OPPRESSION IN TWO SECTIONS: A STUDY OF THE JUDICIAL INTERPRETATION OF OPPRESSION IN SECTIONS 232 AND 445D(1)(F) OF THE *CORPORATIONS ACT 2001* (CTH)

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The terms 'oppressive', 'unfairly prejudicial to' and 'unfairly discriminatory against' appear in two sections of the Corporations Act 2001 (Cth). The first, section 232, is the members' oppression remedy, and provides that the court may make an order if the conduct of the company's affairs is oppressive to a member of the company. The second is section 445D(1)(f) which allows for the court to terminate a deed of company arrangement if that deed is oppressive to one or more creditors. The wording of these two sections is near identical. However, this article demonstrates that the two sections have been treated differently by the courts and suggests why this might be the case. The article concludes that whilst it might be desirable to have a uniform approach to determine oppression in both sections, it would not be possible to do so as the contexts of each are vastly different.

I INTRODUCTION

In a large and complex piece of legislation such as the *Corporations Act 2001* (Cth) ('*Corporations Act*'),[1] one might expect the same terms and phrases to appear multiple times throughout the legislation. If the same term appears in different sections, in different parts, and is to be used in different contexts, how should those terms be interpreted? Are they to be interpreted the same way in both situations or does their interpretation differ in response to the context in which they arise? This article considers one such example, where the terms 'oppressive', 'unfairly prejudicial to' and 'unfairly discriminatory against' appear in two sections, and two parts, of the *Corporations Act*.

The first, section 232, is found in part 2F.1 entitled 'Oppressive Conduct of Affairs', located in chapter 2F of the *Corporations Act* – Members' Rights and Remedies. Section 232 is regarded as a members' remedy, and provides that the

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1 *Corporations Act 2001* (Cth) ('*Corporations Act*').

court may make an order if the conduct of the company's affairs is either contrary to the interests of the members as a whole or oppressive to, unfairly prejudicial to, or discriminatory against, a member or members of a company.

The second section where the terms 'oppressive', 'unfairly prejudicial to' and 'unfairly discriminatory against' appear is section 445D. Section 445D is found in part 5.3A, entitled 'Administration of a Company's Affairs with a View to Executing a Deed of Company Arrangement' of chapter 5 – External Administration. Section 445D allows eligible applicants, primarily creditors, to request that a deed of company arrangement ('DOCA') be terminated on various grounds. A DOCA may be terminated for a variety of reasons, including if there are concerns regarding how the DOCA was approved, if the approval was based on adequate information, as well as concerns regarding the terms of the DOCA themselves. Specifically, section 445D(1)(f) provides that the court may terminate a DOCA if the deed is oppressive or unfairly prejudicial to, or unfairly discriminatory against, one or more creditors or contrary to the interests of creditors as a whole.

It is clear that the terms found in sections 232 and 445D(1)(f) are almost identically drafted. This was identified by Austin J, in *Deputy Commissioner of Taxation v Portinex Pty Ltd* ('*Portinex*'),[2] where his Honour stated that section 445D(1)(f)

> is obviously similar to the grounds for relief under the oppression provisions of the *Corporations Law* [now *Corporations Act*], which are now found in Pt 2F.1. Presumably the case law in that field may be of assistance, if one bears in mind that in the present context the oppression may be of the creditors by other creditors rather than of members by directors or other members.[3]

This article considers whether, in the 20 plus years since this decision, Austin J's observations have come to fruition. Has the case law of section 232 been used in relation to section 445D(1)(f)? Taking that question a step further, have the courts approached the cases under the respective provisions in a similar way, or have the courts used different approaches? If the courts have developed different approaches, why might that be?

While the focus of this article is on sections 232 and 445D(1)(f), due to those sections being referred to explicitly by Austin J in the above quote, the author notes that the terminology of 'oppressive', 'unfairly prejudicial to' and 'unfairly discriminatory against' also appears in section 461, which grants the court power to wind up a company.[4] The wording of sections 461(1)(f) and (g) are identical in substance, although its form differs, to section 232. Both sections refer to the oppressive conduct of members, unlike section 445D(1)(f), which refers specifically to creditors. Section 461(1)(f) provides that the court can order the

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2 *Deputy Commissioner of Taxation v Portinex Pty Ltd* (2000) 156 FLR 453 ('*Portinex*').

3 Ibid 476 [100] (Austin J). This was later cited in *Fleet Broadband Holdings Pty Ltd v Paradox Digital Pty Ltd* (2005) 228 ALR 598, 608–9 [61] (Master Newnes) ('*Fleet Broadband*').

4 Both creditors and members have standing to bring an application to wind up the company under section 461: *Corporations Act* (n 1) s 462. Creditors have standing under section 462(2)(b), as do contributories under section 462(2)(c). A contributory is defined in section 9 as including a member (specifically, a member who is liable to contribute to the property of the company if the company is wound up under section 9 of the *Corporations Act*, or a holder of fully paid shares).

winding up of the company if the 'affairs of the company are being conducted in a manner that is oppressive to, unfairly prejudicial to, or unfairly discriminatory against, a member or members or in a manner that is contrary to the interests of the members as a whole'.[5] Additionally, section 461(1)(g) provides the same but in relation to acts or omissions, or resolutions or proposed resolutions. The language of sections 461(1)(f) and (g) therefore mirrors the language of section 232.

It appears that sections 461(1)(f) and (g) are interpreted in the same vein as section 232. After analysing numerous cases,[6] it appears that most applicants that seek an order to wind up the company under sections 461(1)(f) and (g) do so in addition to arguing oppressive conduct under section 232 (and seeking the winding up of the company under section 233(1)(a), as discussed in Part II of this article). In a number of these cases, the courts initially consider the claim under section 232, and if successful, then provide that the grounds under sections 461(1)(f) or (g) are also satisfied. In *Asia Pacific Joint Mining Pty Ltd v Allways Resources Holdings Pty Ltd*,[7] the Queensland Court of Appeal specifically considered the interpretation of sections 461(1)(f) and (g). The Court, referencing the judgment of Bond J at first instance, stated that the language used in sections 461(1)(f) and (g) 'mirrored the language used in ss 232(d) and 232(e)', and that 'where the same words appear multiple times in a single piece of legislation, they should ordinarily be given the same meaning' unless there is a reason to do otherwise.[8] Importantly, it was noted that as 'a winding up order is an available remedy under both sets of provisions, ss 461(1)(f) and (g) do not appear to contemplate any avenues of relief beyond those available in s 232' and hence, there is no reason to interpret the terms in sections 461(1)(f) and (g) differently to those terms in section 232.[9]

In contrast, section 445D(1)(f), discussed in Part III of this article, allows for a different avenue of relief (being the termination of a DOCA), sits within a different contextual situation, and, as this article discusses, has a different approach to interpretation than that of section 232.

This article progresses as follows: in Part II, this article will undertake a detailed discussion of section 232, with a focus on how the key terms of 'oppressive to', 'unfairly prejudicial to' and 'unfairly discriminatory against' are defined. Part II also discusses the courts' approach when determining a case under this section. Part III then considers section 445D, and in particular section 445D(1)(f) which provides that a DOCA can be terminated if it is oppressive to the creditors of the company. Part III also discusses how the courts have developed a factor approach

5 *Corporations Act* (n 1) s 461(1)(f).

6 The author conducted a CaseBase search and considered 27 cases that referred to section 461(1)(f).

7 [2018] 3 Qd R 520 ('*Asia Pacific*').

8 Ibid 534 [38] (McMurdo JA), quoting the first instance decision of Bond J in *Allways Resources Holdings Pty Ltd v Samgris Resources Pty Ltd* (2017) 121 ACSR 1, 11 [30].

9 See above n 8. This judicial consideration is also supported by two leading academic texts, which when discussing sections 461(1)(f) and (g), refer their readers back to the discussion of the key terms of 'oppressive', 'unfairly prejudicial to' and 'unfairly discriminatory against' in relation to section 232: Stephen Bottomley et al, *Contemporary Australian Corporate Law* (Cambridge University Press, 2nd ed, 2021) 414 [14.40]; Robert P Austin and Ian M Ramsay, *Ford, Austin and Ramsay's Principles of Corporations Law* (LexisNexis Butterworths, 17th ed, 2018) [10.386].

to determine when a DOCA should be terminated for oppression. In Part IV, the reasons why the courts' approach varies in relation to each section is considered, taking into account the histories of each section, general approaches to statutory interpretation and the context of each provision. Part V discusses whether a uniform approach to determining oppression under both sections would be desirable and workable. Finally, Part VI concludes that although it would be desirable to have one approach for 'oppressive conduct' regardless of whether the term appears in section 232 or section 445D(1)(f), the contexts of both provisions vary greatly, and a uniform approach would be unworkable.

II SECTION 232: THE MEMBERS' OPPRESSION REMEDY

The oppression remedy is found in part 2F.1 'Oppressive Conduct of Affairs', in chapter 2F, 'Members' Remedies' of the *Corporations Act*. The oppression remedy was first enacted in Australia in the early 1960s.[10] The remedy plays an important role in protecting the rights and interests of members,[11] in particular minority members, as it allows a member to bring an action against the company itself or against others within the company, including the board of directors or the majority of members, if their acts or omissions are either oppressive to the member or contrary to the interests of the members as a whole.[12]

Section 232 provides the grounds for which a court can order relief. Section 232 states:

> The Court may make an order under section 233 if:
>
> (a) the conduct of a company's affairs; or
>
> (b) an actual or proposed act or omission by or on behalf of a company; or
>
> (c) a resolution, or a proposed resolution, of members or a class of members of a company;
>
> is either:
>
> (d) contrary to the interests of the members as a whole; or
>
> (e) oppressive to, unfairly prejudicial to, or unfairly discriminatory against, a member or members whether in that capacity or in any other capacity.

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10 *Companies Act 1961* (Cth) s 186 ('*Uniform Companies Act*'). The *Uniform Companies Act* comprises of mirror legislation across the Australian jurisdictions, including: *Companies Ordinance 1962* (ACT); *Companies Act 1961* (NSW); *Companies Ordinance 1963* (NT); *Companies Act 1961* (Qld); *Companies Act 1962* (SA); *Companies Act 1962* (Tas); *Companies Act 1961* (Vic); *Companies Act 1961* (WA). For a more detailed history of the oppression remedy, see Part IV of this article below.

