113 (1986) 11 ACLR 94.

114 Ibid 96.

115 Ibid.

116 *ENT v Sunraysia* (2007) 61 ACSR 626, 636 (Austin J).

117 Conaglen, above n 10, 201–2 n 140.

118 (2010) 81 ACSR 262.

Court states that the 'directors owe a fiduciary duty to members to give them full information of all matters material to the business that is to be transacted at a company meeting'.¹¹⁹ Surprisingly given the discussion above, the Court declares that this duty is fully stated in *Bulfin v Bebarfald's* case.¹²⁰

The Court concludes that the information must be sufficient to allow members to determine whether they would attend the meeting in order to vote, following *Fraser v NRMA* with no further discussion.¹²¹ Two assumptions make this duty relevant on the facts: first, that an administrator is under the same duty to advise creditors when convening a meeting as a director would be when convening a meeting of members, and secondly, that the duty arises whether or not the administrator is urging a particular approach.¹²² The Court proceeds on the basis that both assumptions are an accurate statement of the legal position, but acknowledges that '[n]either assumption is self-evidently correct. Rather, there is good reason to think that the opposite is the true position'.¹²³ Unfortunately for the development of the law in this area, as these two assumptions were not put in issue before the Court, neither the assumptions nor the underlying 'fiduciary duty of disclosure' are fully articulated in the resulting judgment.

C *Blackmagic Design v Overliese*

The following year in an appeal before the Full Federal Court the question of a fiduciary duty of disclosure is raised again. *Blackmagic Design v Overliese*¹²⁴ considers, in part, whether two employees of the appellant company are in breach of their employment obligations by failing to disclose their development of a product which competed with the business of the appellant company.¹²⁵ This judgment provides the logic to harmonise the preceding cases with the authority provided by the High Court, and whilst soundly dismissing the possibility of a positive fiduciary duty of disclosure, emphasises the use of the defence of fully informed consent.

Besanko J, for the Court, notes that before the trial judge and in its notice of appeal, the appellant appears to base its claim for equitable compensation from the first respondent on an alleged breach of fiduciary obligation to disclose the details of their product to their employer. The trial judge rejects this claim on the basis that fiduciary obligations are proscriptive, not prescriptive.¹²⁶ Consequently, some creative linguistics were required on appeal to circumvent the language in the pleadings, which led to the appellant submitting that

119 Ibid 272 (Finkelstein J).

120 Ibid.

121 Ibid.

122 Ibid.

123 Ibid.

124 (2011) 191 FCR 1.

125 Ibid 4–6 (Besanko J).

126 Ibid 6.

the ... respondents had placed themselves in a position of conflict of interest and duty and that disclosure of that conflict – and that meant the details of [the product] – was required.¹²⁷

During his Honour's discussions as to whether the claim for equitable compensation could succeed, he directly addresses the question as to whether there was a fiduciary duty to disclose, or whether it was more correctly ascribed as a defence to a claim of breach.¹²⁸

On one view there is no *duty* to disclose a conflict and when judges refer to a duty to disclose in this context it is no more than a shorthand way of referring to the defence of fully informed consent by the principal. As I have said, the law in Australia is that fiduciary duties are proscriptive and not prescriptive. On this view the breach of fiduciary duty is the conduct of the fiduciary in placing himself in a position of conflict. Disclosure is simply a means of avoiding a breach, not a duty. The loss which is recoverable by way of equitable compensation on this view is that which would not have occurred if the conflict had not arisen and not the loss which would not have occurred had disclosure been made.¹²⁹

His Honour cites a number of sources which favoured the view that disclosure is a defence and not a positive duty.¹³⁰ He then turns to the counterargument:

The other view is that the duty is not to act in conflict without the informed consent of the principal and that there are many decisions of high authority where the courts have said that there is a duty of disclosure in circumstances of a conflict of interest and duty.¹³¹

Quite succinctly, Besanko J resolves the issue:

It seems to me the first view is the correct one. It seems to me to be the orthodox approach because there is undoubtedly a breach when the fiduciary places himself or herself in a position of conflict. The breach is excused or perhaps does not arise if the principal consents. In other words, it is not enough that there be disclosure, there must be consent. Disclosure is part of a defence.¹³²

This seems to correctly categorise the outcome: 'a shorthand way of referring to the defence of fully informed consent'¹³³ has been misinterpreted as creating a fiduciary duty of disclosure. This accords with previous Federal Court interpretation of the judgment of Brennan J in *Daly v Sydney Stock Exchange Ltd*¹³⁴ on the defence of fully informed consent. That judgment has been

127 Ibid. The argument as to a breach of fiduciary obligation was limited to the first respondent, as a senior employee, whereas the claim in relation to the other employee was for common law damages based on an alleged breach of a 'disclosure of conflict of interest' term in his written contract of employment.