11 For a company with share capital, the members are known as shareholders.

12 Section 234 of the *Corporations Act* (n 1) outlines who has standing to bring an action under section 232. Standing is open to: members of the company (in their capacity as members or otherwise), persons who have been removed from the register of members if their removal is as a result of a selective share reduction or the alleged oppressive conduct, persons who have received shares by transmission of will or operation of law, and any person whom the Australian Securities and Investments Commission ('ASIC') thinks appropriate after conducting investigations.

As can be seen from the structure of section 232, an applicant must first establish that the relevant conduct falls within one of the options in sections 232(a)–(c), and then must establish that the effect of that conduct on the applicant satisfies either section 232(d) or (e). The components of section 232, in particular section 232(e), will be discussed in more detail further below.

Once an order under section 232 has been made, relief can be granted under section 233. Section 233 provides that '[t]he Court can make any order under this section that it considers appropriate in relation to the company', and lists a number of orders that the court can make. These orders include: that the company be wound up, that the company's constitution be modified, that the company's future conduct be regulated, an order that a member or the company purchase the shares of the petitioner, for the company or a member to instigate or defend proceedings, for the appointment of a receiver, as well as orders restraining a person from engaging in specified conduct and requiring a person to do a specified act.[13] As can be seen from the phrase '[t]he Court can make', as opposed to the court must make, section 233 is discretionary. The court has the discretion to make an order granting relief, but it is not required to do so.[14] It is important to note that the listed orders found in section 233 are examples of what the court *may* order: the court is not limited to orders of relief listed in section 233, and is able to order whatever relief is appropriate in the circumstances, to bring an end to the oppression. This could include orders for an account of profits in the case of a breach of fiduciary duties,[15] or an order that directors be replaced with an independent board.[16]

A Section 232: The Conduct

As set out above, section 232 relates to the conduct of the company's affairs, an actual or proposed act or omission by or on behalf of the company,[17] or a resolution (actual or proposed) by members or a class of members of the company. The potential behaviour or actions covered by section 232 is wide.

'Company's affairs' are defined in a broad, non-exhaustive way to include, the membership, control, business, trading and transactions of a company, the internal management of the company, and any act or thing done by the company when the company is under external management.[18] From this definition, it is clear that the conduct of the 'company's affairs' is not limited to outward facing actions of the company, such as entering contracts with third parties. The internal

13 *Corporations Act* (n 1) s 233(1).

14 For an example of when the court has found that oppressive conduct did exist under section 232 but did not award relief under section 233, see *Campbell v Backoffice Investments Pty Ltd* (2009) 238 CLR 304.

15 *Fexuto Pty Ltd v Bosnjak Holdings Pty Ltd* (2001) 37 ACSR 672. This case was decided on the predecessor to section 232, section 260 of the *Corporations Act 1989* (Cth) ('*Corporations Law*').

16 *Re Spargos Mining NL* (1990) 3 WAR 166 ('*Re Spargos*').

17 Section 232(b) of the *Corporations Act* (n 1) not only covers present and future acts but also covers past acts of the company, if the past conduct has a continuing (and present) oppressive effect: *Re Spargos* (n 16) 190 (Murray J).

18 *Corporations Act* (n 1) s 53. Note: this is not a complete statement of the contents of section 53.

actions of the key players within the company are also covered by this definition.[19] The understanding of conduct is also not limited to the formalised actions of the company; informal understandings between members of the company, especially in 'quasi-partnership' situations, may also be covered by this definition.[20]

Whilst the range of conduct covered by the provision appears to be very broad, it is important to remember that fulfilling the *conduct* requirement is only the first step in a successful oppression application. The applicant must establish that the *effect* of the conduct is either oppressive to, unfairly prejudicial to or unfairly discriminatory against a member or members, or is contrary to the interests of members as a whole. Establishing this effect therefore reduces the range of possible conduct that may fall under the ambit of section 232.

B Section 232: The Effect of the Conduct

Once the conduct has been identified, the effect of the conduct on the applicant member must be considered. The conduct must be either 'contrary to the interests of members as a whole'[21] or 'oppressive, unfairly prejudicial to, or unfairly discriminatory against a member or members'.[22] It is now settled that these two grounds are separate grounds for relief.[23] The focus of this article is on section 232(e), as this paragraph is judicially considered more often, and the phrase 'oppressive' is the earliest, and constant, term in the history of the remedy.

1 'Oppressive to, Unfairly Prejudicial to, Unfairly Discriminatory against'

The terminology of section 232(e), that the conduct must be 'oppressive to, unfairly prejudicial to, or unfairly discriminatory against' a member has been deliberately evolved by both Parliament and the courts since its inception. With periods of restrictive interpretation by the courts, Parliament has amended the provision numerous times. With each amendment to the provision, a change in judicial interpretation has occurred. The phrase 'oppressive to, unfairly prejudicial to, or unfairly discriminatory against' is not legislatively defined which has required the courts to define the components and set the parameters as to what conduct may fall within the section.

In the first statutory oppression remedy in Australia, the provision provided only that the conduct had to be 'oppressive' to some part of the members.[24] This

19 See the comments of Jenkins LJ in *Re HR Harmer Ltd* [1958] 3 All ER 689, that the provision is 'wide enough to cover oppression by anyone who is taking part in the conduct of the affairs of the company, whether de facto or de jure': at 698.

20 These informal understandings may also give rise to the members' 'legitimate expectations', which are discussed below.

21 *Corporations Act* (n 1) s 232(d).

22 Ibid s 232(e).

23 *Turnbull v National Roads and Motorists' Association Ltd* (2004) 186 FLR 360, 369–70 [32] (Campbell J) ('*Turnbull*'). For a broader discussion of the legislative changes that have resulted in this position, see 369–70 [32]–[35] (Campbell J). See also Austin and Ramsay (n 9) [10.450.3]; Bottomley et al (n 9) 401 [14.30.15].

24 *Uniform Companies Act* (n 10) s 186.

reflected the first United Kingdom ('UK') provision,[25] with the earliest cases coming from the UK. In *Scottish Co-operative Wholesale Society Ltd v Meyer* ('*Scottish Co-operative*'), Viscount Simonds, relying on the dictionary meaning of the word, defined 'oppressive' to mean 'burdensome, harsh and wrongful'.[26] In the same case, Lord Keith of Avonholm added that oppression under the provision may take various forms and suggested that it would include 'a lack of probity and fair dealing'.[27] In *Re Jermyn Street Turkish Baths Ltd* ('*Re Jermyn Street*'),[28] the Court considered the meaning of 'oppressive', starting with the definitions provided in *Scottish Co-operative*. The Court noted that they did not think that this was 'necessarily a comprehensive definition' of 'oppressive' but noted 'that it may serve as a sufficient definition'.[29] The Court added that oppression must 'import that the oppressed are being constrained to submit to something which is unfair to them as the result of some overbearing act or attitude on the part of the oppressor.'[30] In one of the early Australian cases, *Re Tivoli Freeholds Ltd*,[31] the Court consolidated a number of principles relevant to the oppression provision and affirmed the above definitions from *Scottish Co-operative* and *Re Jermyn Street*.[32]

In the second Australian iteration of the oppression remedy, section 320 of the *Companies Code*,[33] the Parliament extended the provision by building upon the 'oppressive to one or more of the members' by adding that an order could be made if the directors of the company have acted in their own interests in a manner than is unfair or unjust to the members. This brought in the statutory language of 'unfair' and 'unjust'. In the 1983 amendment to section 320, the 'oppressive' term was extended by Parliament to include 'oppressive or unfairly prejudicial to, or

25 *Companies Act 1948* (UK) s 210.

26 [1959] AC 324, 342 ('*Scottish Co-operative*'). This case considered section 210 of the *Companies Act 1948* (UK), the first provision enacted in response to the Cohen Report (Board of Trade (UK), *Report of the Committee on Company Law Amendment* (Cmd 6659, 1945) ('Cohen Report')), and the basis of Australia's first oppression remedy in section 186 of the *Uniform Companies Act* (n 10).

27 *Scottish Co-operative* (n 26) 364, citing *Elder v Elder* [1952] SC 49, 60 (Lord Keith of Avonholm). Despite their Lordships' approach in *Scottish Co-operative* being regarded as a 'liberal construction' by commentators, see BH McPherson, 'Oppression of Minority Shareholders: Part II' (1963) 36(12) *Australian Law Journal* 427, 428 <https://doi.org/10.1093/clp/25.1.124>, these early interpretations formed the basis of the restrictive interpretation of the provision that followed. For this restrictive interpretation, see, eg, K W Wedderburn, 'Oppression of Minority Shareholders' (1966) 29(3) *The Modern Law Review* 321 <https://doi.org/10.1111/j.1468-2230.1966.tb01117.x>; H Rajak, 'The Oppression of Minority Shareholders' (1972) 35(2) *Modern Law Review* 156 <https://doi.org/10.1111/j.1468-2230.1972.tb01325.x>; D Prentice, 'Protection of Minority Shareholders: Section 210 of the Companies Act 1948' (1972) 25(1) *Current Legal Problems* 124 <https://doi.org/10.1093/clp/25.1.124>.

28 [1971] 1 WLR 1042 ('*Re Jermyn Street*').

29 Ibid 1060 (Buckley LJ for the Court).

30 Ibid.

31 [1972] VR 445.

32 Ibid 452–54 (Menhennitt J). A number of these principles were quite restrictive and have since been replaced.

33 *Companies Act 1981* (Cth) s 320 ('*Companies Code*'). The *Companies Code* was a set of mirror legislation enacted across the Australian jurisdictions consisting of provisions set out in the *Companies Act 1981* (Cth), as adopted and amended in the various state and territory codes, for example the *Companies (Applications of Laws) Act 1982* (SA), which brought the Commonwealth provisions into State law.

unfairly discriminatory against'.[34] With the expansion of the phrase to incorporate 'unfairly prejudicial to, or unfairly discriminatory against', the courts were able to expand their definitions of the phrase.[35] In *Morgan v 45 Flers Avenue Pty Ltd*, Young J noted that the decisions following the 1983 amendment[36] provided that it was not correct to consider the term 'oppressive' in isolation, and in his Honour's view, the provision needed to be read as 'a composite whole and the individual elements mentioned in the section should be considered merely as different aspects of the essential criterion, namely commercial unfairness'.[37]

In addition to these 'definitions' of oppression, the courts have developed some tests to determine if the conduct is oppressive. In his 1999 empirical study on the oppression remedy, Ramsay identified that 'in almost 30 per cent of the judgments, courts did not specifically apply any test other than the words of the section'.[38] Ramsay then noted that if courts did apply a test, the most popular test was the *Wayde* test.[39]

In *Wayde v New South Wales Rugby League Ltd* ('*Wayde*'), the High Court considered whether the decision by the New South Wales Rugby League Ltd ('League') to remove the Western Suburbs District Rugby League Football Club ('Wests') from the New South Wales competition (to bring the number of clubs down to twelve) was oppressive, unfairly prejudicial to or unfairly discriminatory against Wests under section 320 of the *Companies Code*.[40] The Court had to balance two competing interests, the interests of Wests to remain in the competition, and the interests of the League as a whole, which would benefit from having a shorter season facilitated by having 12 rather than 13 clubs.[41] The Court noted that the decision to remove Wests from the competition was harsh,[42] but determined that the decision was not oppressive. The board of directors had made the decision in good faith for the benefit of the company as a whole, after balancing the interests

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34 See Part IV(A)(1) of this article below for further detail on the history of this amendment.

35 An example of this is *Re Spargos* (n 16), which considered whether past acts were covered by the oppression provision. The amended section 320 also contained the phrase that the company's affairs 'are being conducted', which is a present tense phrase. Earlier oppression cases (which also contained this present tense phrase), had held that the conduct must be present and continuing at the time of the hearing. However, the broader language of 'unfairly prejudicial' and 'unfairly discriminatory' in the amended section 320, allowed the courts to give a broader interpretation. In *Re Spargos*, Murray J noted that the deliberately broader formulation of section 320 'indicates clearly that the court is not to be fettered in determining the existence of grounds for relief', allowing for past conduct to be captured by the provision: at 190. This interpretation can be supported by Stephen Gageler's observations of how the accumulated experience of a statute will shape its interpretation: Stephen Gageler, 'Common Law Statutes and Judicial Legislation: Statutory Interpretation as a Common Law Process' (2011) 37(2) *Monash University Law Review* 1, 9.

36 His Honour referred to *Wayde v New South Wales Rugby League Ltd* (1985) 180 CLR 459 ('*Wayde*'), as well as New Zealand and English cases.

37 *Morgan v 45 Flers Avenue Pty Ltd* (1986) 10 ACLR 692, 704 ('*Morgan*').

38 Ian M Ramsay, 'An Empirical Study of the Use of the Oppression Remedy' (1999) 27(1) *Australian Business Law Review* 23, 29.

39 Ibid.

40 *Wayde* (n 36).

41 Ibid 466–67 (Mason ACJ, Wilson, Deane and Dawson JJ), 473 (Brennan J).

42 Ibid 468 (Mason ACJ, Wilson, Deane and Dawson JJ).

of both the company and Wests, and the Court determined that the decision was not an unfair one. Brennan J stated:

> The question here is whether the resolutions which were manifestly prejudicial to and discriminatory against Wests, were also unfair – that is, so unfair that reasonable directors who considered the disability the decision placed on Wests would not have thought it fair to impose it.[43]

Whilst the *Wayde* test can certainly be used when the alleged oppressive conduct relates to the effect of a board decision, as it specifically refers to what 'reasonable directors' would do, not all allegations of oppressive conduct are made against the board. A member may argue that the conduct of the majority of shareholders is oppressive, through members' resolutions. As noted in *Wayde*,[44] and consistently by the judiciary since this decision, the oppression remedy will be triggered when the conduct is unfair. Mere prejudice or discrimination or unhappiness with a majority decision is not enough to satisfy section 232; the prejudice or discrimination must be objectively unfair.

A second test often utilised is the 'legitimate expectations' test.[45] The legitimate expectations test refers to expectations that a member might legitimately or reasonably have in a company, and that those rights or expectations may be beyond those that are outlined in the company constitution or a shareholders agreement.[46] The expectations may exist via written agreement, by words or by conduct. If those legitimate expectations of a member are breached, then the conduct may be oppressive and in breach of section 232. Legitimate expectations can arise in a number of situations, including when the founders of a business set up a company and the members have a legitimate expectation to participate in the management of the company, to retain a directorship, and to be paid dividends.[47]

The legitimate expectations test has not been used consistently by the Australian courts,[48] with Brenker and Ramsay suggesting that the test should not be used as it creates confusion and has not aided the courts in their analysis.[49] Incidentally, cases that have been argued as being a breach of legitimate expectations are often able to satisfy a breach of the oppression provision by using the terms of the provision itself rather than using the language of the legitimate expectations test.

Consequently, there is no one test used by the courts when making decisions under section 232. This is likely due to the fact-driven nature of section 232 claims and the highly varied circumstances in which oppression may occur within a

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43 Ibid 473.

44 Ibid 472 (Brennan J).

45 For a detailed consideration of the 'legitimate expectations' test, see Stephanie CB Brenker and Ian Ramsay, '"Legitimate Expectations" and the Oppression Remedy' (2020) 36(1) *Australian Journal of Corporate Law* 3.

46 See further, Elizabeth J Boros, *Minority Shareholders' Remedies* (Clarendon Press, 1995) 135–52.

47 Brenker and Ramsay (n 45) 6–7.

48 Brenker and Ramsay (n 45) outline five different approaches to how the courts have used the legitimate expectations test, including that: it is used as an analytical term as part of the oppression test; it is used as a label for equitable principles; it is used to describe a factual scenario; it is not used by the courts; and finally that it is used in a public law sense, for example, as a denial of procedural fairness: at 11–18.

49 Ibid 19.

company. The development of a universal test to cover all instances of oppression would be challenging and potentially misguided.

Another aspect to consider is the example precedents of what has, or has not, been determined to be oppressive conduct under section 232. With the definition of section 232(e) being the broad 'commercial unfairness', and the lack of a uniform test that can be used in all oppression cases, the courts often rely on earlier specific examples of oppressive conduct to justify why conduct is oppressive in the matter before them. Oppression is often described by using examples of the types of conduct that may be oppressive (for example, a failure to review a dividend policy may be oppressive),[50] as opposed to the types of conduct that are likely not to be oppressive (for example, payment of low dividends to members combined with high directors' fees may not be oppressive).[51] With the context of the conduct playing a vital part in whether the conduct is oppressive, each example needs to be considered in light of that context, and not as a standalone principle as to what is, or is not, generally oppressive.

Whilst the development of these definitions and tests may be useful in understanding the scope of the oppression remedy, we must be cognisant of the fact that these definitions and tests are not a substitute for the words of the section. In relation to the definition of 'commercial unfairness' as interchangeable with the term 'oppressive', Basten JA stated:

> [T]here is a danger in seeking to reduce the statutory language to the criterion of 'commercial unfairness'. Not only does that terminology distract attention from the statutory language, but it tends to ignore important distinctions between different kinds of complaint and, if taken out of the context in which it was originally formulated, ignores the relatively strict test for judicial intervention.[52]

Similar concerns have been raised in relation to the use of 'legitimate expectations' as a test for oppression, as the phrase distracts from the statutory language in section 232.[53]

After considering the courts' approach to the members' oppression remedy in section 232, the next part of this article will consider if the courts have approached the term 'oppressive' in a similar way in section 445D(1)(f), a section that provides for the termination of a DOCA if that deed is oppressive to creditors.

III SECTION 445D(1)(F): TERMINATING A DEED OF COMPANY ARRANGEMENT ON THE GROUNDS OF OPPRESSION

Before discussing section 445D(1)(f) and the courts' approach to that provision, Part III of the article will start with an overview of DOCAs and the voluntary administration process.

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50 *Shamsallah Holdings Pty Ltd v CBD Refrigeration & Airconditioning Services Pty Ltd* (2001) 19 ACLC 517 ('*Shamsallah*').

51 *Morgan* (n 37).

52 *Campbell v Backoffice Investments Pty Ltd* (2008) 66 ACSR 359, 400 [184].

53 Brenker and Ramsay (n 45) 21.

A Voluntary Administration and Deeds of Company Arrangement: An Overview

When a company faces financial difficulties, and the board is of the opinion that the company is insolvent or is likely to be insolvent at a future time (and therefore facing the prospect of liquidation and ultimately deregistration of the company), the company, through its board of directors, may decide to appoint an administrator and enter into voluntary administration.[54] The voluntary administration process has two legislative aims, to either maximise the chances of the company, or its business, continuing in existence or if this is not possible, to provide for a better return to the creditors than an immediate winding up.[55]

Once the administrator has been appointed, the powers of the directors are suspended,[56] the administrator may carry on the company's business,[57] and a statutory moratorium begins preventing actions from being brought against the company.[58] Once appointed, the administrator must investigate the company's business, property, affairs and financial circumstances and form an opinion as to whether it will be in the best interests of the company's creditors to either enter into a DOCA, wind up the company or for the administration to end and for the company to go back under the control of the directors.[59] The administrator must then report to the creditors and present their opinion, this is done at the second meeting of the creditors.[60]

At the second creditors' meeting, after receiving the administrators report into the affairs of the company,[61] the creditors determine the future course of action of the company. Under section 439C, the creditors may resolve that the company execute a DOCA, or that the administration should end, or that the company be wound up.[62] If the creditors believe that the company will be able to continue its

54 *Corporations Act* (n 1) s 436A. In addition, an administrator can also be appointed by a liquidator (if the company is already in liquidation): at s 436B, and also by a secured creditor if they are entitled to enforce a security interest in the whole, or substantially the whole of the company's property, if the security interest has become enforceable: at s 436C.