128 Ibid 22–3.

129 Ibid 22 (emphasis in original).

130 Ibid, citing *National Mutual Property Services (Australia) Pty Ltd v Citibank Savings Ltd* [1998] FCA 564; L S Sealy, 'Some Principles of Fiduciary Obligation' (1963) 21 *Cambridge Law Journal* 119; Finn, 'The Fiduciary Principle', above n 10; John Glover, *Commercial Equity – Fiduciary Relationships* (Butterworths, 1995).

131 *Blackmagic Design v Overliese* (2011) 191 FCR 1, 22–3. His Honour goes on to cite a number of supporting cases: *Tracy v Mandalay Pty Ltd* (1953) 88 CLR 215; *BLB Corporation of Australia Establishment v Jacobsen* (1974) 48 ALJR 372; *Walden Properties Ltd v Beaver Properties Pty Ltd* [1973] 2 NSWLR 815.

132 *Blackmagic Design v Overliese* (2011) 191 FCR 1, 23.

133 Ibid 22 (Besanko J).

134 (1986) 160 CLR 371.

interpreted as imposing expansive, prescriptive obligations of disclosure on the part of the fiduciary.¹³⁵ Austin J concludes in *Aequitas v AEFC* that Brennan J was not prescribing further duties, but merely referring to the contractual aspects of the adviser-client relationship raised by that case, and explaining the nature of disclosure required of the fiduciary in order to satisfy the defence.¹³⁶ A similar conclusion is reached by Finkelstein J in *Fitzwood Pty Ltd v Unique Goal Pty Ltd (in liq)*¹³⁷ when he refuses to describe the obligation to seek informed consent as a positive duty but instead describes it as a 'means by which the fiduciary obtains the release or forgiveness of a negative duty'.¹³⁸

Should further clarity still be required, obiter dicta by their Honours in *Concut Pty Ltd v Worrell*,¹³⁹ a case regarding an oral contact of employment with subsequent written terms and so not directly on point here, is still of assistance. When considering whether the employee ought to have disclosed prior misconduct to their employer, and the speech of Lord Atkin in *Bell v Lever Brothers Ltd*¹⁴⁰ on that point, their Honours raise an exception 'to allow for obligations of disclosure which attend a fiduciary duty, if informed consent is to be obtained to what otherwise would be a breach of that duty'.¹⁴¹ Careful phrasing avoids declaring the disclosure to be a fiduciary duty itself, but instead states it as an obligation which attends disclosure if the fiduciary wishes to obtain consent in order to avoid being guilty of breach.

D Conclusions on the Duty of Disclosure

To add further doubt to the matter, none of the cases which support the concept of a 'fiduciary duty of disclosure' undertake the essential initial step of finding a fiduciary relationship between the directors and any beneficiary. Although the company is the beneficiary of fiduciary obligations, that first step is vital to a discussion of the obligation, as, in the circumstances before the Court, the shareholders acting in their capacity as an organ of the company were entitled to grant fully informed consent.¹⁴² It is rather hard to understand how a director can owe a 'fiduciary duty' of any nature without first having been established as a fiduciary with obligations flowing to some ascertainable beneficiary. The path of reasoning within these judgments would suggest that a director can owe a 'fiduciary duty' without first being found to be a fiduciary.¹⁴³ That cannot be reconciled with the prophylactic nature of the fiduciary obligation.

Finally, it is important to be clear that this is not simply a case of semantics. It does make a difference to declare a fiduciary duty to disclose, rather than

135 Vince Battaglia, 'Dealing with Conflicts: The Equitable and Statutory Obligations of Financial Services Licensees' (2008) 26 *Company and Securities Law Journal* 483, 489.

136 *Aequitas Ltd v AEFC Leasing Pty Ltd* (2001) 19 ACLC 1006, 1059. See also *ibid* 489–90.

137 (2001) 188 ALR 566.

138 *Ibid* 576 [32].

139 (2000) 176 ALR 693.

140 [1932] AC 161, 228, quoted in *Concut Pty Ltd v Worrell* (2000) 176 ALR 693, 702 [33]–[35] (Gleeson CJ, Gaudron and Gummow JJ).