55 *Corporations Act* (n 1) s 435A. The object of part 5.3A, as outlined in section 435A, will be discussed below in Part IV of this article.

56 Ibid s 198G.

57 Ibid s 437A. The administrator also acts as the company's agent: at s 437B.

58 Ibid s 440D.

59 Ibid s 438A. The directors are required to assist the administrator in their investigations: at s 438B.

60 The second creditors' meeting usually occurs within 20 to 25 business days of the administration beginning: ibid s 439A(5). The court may extend the convening period of the second creditors meeting upon application: at s 439A(6).

61 See division 75 sub-division F rule 75-225 of the *Insolvency Practice Rules (Corporations) 2016* (Cth) ('*IPRC*'), for the requirements of this administrators report.

62 The resolution as to the future of the company will be passed if a majority of the creditors voting vote in favour of the resolution and a majority in value of the creditors voting vote in favour of the resolution: *IPRC* (n 61) div 75 sub-div 5 r 75-115(1). The voting may be conducted 'on the voices' or if a poll is requested, by poll: at r 75-110. If the vote does not achieve both a majority in number and majority in value, then the person presiding over the meeting, the administrator, has a casting vote: at r 75-115(3).

business, either in whole or in part, the likely outcome of the second creditors meeting is that the company enters a DOCA.[63]

A DOCA is a negotiated instrument entered into by the company and its creditors, and, once passed, is binding on all unsecured creditors of the company in relation to their claims arising on or before the day specified in the deed.[64] Each DOCA can be bespoke, which allows for a flexible approach for each company and its circumstances.[65] The deed may be a 'quasi-liquidation' type deed, where the DOCA acts as a means to maximise the returns to the creditors through a more structured sale and winding up process. Or, the deed may have a restructuring aim, with the company trading on, with the goal of achieving a continuation of the business either in part or in full.[66] To achieve either of these aims, the creditors may be required to compromise their debts. This compromise may involve creditors accepting less than the full amount they are owed, accepting a rescheduling of those debts to allow the company to pay the debt by instalment, or having their debt restructured by accepting payment of the debt in some other form, for example receiving assets, shares or securities in exchange for their debt.[67]

With the resolution to execute a DOCA needing to be passed by a majority of creditors,[68] it will be the majority of creditors that determine what an acceptable cost is for compromising their claims. With DOCAs involving the compromise of creditors' right to be paid, and a DOCA being implemented by majority vote, the very nature of this process means that it is possible that some creditors may win, and some creditors may lose.[69] As will be discussed below, the ability to terminate a DOCA for oppression under section 445D(1)(f) requires more than simply being outvoted on this resolution.

The risk of abuse in the DOCA formation process is not insignificant. Parties will be looking out for their own interests. Naturally, creditors will want to receive as much of their debt as possible. Company directors may want to avoid the company entering into a liquidation (and the investigation into voidable transactions or insolvent trading that comes with it). Related party creditors may vote in favour of a DOCA to benefit the directors of the company or the DOCA may provide

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63 For a detailed discussion of deeds of company arrangement ('DOCAs'), see Michael Murray and Jason Harris, *Keay's Insolvency: Personal and Corporate Law and Practice* (Thomson Reuters, 10th ed, 2018) ch 20.

64 *Corporations Act* (n 1) s 444D. The deed will also be binding on secured creditors who voted in favour of the deed.

65 Section 444A(4) of the *Corporations Act* (n 1) provides a list of matters that must be included in a deed.

66 Mark Wellard, 'A Review of Deeds of Company Arrangement' (2014) 26(2) *Australian Insolvency Journal* 12, 15.

67 Murray and Harris (n 63) 838 [20.10].

68 See above n 62 as to the voting requirements.

69 See the comments of Young J in *Khoury v Zambena Pty Ltd* (1997) 23 ACSR 344, 353 ('*Khoury*'). It is noted that a DOCA cannot provide a worse outcome for creditors than an immediate winding up would produce. If it does, then the DOCA can be challenged on various grounds: under section 445D(1)(f) that the DOCA is oppressive to the creditor as they are receiving less than they would in an immediate winding up, under section 445G as the DOCA be declared void as it is inconsistent with part 5.3A (in particular the objects outlined in section 435A), or under section 447A, the broad power of the court to make any order it sees fit in relation to part 5.3A.

incentives to certain creditors to vote in favour of the DOCA to ensure that the DOCA is approved.[70] To counter this potential risk, part 5.3A includes multiple 'checks and balances' that allow for a DOCA to be challenged in court. One of these is section 445D, which is discussed in detail below.[71]

B Section 445D

Section 445D allows the court to terminate a DOCA on various grounds as outlined in the provision. A creditor of the company may bring an application under section 445D.[72] If a DOCA is terminated under section 445D, the company will enter into voluntary liquidation.[73] Section 445D(1) provides:

> (1) The Court may make an order terminating a deed of company arrangement if satisfied that:
>
> (a) information about the company's business, property, affairs or financial circumstances that:
>
> (i) was false or misleading; and
>
> (ii) can reasonably be expected to have been material to creditors of the company in deciding whether to vote in favour of the resolution that the company execute the deed;
>
> was given to the administrator of the company or to such creditors; or
>
> (b) such information was contained in a document that accompanied a notice of the meeting at which the resolution was passed; or
>
> (c) there was an omission from such a document and the omission can reasonably be expected to have been material to such creditors in so deciding; or
>
> (d) there has been a material contravention of the deed by a person bound by the deed; or
>
> (e) effect cannot be given to the deed without injustice or undue delay; or
>
> (f) the deed or a provision of it is, an act or omission done or made under the deed was, or an act or omission proposed to be so done or made would be:
>
> (i) oppressive or unfairly prejudicial to, or unfairly discriminatory against, one or more such creditors; or
>
> (ii) contrary to the interests of the creditors of the company as a whole; or
>
> (g) the deed should be terminated for some other reason.

As the action and the remedy are both in the same section (which is in contrast with the members oppression provision in part 2F.1 where the action is found

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70 See, eg, *Canadian Solar v ACN 138 535 832 Pty Ltd (Subject to a Deed of Company Arrangement)* [2014] FCA 783, where a creditor was promised a payment of $200,000 in return for assigning its debt and agreeing to vote in favour of the proposed DOCA, and the director's parents-in-law (who voted in favour of the DOCA) were given preferential treatment under the DOCA.

71 The other sections that may provide relief to a creditor wishing to have a deed brought to an end are discussed below, in Part IV(C)(4) of this article.

72 *Corporations Act* (n 1) s 445D(2). The company, ASIC or any other interested person also has standing.

73 Ibid s 445C(a).

in section 232 and the remedy in section 233), the courts use a two stage test to determine if a DOCA should be terminated under section 445D. As explained in *Re Recycling Holdings Pty Ltd*:

> An inquiry under s 445D involves two stages, though they are not unrelated. The first is whether one of the grounds referred to in s 445D(1) is established. The second, which arises only if the first is established, is whether as a matter of discretion the DOCA should be terminated.[74]

Whilst it appears pragmatic to consider whether to terminate a deed under section 445D in two clear steps, the line between those two steps is often blurred. There is often an overlap of considerations across both steps, and in some cases, the court will consider the ground and the discretion at the same time.

Under the first stage, the applicant must establish one or more of the seven grounds under section 445D(1). Once the applicant has established one or more of these grounds, the DOCA does not automatically terminate; the jurisdiction is enlivened, and the court has a discretion to terminate (or not to terminate) the deed.[75] This discretion is exercised on a case by case basis. Broadly, in considering whether to terminate a DOCA, the court will exercise this discretion 'having regard to both the interests of the creditors as a whole, and in the public interest',[76] and taking into account the objects of part 5.3A.[77] Other factors may also be taken into

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74 *Re Recycling Holdings Pty Ltd* (2015) 107 ACSR 406, 419 [29] (Brereton J) ('*Re Recycling*'). This paragraph was cited in the Federal Court case of *Britax Childcare Pty Ltd v Infa Products Pty Ltd (admin apptd)* (2016) 115 ACSR 322, 342 [90] (Burley J) ('*Britax*'), with *Britax* also being cited in the Victorian Supreme Court in *Eco Heat (Vic) Pty Ltd v The Syndicate Forty Four Pty Ltd* [2018] VSC 156 [34] (Sifris J) ('*Eco Heat*'), and more recently in *Pilot Advisory Pty Ltd v ACN 137806574 Pty Ltd (admin apptd)* (2019) 376 ALR 662, 692 [81] (Reeves J) ('*Pilot Advisory*'). This two-step test approach has also been cited in various other cases, including *Bidald Consulting Pty Ltd v Miles Special Builders Pty Ltd* (2005) 226 ALR 510, 562 [270] (Campbell J) ('*Bidald*'), with *Bidald* being cited in *TiVo Inc v Vivo International Corporation Pty Ltd* [2014] FCA 789 [67] (Gordon J) ('*TiVo*').

75 See, eg, *Emanuele v Australian Securities Commission* (1995) 63 FCR 54, 69 ('*Emanuele*'); *McVeigh v Linen House Pty Ltd [No 2]* (2000) 1 VR 31, 42 [33] (Phillips JA, Tadgell JA agreeing at 33 [1] and Buchanan JA agreeing at 33 [2]); *Bidald* (n 74) 539 [138] (Campbell J); *Fleet Broadband* (n 3) 609 [65] (Master Newnes); *TNT Building Trades Pty Ltd v Benelong Developments Pty Ltd (admin apptd)* (2012) 91 ACSR 17, 25 [27] (Black J) ('*TNT Building Trades*'); *Hayes v Doran [No 2]* [2012] WASC 486 [406] (Kenneth Martin J) ('*Hayes*'); *Re Recycling* (n 71) 419 [29], 428–9 [71] (Brereton J). See also Austin and Ramsay (n 9) [26.380.3]; Bottomley et al (n 9) 453 [15.40.10]; Murray and Harris (n 63) 870 [20.255]; Christopher F Symes, David Brown and Sulette Lombard, *Australian Insolvency Law* (LexisNexis Butterworths, 4th ed, 2019) 340–1 [8.77].

76 *Emanuele* (n 75) 69. This has been cited with approval in a variety of cases, including, but not limited to: *TNT Building Trades* (n 75) 25 [27] (Black J); *Hayes* (n 75) [406] (Kenneth Martin J); *Re Recycling* (n 74) 419 [29] (Brereton J); *B Nichols Holdings Pty Ltd v The Infant Nutrition Company of Australia Pty Ltd (admin apptd)* [2019] VSC 595, [48] (Kennedy J). The 'public interest' includes considerations of commercial morality and the interests of the public at large: *Vero Insurance Ltd v Kassem* (2011) 86 ACSR 607, 621 [82] (Campbell JA).

77 In *Britax* (n 74), Burley J stated: '[h]owever, ultimately the exercise of discretion under the *Corporations Act* involves a balance taking into consideration the policies and purposes of Pt 5.3A and s 435A': at 366 [246].

account.[78] Depending on the circumstances of the case, and the grounds pleaded under section 445D(1), the weighting attached to the various factors will vary.[79]

C Section 445D(1)(f)

Section 445D(1)(f) is the focus of this article, and is set out above. There are two different, but related, grounds under section 445D(1)(f). Firstly, the court may terminate the deed under section 445D(1)(f)(i) if the deed, or a provision of it, is oppressive, unfairly prejudicial to, or unfairly discriminatory against one or more such creditors. Secondly, the Court may terminate the deed under section 445D(1)(f)(ii) if the deed, or a provision of it, is contrary to the interests of the creditors of the company as a whole.[80]

There are obvious similarities to section 232 (discussed above in Part II of this article), in both the structure and the wording. The similarities between the two provisions were noted by Austin J in *Portinex*, as quoted above in the Introduction to this article.

As noted by Pearce, words are assumed to be used consistently throughout a piece of legislation, and that if a word is used consistently it should be given the same meaning.[81] However, if the contexts in which the words are used throughout the text vary, then the court may rebut that presumption.[82] The context of the two provisions will be considered below in Part IV. It is, therefore, a logical starting point to assume that as the phrasings of the provisions are identical, that the meanings in both provisions are identical. We might also reasonably assume that the two provisions have been treated similarly by the courts, and that the case law from section 232 (the earlier of the two provisions) would be used by the courts in determining cases under section 445D(1)(f). The next section of this article will demonstrate that, in fact, the courts appear to have developed a different approach in determining cases under section 445D(1)(f), and the courts have rarely referred to the case law of section 232.

D How Have the Courts Approached Section 445D(1)(f) Cases?

As with section 232, the jurisprudence on section 445D(1)(f) has developed over the years. One of the first cases to consider section 445D(1)(f) was *Lam Soon*

78 For example, any delay in bringing proceedings, any unconscionable conduct under the deed, the impact on employees, whether the business of the company is ongoing, the availability of funding for investigations during the liquidation process, and the possibility of recovery if action is taken against directors in a liquidation: see *Bidald* (n 74) 565–6 [286]–[291], 567 [298]–[299] (Campbell J); *Khoury* (n 69) 353 (Young J).

79 *Linen House Pty Ltd v Rugs Galore Australia Pty Ltd* [1999] VSC 126, [96], [99], [106] (Gillard J).

80 The discussion in this Part focuses on the first of these grounds, found in section 445D(1)(f). Similar to section 232 of the *Corporations Act* (n 1), the majority of cases considering section 445D(1)(f) focus on the oppressive or unfairly prejudicial to, or unfairly discriminatory against a creditor (or member as it would be for section 232) ground, as opposed to the contrary to the interests of the creditors (or members as it would be for section 232).

81 Dennis C Pearce, *Statutory Interpretation in Australia* (LexisNexis Butterworths, 9th ed, 2019) 141 [4.6].

82 Ibid 143 [4.9].

Australia Pty Ltd (admin apptd) v Molit (No 55) Pty Ltd ('*Lam Soon*').[83] Lam Soon Australia Pty Ltd ('the company') operated two supermarkets. The company went into voluntary administration, and entered into a DOCA. The deed provided that the supermarket (leased from Molit) that was not profitable would be shut down, whereas the other supermarket (which was profitable) would remain in operation. Molit voted against the deed at the second creditors' meeting, and once the deed was executed, brought an action to terminate the deed.[84]

At first instance, Branson J considered whether the DOCA was 'oppressive or unfairly prejudicial to, or unfairly discriminatory against' the applicant within the meaning of section 445D of the *Corporations Law 1989* (Cth) ('*Corporations Law*') (now *Corporations Act*).[85] Her Honour set out the relevant terms of the DOCA, and the respondent's arguments as to why the DOCA was not oppressive to Molit.[86] Her Honour considered whether Molit could be treated differently under the DOCA compared to the other creditors, and stated:

> A deed of company arrangement may in certain circumstances be valid notwithstanding that there is differentiation between the treatment of different classes of creditors. Reasonable grounds for such differentiation, consistent with the object and spirt of Pt 5.3A of the *Corporations Law* [now *Corporations Act*], need to be able to be demonstrated.[87]

Her Honour referred to two cases that had considered section 445D broadly in her reasoning,[88] but there was no mention of any cases specific to the oppression ground, as this was one of the first cases to consider this provision. On appeal, the Court confirmed the principle that a DOCA can discriminate amongst creditors if that discrimination is not unfair,[89] but held that the deed should not have been terminated at first instance.[90]

In *Sydney Land Corp Pty Ltd v Kalon Pty Ltd* ('*Sydney Land Corp*'),[91] Young J provided the first consolidated approach in how to determine if a DOCA should be terminated under section 445D(1)(f) for being oppressive or unfairly prejudicial to, or unfairly discriminatory against a creditor. Kalon Pty Ltd (the company), was insolvent and owed a total of $6.2 million to eight creditors. The company entered into a DOCA, with six of the eight creditors voting in favour of the deed, Sydney Land Corp (the applicant) with a debt of $2.1 million voting against the deed, with one small creditor who did not attend and vote.[92] The terms of the deed required that the applicant would receive the choice of a payment of $440,000 or 40 million shares in a related New Zealand company (the shares were deemed

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83 (1996) 70 FCR 34 ('*Lam Soon*').
84 Ibid 37–8.
85 *Molit (No 55) Pty Ltd v Lam Soon Australia Pty Ltd (admin apptd)* (1996) 63 FCR 391, 403.
86 Ibid 404–5.
87 Ibid 406.
88 The first, *Re Bartlett Researched Securities Pty Ltd* (1994) 12 ACSR 707 in relation to the purpose of part 5.3A and, the second, *Emanuele* (n 75) regarding the discretionary power to terminate a deed of company arrangement under section 445D.
89 *Lam Soon* (n 83) 48.
90 Ibid 50.
91 *Sydney Land Corp Pty Ltd v Kalon Pty Ltd* (1997) 26 ACSR 427 ('*Sydney Land Corp*').
92 Ibid 428.

close to worthless) in lieu of its debt of $2.1 million.[93] The applicant argued that the deed was oppressive or unfairly prejudicial to, or unfairly discriminatory against it and should be terminated under section 445D(1)(f).

After acknowledging that section 445D had been considered a few times in recent years, and referring to *Lam Soon*, Young J stated:

> I must approach the discretion that I am given under s 445D of the *Corporations Law* untrammelled by any overriding considerations. I must look at the whole of the effect of the deed and assess its unfairness, if any, to the plaintiff, but in doing so, I must bear in mind the scheme of Pt 5.3A of the *Corporations Law* [now *Corporations Act*] and the interests of other creditors, the company and the public generally.[94]

After considering the purpose of part 5.3A, with reference to section 435A and the enacting history of part 5.3A, his Honour then considered the broader context surrounding part 5.3A:

> Accordingly, when one is looking at what is oppressive or unfairly prejudicial under s 445D, one looks at it in the background of the general right of a creditor to be paid or to wind the company up, or to have the company administered by the administrator under the deed in a way which keeps the company's business going and will see the creditor paid something out of the property of the company. If a scheme in a deed deviates from that, then the creditor is more easily able to say that it is operating oppressively, than otherwise.[95]

His Honour then considered the comparable position of the applicant under the deed and what might be available under an immediate winding up and was unable to determine if the applicant would be worse off under the scheme. His Honour noted that 'it is fairly close to line ball one way or the other', and ultimately held that the deed was oppressive to the applicant and should be terminated under section 445D.[96]

Young J has taken a contextual approach in this reasoning. His Honour started his consideration by focusing on the text of the section itself and the (few) previous cases that had considered section 445D, including *Lam Soon* which focused on section 445D(1)(f). His Honour then considered the context and purpose of part 5.3A, the part in which section 445D sits. His consideration then 'spiralled out'[97] taking into account the broader context in which part 5.3A sits, where he considered the law of insolvency, and the rights a creditor has under insolvency law. These statements by Young J highlight the broader considerations that need to be taken in consideration when deciding whether or not to terminate a deed under section

93 Ibid.

94 Ibid 429.

95 Ibid 430. Young J's reasoning, and his reference to the rights of creditors, were subject to appeal. The Court of Appeal dismissed the appeal, holding that his Honour's reasons, read as a whole, demonstrated awareness of the purpose of part 5.3A, of its object provision section 435A, and of the different grounds available for terminating a deed, and that his Honour reached the correct conclusion in determining that the deed should be terminated: *Kalon Pty Ltd v Sydney Land Corporation Pty Ltd* (1998) 26 ACSR 593, 598–9.

96 *Sydney Land Corp* (n 91) 432.

97 Jeffrey Barnes refers to the spiral approach (which he attributes to Justice Susan Glazebrook) in 'Contextualism: "The Modern Approach to Statutory Interpretation"' (2018) 41(4) *University of New South Wales Law Journal* 1083, 1084, 1090 <https://doi.org/10.53637/PRVR3704>.

445D, and form the first consolidated principles in how to determine if a deed should be terminated for oppression under section 445D(1)(f).