141 *Concut Pty Ltd v Worrell* (2000) 176 ALR 693, 703 [37] (Gleeson CJ, Gaudron and Gummow JJ).

142 That is, the shareholders as a whole, not individually, acting as the company in general meeting.

143 This is inherently problematic, as discussed in Finn, *Fiduciary Obligations*, above n 10, 2, 201.

acknowledge disclosure as one step within the defence of fully informed consent. To reiterate the findings of Besanko J in *Blackmagic Design v Overliese*, '[t]he breach is excused or perhaps does not arise if the principal consents. In other words, it is not enough that there be disclosure, there must be consent. Disclosure is part of a defence'.¹⁴⁴ To describe only a fiduciary duty to disclose inappropriately ignores that element of consent from the beneficiary of the duty, without which there is still breach. Equally, this description curtails the fiduciary's rights as well, as the defence permits absolution for a breach already committed,¹⁴⁵ which is not something that appears to be contemplated within a duty of disclosure, fiduciary or not.

VI CONCLUSION

Although the relationship of director and company is an accepted category of relationship in which fiduciary obligations are presumed to be owed,¹⁴⁶ not all duties and obligations owed by the director to the company will be fiduciary in nature. Some will exist at common law, some in equity, and only a subset of those equitable obligations will be fiduciary in nature. This does not include a duty of disclosure, which is more properly seen as an element of the defence of fully informed consent. It is unfortunate that mistakes in assigning labels to these duties abound, as the determination of the nature of a particular obligation is important because of the differing rules relating to causation, remoteness, limitation periods and remedies available.¹⁴⁷

The outcome that a duty to disclose does not exist within fiduciary law is not an argument against the utility of fiduciary obligations within the corporate sphere. Although fiduciary obligations have often been overlooked as a source of corporate governance in the past,¹⁴⁸ it is clear that in certain circumstances, the courts are willing to recognise them as a method of controlling authority exercised within companies. The reticence to rely on fiduciary obligations is perhaps because they are subject to exclusion or variation via contract,¹⁴⁹ or because the obligations are not intended to advance performance 'except in the

144 *Blackmagic Design v Overliese* (2011) 191 FCR 1, 23 [108].

145 Patrick Parkinson, 'Fiduciary Obligations' in Patrick Parkinson (ed), *The Principles of Equity* (Lawbook, 2nd ed, 2003) 339, 372.

146 *Hospital Products* (1984) 156 CLR 41, 96–7 (Mason J).

147 J D Heydon, 'Are the Duties of Company Directors to Exercise Care and Skill Fiduciary?' in Simone Degeling and James Edelman (eds), *Equity in Commercial Law* (Lawbook, 2005) 185, 189–91.

148 Jennifer Hill and Charles M Yablon, 'Corporate Governance and Executive Remuneration: Rediscovering Managerial Positional Conflict' (2002) 25 *University of New South Wales Law Journal* 294. The authors list three basic techniques to control directors' conflicts of interest, placing self-control via fiduciary obligations in a separate category to corporate governance techniques and aligning managerial self-interest with the interests of shareholders: at 301.

149 The inherent tension between the ability to contractually exclude a fiduciary obligation which has been imposed by law in the circumstances of the contract is discussed briefly by N J Young, 'Conflicts of Interest in the Context of Private Equity Transactions' (Paper presented at the Law Council Workshop, Stamford Grand, Glenelg, 21 July 2007) 9, 38. See also Peter Radan and Cameron Stewart, *Principles of Australian Equity and Trusts* (LexisNexis Butterworths, 2010) 208–9.

specific sense that self-regard must not compromise the undertaking'.¹⁵⁰ The fact that they are couched in proscriptive language does not prevent fiduciary obligations from contributing to corporate governance through both their deterrent and disclosure effects. Furthermore, the defence requires the best kind of disclosure for good corporate governance – pertinent, timely and not designed to overwhelm the beneficiary – because it is that disclosure which is necessary to achieve fully informed consent. The description of the fiduciary obligation as being 'imposed by private law, but its function is public, and its purpose social'¹⁵¹ and as 'a pragmatic communal response to the corrosive mischief of opportunism'¹⁵² indeed seems a perfect fit with the philosophy of corporate governance.

150 Flannigan, 'The Core Nature of Fiduciary Accountability', above n 14, 426 (emphasis in original).

151 Lord Wedderburn, 'Trust, Corporation and the Worker' (1985) 23 *Osgoode Hall Law Journal* 203, 221.

152 Flannigan, 'The Core Nature of Fiduciary Accountability', above n 14, 376.