After *Sydney Land Corp*, the courts continued to develop principles in relation to section 445D, and specifically section 445D(1)(f).[98] In the 2014 case of *TiVo Inc v Vivo International Corporation Pty Ltd (subject to deed of company arrangement)* ('*Tivo*'),[99] Gordon J of the Federal Court, developed a clear and systematic set of factors that the court should have regard to when determining if a deed should be terminated under section 445D(1)(f), including

1. the object of Pt 5.3A;
2. the interests of other creditors, the company and the public;
3. the comparable position of the creditor on a winding-up, compared with their position under the deed; and
4. other relevant facts such as the relative position of all creditors under the deed (ie whether they are better off), the existence of a collateral benefit to the shareholders and the whole of the effect of the deed.[100]

After setting out these criteria, her Honour then considered each of the criteria in turn, finally noting that 'the circumstances in which a DOCA may be terminated are not closed. Each case will depend upon its own facts and combination of circumstances, which must be mutually balanced'.[101] This similarly reflects the position of the courts when considering whether oppressive conduct has occurred under section 232; outcomes are heavily fact specific. The *TiVo* criteria have been cited numerous times in recent cases.[102]

To address the specific observations of Austin J in *Portinex*,[103] set out in the Introduction of this article, it appears that very few section 445D(1)(f) cases refer to section 232 members' oppression cases, and very few attempt to define the phrase 'oppressive to, unfairly prejudicial to or unfairly discriminatory against'. In a survey of a number of section 445D(1)(f) cases,[104] only one case referred to a section 232 case. In *Fleet Broadband Holdings*,[105] after referring to *Lam Soon* and *Sydney Land Corp* (discussed above), Master Newnes considered how the court should balance the interests of creditors as a whole against the interests of the minority creditor. He stated that, '[t]he court decides this "according to the

98 See, eg, *Vero Insurance Ltd v Kassem* (2011) 86 ACSR 607, where Campbell JA pulled together various principles to determine whether a deed should be terminated under section 445D(1)(f): at 621–2 [83].

99 *TiVo* (n 74).

100 Ibid [54], citing *Sydney Land Corp* (n 91).

101 *TiVo* (n 74) [59], citing *Mediterranean Olives Financial Pty Ltd v Loaders Traders Pty Ltd [No 2]* (2011) 82 ACSR 300, 344 [197] (Dodds-Streeton J).

102 See, eg, *Britax* (n 74) 346 [115] (Burley J); *Eco Heat* (n 74) [35] (Sifris J); *Mighty River International Ltd v Hughes (as administrator of MESA Minerals Ltd)* (2017) 52 WAR 1, 31–2 [127] (Buss P).

103 *Portinex* (n 2) 476 [100].

104 The author conducted an informal, non-coded study of 30 cases which considered section 445D(1)(f) of the *Corporations Act* (n 1).

105 *Fleet Broadband* (n 3).

ordinary standards of reasonableness and fair dealing"', citing *Jenkins v Enterprise Goldmines NL*,[106] a case considering members' oppression.[107]

The author only identified one section 445D(1)(f) case which defined components of the phrase 'oppressive to, unfairly prejudicial to or unfairly discriminatory against' a creditor, and interestingly the authorities cited were not section 232 cases, or even corporate law cases. In *Pilot Advisory Pty Ltd v ACN 137806574 Pty Ltd (admin apptd)*, Reeves J of the Federal Court, cited two industrial law cases in his consideration of whether the effect of various provisions of the DOCA were unfairly prejudicial to the applicant.[108] His Honour concluded that the terms of the DOCA were prejudicial to the applicant creditor, and then went on to consider whether that prejudice was unfair. It is important to note that in his reasons Reeves J spent multiple pages outlining the numerous principles relating to section 445D(1)(f) (some of which have been outlined above) before considering the term 'prejudice'.[109] However, the author finds it unusual that industrial law cases would be cited when there is a vast number of cases that consider 'prejudice' in the corporate law sphere.

From the above discussion, a number of observations can be made regarding the approach of the courts when considering oppression under section 445D(1)(f). Firstly, the courts have rarely made direct reference to the vast common law of the members' oppression remedy, found in section 232. Secondly, it appears that the courts have taken a criteria or factor approach rather than a definitional approach to determine if a DOCA should be terminated for oppression. The case of *TiVo* set out a number of factors that can be used to determine if the DOCA should be terminated for being oppressive under section 445D(1)(f). This is in contrast to the definitional approach taken by the courts when considering the members' oppression remedy under section 232, where the courts have not set out a universal test or a set of factors, but have instead developed numerous definitional principles as to what oppression is. The reasons why the approaches might differ are now considered.

IV WHY ARE THE APPROACHES DIFFERENT?

This article has now outlined the differing approaches taken by the courts when considering oppression under section 232 (members' oppression) and section 445D(1)(f) (creditors' oppression under a DOCA). In the author's opinion, there

106 (1992) 6 ACSR 539, 550.

107 *Fleet Broadband* (n 3) 608–9 [61] (Master Newnes).

108 *Pilot Advisory* (n 74) 492 [97] (Reeves J). His Honour referred to the High Court case of *Patrick Stevedores Operations No 2 Pty Ltd v Maritime Union of Australia [No 3]* (1998) 195 CLR 1, where Brennan CJ, McHugh, Gummow, Kirby and Hayne JJ defined the word prejudice to mean that it covered 'not only legal injury but any adverse affection of, or deterioration in, the advantages enjoyed by the employee': at 18 [4]. This definition of 'prejudice' was in relation to section 298K of the *Workplace Relations Act 1996* (Cth). Reeves J then referred to *Auimatagi v Australian Building and Construction Commissioner* (2018) 267 FCR 268, where the Full Court of the Federal Court also considered the dictionary meaning of the term 'prejudice': at 288–9 [109].

109 *Pilot Advisory* (n 74) 691–5 [79]–[90], 695 [97].

are a number of reasons why the courts may have approached the cases under section 445D(1)(f) and section 232 differently, including the history of the two provisions, the changes in statutory interpretation approaches, the use of objects clauses, and the differing contexts relating to each provision. These reasons will now be considered in turn.

A Time, History and the Change in Statutory Interpretation Approaches

The fact that the two provisions were enacted 30 years apart likely plays a significant role in how the two provisions have been considered by the courts.

1 History of Section 232

Section 232's genesis traces back to 1945, with the UK's Cohen Report.[110] The Cohen Committee, while reviewing the *Companies Act 1928* (UK), recommended that an oppression remedy should be introduced to provide an additional remedy to a winding up order that was currently in existence.[111] This recommendation led to the first statutory oppression remedy in the UK, section 210 of the *Companies Act 1948* (UK).

In Australia, the first statutory oppression remedy was section 186 of the Australian *Uniform Companies Acts* 1961–62,[112] with almost identical wording to the UK's section 210.[113] The oppression remedy then found itself in section 320 of the *Companies Code*,[114] with section 320 undergoing a major amendment a few years later in 1983.[115] The 1983 amendment brought the oppression provision a step closer to the provision we see today, with the addition of 'unfairly prejudicial to or unfairly discriminatory against' to the term oppressive. In the Explanatory Memorandum to the 1983 amendment, it was clear that the way in which the statutory oppression remedy had been interpreted had been a cause of concern.[116] This amendment broadened the nature of the conduct that could be covered by the provision, encompassing conduct that was both prejudicial and discriminatory, a step below the high threshold of 'oppressive'. As noted by Hill, the amendment

110 Cohen Report (n 26) [60].

111 Ibid [152].

112 See *Uniform Companies Act* (n 10). For key legislation in the Australian corporate law history see, 'Key Documents in the History of Australian Corporate Law', *Centre for Corporate Law, University of Melbourne* (Web Page) <https://law.unimelb.edu.au/centres/ccl/resources/history/key-documents-in-the-history-of-australian-corporate-law>.

113 For an analysis of section 186 and two early cases on this section see McPherson (n 27); Robert Baxt, 'Oppression of Shareholders: The Australian Remedy' (1971) 8(1) *Melbourne University Law Review* 91.

114 *Companies Code* (n 33).

115 This amendment occurred via the *Companies and Securities Legislation (Miscellaneous Amendments) Act 1983* (Cth) section 89. This amendment was heavily based upon the (much) earlier recommendations of the United Kingdom's 1962 Jenkins Committee, Board of Trade (UK), *Report of the Company Law Committee* (Cmnd 1749, June 1962).

116 Explanatory Memorandum, Companies and Securities Legislation (Miscellaneous Amendments) Bill 1983 (Cth) 476.

'removed many of the technical limitations which had accumulated around the remedy and dogged its development as a meaningful form of minority protection'.[117]

The oppression remedy (in the same form as the amended section 320) was then located in section 260 of the *Corporations Law*, coming into effect in 1991.[118] On 1 July 1998, the oppression remedy then became section 246AA of the *Corporations Law* as a result of amendments made by the *Company Law Review Act 1998* (Cth).[119] In March 2000, section 246AA became part 2F.1 of the *Corporations Law*,[120] and is now located in section 232 of the *Corporations Act 2001* (Cth). The current section 232 is in substance the same as the earlier section 260, but in a modified form due to a simplified drafting process.[121]

With the members' oppression remedy going through various iterations, and each iteration having its own interpretation, this may explain why so many decisions trace through the historical development of the phrase, often going back to the very beginning with *Scottish Co-operative*.[122] By tracing this history, the courts may gain a better understanding of the evolution and meaning of the provision. It is difficult to understand the current meaning of a provision without considering its earlier iterations, its context, its purpose, and the mischief it was intended to cure.[123]

2 History of Section 445D(1)(f)

In comparison to the almost 80 year history of section 232, the history of section 445D is much more recent. Section 445D's beginnings go back to the 1988 *Harmer Report*.[124] The Harmer Committee conducted a comprehensive review of the personal and corporate insolvency laws of Australia,[125] and recommended the introduction of a new procedure for dealing with insolvent companies – voluntary administration.[126] With the majority of the voluntary administration process occurring outside the courts, it was crucial for the court to have the ability to terminate or set aside a deed or provisions of it, if the deed was invalid. Sections 445D and 445G were included for this purpose.

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117 Jennifer Hill, 'Protecting Minority Shareholders and Reasonable Expectations' (1992) 10(5) *Company and Securities Law Journal* 86, 95.

118 Comprised of the provisions set out in the *Corporations Act 1989* (Cth), as adopted into the various states, for example, the *Corporations (South Australia) Act 1990* (SA).

119 Austin and Ramsay (n 9) [10.430.3].

120 Ibid.

121 The major difference between section 232 and the earlier provision is the separation of the two effects of the conduct – with 'contrary to the interests of the members as a whole': *Corporations Act* (n 1) s 232(d)), being separated out from 'oppressive to, unfairly prejudicial to, or unfairly discriminatory against': at s 232(e).

122 *Scottish Co-operative* (n 26).

123 The need to consider the legislative history of a provision has been confirmed by the High Court, where it was stated that 'it is useful to have regard to its legislative history, which, in this case, informs its construction' in relation to section 588FF of the *Corporations Act* (n 1): *Fortress Credit Corporation (Australia) II Pty Ltd v Fletcher* (2015) 254 CLR 489, 500 [10]. See also John Basten, 'Choosing Principles of Interpretation' (2017) 91(11) *Australian Law Journal* 881, 882.

124 Australian Law Reform Commission, *General Insolvency Inquiry* (Report No 45, 1988).

125 Ibid [2]–[3].

126 Ibid [56].

The *Harmer Report* outlined three categories for terminating a deed, which are all reflected in section 445D(1), including: (1) 'factors which go to the heart of the effective operation of the legislation' (including if a party to the deed fails to carry out or comply with the deed, and if the deed cannot be carried out without injustice or delay); (2) 'factors which reflect public policy criteria developed by the courts for invalidation of schemes of arrangement' (including if false or misleading information is given to creditors or the administrator and the omission of such material information); and (3) a 'general provision for termination of the deed "for some other sufficient reason" (a catch-all provision, enab[ling] the court to draw on the case law which has been developed in respect of schemes of arrangement)'.[127] The recommended provision of the *Harmer Report* was introduced into the *Corporations Law*,[128] with one key difference. The legislation also included the oppression ground, found in section 445D(1)(f). There was no mention of this oppression ground in the *Harmer Report*.[129]

In relation to section 445D(1)(f), the Explanatory Memorandum does not provide an explanation as to why this ground was included, but does provide that it could be used where, 'for example, a particular "class" of creditors has been oppressed or unfairly prejudiced by the decision of the majority of creditors'.[130] The terms 'oppressed' or 'unfairly prejudiced' are not defined in the Explanatory Memorandum. Additionally, the parliamentary debates do not shed any light as to the inclusion of section 445D(1)(f) into the legislation.[131] This is likely due to the fact that the Bill introduced wholesale measures into the *Corporations Law*, including the introduction of the voluntary administration system, as well as changes to directors' duties and the introduction of the civil penalty regime.[132] Coupled with the limited time that was given for debate in the Parliament,[133] specific grounds on how a deed may be terminated were not discussed.

In addition to its shorter legislative history, section 445D has also not had any significant amendments since its introduction. The only amendment to section 445D was in relation to who has standing under section 445D(2), with Australian

127 Ibid [123].

128 Via the Corporate Law Reform Bill 1992 (Cth).

129 For a judicial discussion of the history of the provision, see Austin J in *Portinex* (n 2) 475–6 [97]–[100].

130 Explanatory Memorandum, Corporate Law Reform Bill 1992 (Cth) 602. For discussion of section 445D generally, see at 598–603.

131 The Corporate Law Reform Bill 1992 (Cth) was considered in the House of Representatives on 3 November 1992 (Commonwealth, *Parliamentary Debates*, House of Representatives 3 November 1992, 2400), 10 November 1992 (Commonwealth, *Parliamentary Debates*, House of Representatives, 10 November 1992, 3029) and in the Senate on 12 November 1992 (Commonwealth, *Parliamentary Debates*, Senate, 12 November 1992, 2850) and 17 December 1992 (Commonwealth, *Parliamentary Debates*, Senate, 17 December 1992, 5296).

132 Apart from the introduction of the voluntary administration process, the Corporate Law Reform Bill 1992 (Cth) also included: amendments to the directors' duty of due care and diligence, the introduction of related party transactions, the civil penalty regime, related party transactions, the duty to prevent insolvent trading, and the introduction of the Clearing House Electronic Subregister System.

133 As highlighted by the Opposition (in both Houses), only 40 minutes was allowed for the debate of the Bill, resulting in a broad brushstrokes debate of the major reforms: Commonwealth, *Parliamentary Debates*, House of Representatives, 10 November 1992, 3029; Commonwealth, *Parliamentary Debates*, Senate, 17 December 1992, 5296.

Securities and Investments Commission being given standing in 2007.[134] This lack of modification means that section 445D(1)(f) is still in the same form as it was when it was introduced, meaning that the courts may feel that it is less necessary to trace its history when considering cases under the provision, resulting in an often shorter discussion of oppression in comparison to the section 232 cases.

In addition to the varying lengths of history for each of the provisions, there has also been a marked shift in the interpretation approaches taken by the courts generally.

3 The Shift to 'Contextualism' as the Modern Approach to Statutory Interpretation

As discussed above, the predecessor to section 232 was first enacted in Australia in 1961, with one of the earliest cases on oppression being the UK's *Scottish Co-operative* case from 1959,[135] which was (and still is) heavily cited by courts considering the Australian provision. During this time, statutory interpretation, both in Australia and the UK, relied upon the common law rules of interpretation, namely, the literal approach, the golden rule, the mischief rule and purposive approach.[136]

At the time, there was a perception that the courts were interpreting legislation too literally, resulting in narrow and restrictive interpretations. In the late 1970s the Barwick High Court of Australia was under intense scrutiny for its strictly literal approaches in relation to a number of tax avoidance cases.[137] The Court was criticised for interpreting the general anti-avoidance provision 'to the letter of the law and not the spirit of the law' which resulted in a significant number of tax avoidance schemes, including the bottom of the harbour schemes.[138]

In March 1981, the Commonwealth Attorney-General's Department held a 'Symposium on Statutory Interpretation', where they considered the statutory interpretation approach in Australia. The symposium considered the status of the mischief rule, the use of objects clauses in legislation, the purposive versus literal

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134 *Corporations Act* (n 1) s 445D(2)(ba). This paragraph was inserted via the Corporations Amendment (Insolvency) Bill 2007 (Cth). The Explanatory Memorandum to this Bill indicates that there may be circumstances where it is in the public interest for ASIC to bring an action, for example, where creditors are financially unable to make an application or when ASIC has information that the creditors are not privy to: Explanatory Memorandum, Corporations Amendment (Insolvency Bill) 2007 (Cth) 94 [7.20].

135 *Scottish Co-operative* (n 26).

136 See, eg, Michelle Sanson, *Statutory Interpretation* (Oxford University Press, 2nd ed, 2016) 4–5. As discussed below, section 15AA was inserted into the *Acts Interpretation Act 1901* (Cth) in 1981 formalising the purposive approach in interpretation in Australia.

137 Pearce (n 81) 45 [2.14].

138 See, Anthony Mason, 'Barwick Court (27 April 1964–11 February 1981)' in Michael Coper, Tony Blackshield and George Williams (eds), *The Oxford Companion to the High Court of Australia* (Oxford University Press, 2007) <https://doi.org/10.1093/acref/9780195540222.001.0001>; Michael Kobetsky and Rick Krever, 'Taxation Law' in Michael Coper, Tony Blackshield and George Williams (eds), *The Oxford Companion to the High Court of Australia* (Oxford University Press, 2007) <https://doi.org/10.1093/acref/9780195540222.001.0001>. The post-Barwick High Court (from 1981) resulted in a shift in interpretation, with the High Court taking a more purposive approach to tax anti-avoidance legislation: Kobetsky and Krever (n 138).

approach, as well as the use of explanatory memoranda.[139] At this symposium, it was argued that the purposive approach was part of the current law in Australia,[140] and that it was necessary to articulate the purposive approach in a general provision of the *Acts Interpretation Act 1901* (Cth).[141] Later that year, section 15AA was introduced into the *Acts Interpretation Act 1901* (Cth),[142] and later amended in 2011.[143] Section 15AA provides that the interpretation that would best achieve the purpose of the legislation is to be preferred; thereby formalising the purposive approach in interpretation.

The shift to this 'official' approach to statutory interpretation in the 1980s,[144] meant that courts had changed their approach to statutory interpretation prior to the introduction of part 5.3A, and specifically section 445D, with the courts more heavily focusing on the purpose of the legislation in their deliberations. It is possible that this shift in interpretation approach resulted in the courts taking a broader contextual approach to section 445D(1)(f) cases from the outset, as suggested in Part III above.

B Objects Clause

As noted earlier in this article, sections 232 and 445D(1)(f) are located in different chapters of the *Corporations Act*, and were also introduced decades apart. A point of difference between sections 232 and 445D(1)(f) is that the latter is subject to a legislative 'objects clause'.

Section 232 is located in chapter 2F – 'Members' Rights and Remedies', specifically in part 2F.1 – 'Oppressive Conduct of Affairs'. There is no objects clause found in either the part or the chapter. In comparison, section 445D(1)(f) is located in chapter 5 – 'External Administration', specifically in part 5.3A

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139 Commonwealth Attorney-General Department, *Another Look at Statutory Interpretation* (Australian Government Publishing Service, 1982) ('*Another Look at Statutory Interpretation*'). A second symposium on statutory interpretation was held in 1983, with a focus on the use of extrinsic materials (which led to the introduction of section 15AB of the *Acts Interpretation Act 1901* (Cth)), as a direct result of the discussions of this first symposium.

140 Patrick Brazil, Deputy Secretary of the Attorney-General's Department, argued that the purposive approach was part of the existing law as 'the purposive approach is implicit in the mischief rule, which … is clearly part of the modern law of statutory interpretation': *Another Look at Statutory Interpretation* (n 139) 18.

141 Ibid 18–19.

142 Inserted via the *Statute Law Revision Act 1981* (Cth) s 115. This provision was then enacted by each of the states and territories, and appears in: *Legislation Act 2001* (ACT) s 139; *Interpretation Act 1987* (NSW) s 33; *Interpretation Act 1978* (NT) s 62A; *Acts Interpretation Act 1954* (Qld) s 14A; *Acts Interpretation Act 1915* (SA) s 22, now repealed by the *Legislation Interpretation Act 2021* (SA) s 14; *Acts Interpretation Act 1931* (Tas) s 8A; *Interpretation of Legislation Act 1984* (Vic) s 35(a); *Interpretation Act 1984* (WA) s 18.

143 *Acts Interpretation Amendment Act 2011* (Cth) sch 1 item 23. As outlined in the Explanatory Memorandum, section 15AA was amended as the original provision was 'expressed in absolute terms' and did not 'address the situation where there is a choice between two or more constructions that will promote the Parliament's purpose': Explanatory Memorandum, Acts Interpretation Amendment Bill 2011 (Cth) 99.

144 Suzanne Corcoran, 'Theories of Statutory Interpretation' in Suzanne Corcoran and Stephen Bottomley (eds), *Interpreting Statutes* (Federation Press, 2005) 8, 25.

– 'Administration of a Company's Affairs with a View of Executing a Deed of Company Arrangement'. Part 5.3A does contain an objects clause, section 435A, which provides that the purpose of voluntary administrations is

> to provide for the business, property and affairs of an insolvent company to be administered in a way that:
>
> (a) maximises the chances of the company, or as much as possible of its business, continuing in existence; or
>
> (b) if it is not possible for the company or its business to continue in existence – results in a better return for the company's creditors and members than would result from an immediate winding up[145]

This objects section has become an integral factor in how the sections in part 5.3A, including section 445D, have been interpreted and applied, as discussed in Part III of this article above.

The use of objects clauses is a modern phenomenon. As noted by Pearce, the objects clause is a 'modern-day variant on the use of a preamble',[146] and Neaves, while, presenting at the Symposium on Statutory Interpretation in 1981, noted that the 'draftsman has resorted to the practice of including an objects clause … and it would seem that the practice is increasing'.[147] Corcoran also suggests that the insertion of section 15AA of the *Acts Interpretation Act 1901* (Cth) in 1981 'has had some effect on the drafting of legislation, including the drafting of purpose clauses'.[148]

With the first members' oppression remedy being enacted in 1961, it was not common for legislation at that time to have objects clauses. In fact, the Uniform Companies Acts did not contain any objects clauses. The Companies Code, from 1981, which contained the second iteration of the members' oppression remedy, did include an objects clause for the Companies Code as a whole,[149] as well as objects clauses for some specific sections of the Code,[150] but not in relation to members' remedies. Consequently, the courts do not refer to an objects clause when considering section 232.

In contrast, part 5.3A, of which section 445D(1)(f) is a part, was first introduced in 1992, after objects clauses became a more common feature of legislation.[151] In combination with the shift to the purposive approach and contextualism, as discussed above, the inclusion of an objects clause in section 435A has significantly shaped the way the courts approach cases under section 445D(1)(f). The objects of the part are frequently referred to by the courts (as discussed above in Part III of this article), and is the first item on the *TiVo* checklist.

This highlights that this move towards including objects clauses in legislation likely influenced how the courts are approaching section 445D(1)(f) cases in comparison to the judicial approach of section 232 cases.

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145 *Corporations Act* (n 1) s 435A.
146 Pearce (n 81) 193 [4.63]. See also Sanson (n 136) 127.
147 Alan Neaves, Attorney-General's Department (Cth), 'Objects Clauses in Acts' in *Another Look at Statutory Interpretation* (n 139) 14.
148 Corcoran (n 144) 26.
149 See, eg, *Companies Code* (n 33) s 3.
150 See, eg, ibid s 66C.
151 *Corporate Law Reform Act 1992* (Cth) pt 5.3A.

C Differing Contexts

In addition to the effects of time and the use of objects clauses, the two sections operate in vastly different contexts. Whilst the wording of sections 232 and 445D(1)(f) are near identical, the environments in which the provisions operate, the relative scope of the provisions, as well as how they are used by applicants in legal argument all differ. These differing contexts may help explain the difference in approach between the two sections.

1 Solvent or Insolvent?

The first major contextual difference between the two provisions is when in the company's lifecycle the provisions are used. Section 232 is generally utilised by members in relation to an oppressive conduct that occurs within a solvent company that is a going concern.[152] In contrast, section 445D(1)(f) is only used when a company is insolvent, the company has been through voluntary administration, and a DOCA has been entered into by the company and its creditors. This change in solvency status has a significant impact on the company. Firstly, there is the serious risk of the company being wound up and deregistered when a company is insolvent. In that case, all stakeholders are affected, including directors and employees who lose their jobs, creditors who may not be repaid their debts, and members who have lost their investment in the company. Secondly, when a company moves towards insolvency it is the interests of the creditors that take priority over those of the shareholders.[153] This therefore changes the focus of the sections of the *Corporations Act* that relate to insolvency, such as section 445D(1)(f).

2 The Scope of the Provision: Breadth of Application and Remedies

A second area of comparison between the contexts of sections 232 and 445D(1)(f) is the breadth of the application of the provisions, and the purpose of each of these provisions. Simply, the purpose of section 232 is to bring an end to the oppressive conduct against a member of the company, in whatever form that conduct takes, with whatever order is most appropriate to end the conduct. With section 445D(1)(f), the purpose of this provision is to terminate a deed that is either oppressive in its terms or in its implementation; terminating the deed is the only possible outcome when an applicant successfully brings an action under this section.[154]

More specifically, oppressive conduct to a member, under section 232, can occur in a large number of ways, and can be conducted by a variety of individuals

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152 The author notes that it may be possible for an oppression action under section 232 to be brought against a company in liquidation, in the right circumstances: see Nadia Hess, 'Utility of Relief: The Oppression Remedy in Liquidation' (2020) 35(3) *Australian Journal of Corporate Law* 320.

153 For the shift towards creditors interests when a company approaches insolvency, see, eg, *Walker v Wimborne* (1976) 137 CLR 1; Rosemary Teele Langford and Ian Ramsay, 'The Contours and Content of the "Creditors" Interests Duty' (2021) 21(1) *Journal of Corporate Law Studies* 85 <https://doi.org/10.1080/14735970.2020.1770454>.

154 *Corporations Act* (n 1) s 445C(a). The author notes that applicants will often bring a variety of actions in addition to that of section 445D(1)(f), and those may produce various outcomes. This is discussed in the next section.

within the company. The conduct could occur at any stage during the operation of a company and the oppressive conduct may be at the hands of the board of directors, or by the majority of members. The actions of the company itself may be oppressive. The types of conduct that can be the subject of a section 232 oppression action are numerous, as evidenced by the sheer number of examples of oppression outlined in any corporate law textbook. The conducts could include: a parent company withholding supplies from a subsidiary with the result being that the parent company takes over the business of the subsidiary,[155] an exclusion from management,[156] a failure to review a dividend policy,[157] and a breach of director duties,[158] just to name a few. It is important to remember that any corporate conduct is capable of being subject to an oppression action, as long as the effect of that conduct is oppressive, unfairly prejudicial to, unfairly discriminatory against a member or contrary to the interests of the members as a whole.

In comparison, the application of section 445D(1)(f) has a much narrower scope. Section 445D(1)(f) only applies in relation to one particular document, a DOCA. This of course, can only be executed by a company that is under external administration, specifically voluntary administration. And section 445D(1)(f) can only be used in relation to the terms of the deed, the creation of the deed, and how the deed is implemented.

This differing scope of application also has an impact on the range of relief available under each provision. In relation to section 232, once a court has declared oppressive conduct exists, the court may order relief under section 233. The relief available under section 233 is incredibly broad, and the purpose of the relief is to bring the oppression to an end.[159] In comparison, the relief available under section 445D(1)(f) if the deed is found to be oppressive, is that the deed is terminated. As discussed above,[160] section 445D is discretionary, but once the court determines that the deed is oppressive, the court has only two choices: terminating the deed, or not terminating the deed.

This stark difference in the remedies available may have an impact on how the courts approach both sections. In relation to section 445D(1)(f), the courts are faced with an all or nothing outcome – either the deed is terminated (and the company enters liquidation) or it is not, and the deed remains in place. Under section 445D, the court cannot vary a deed, or impose other orders that might mitigate the oppressive effects on the applicant creditor.[161] This may lead the courts to consider the broader context of the company and its insolvency. In comparison, under section 233, the court has the ability to order any relief it sees fit, giving the court a range of options to choose from, ranging from the drastic result of winding

155 *Scottish Co-operative* (n 26).
156 *John J Starr (Real Estate) Pty Ltd v Robert R Andrew (A'Asia) Pty Ltd* (1991) 6 ACSR 63.
157 *Shamsallah* (n 50).
158 *HNA Irish Nominees Ltd v Kinghorn [No 2]* (2012) 290 ALR 372.
159 Section 233 is discussed further in Part II of this article.
160 See Part III of this article.
161 A DOCA can be varied under *Corporations Act* (n 1) section 445G, and under section 447A the courts can impose any order in relation to how part 5.3A applies to a specific company. See the discussion on alternate arguments below.

up a company, to other orders which may have a minimal impact on the company, but a significant impact on the applicant member, such as an order requiring another member to purchase the shares of the applicant.

3 The Corporate Environment in Which the Provision Operates: An Internal versus External Context

To build on the difference in the scope of the provisions, the relationship between the applicant and the company might be regarded as 'internal' in relation to section 232 and, 'external' in relation to section 445D(1)(f).

When considering section 232, it is a member bringing an oppression claim against the company. As noted above, it may be the actions of the company itself, or the actions of the organs of the company that are subject to the oppression claim. The conduct in question is usually conduct that relates to how the member applicant interacts with the company and its organs. The factual circumstances subject to the claim are personal, and relate to the inner workings of the company structure.

In comparison, section 445D(1)(f) is used by a creditor in relation to a DOCA entered into by the company and its creditors as a result of the external administration process. In this sense, the company is acting in its separate legal entity capacity, entering into a deed with other separate legal entities, the creditors. It is the external manifestation of the company. While the creditors are an important stakeholder in a company, and creditors' interests gain priority when a company enters insolvency,[162] they are still external to the company itself.

4 Use of Alternate Arguments

Another point of contextual difference between the two provisions is how the provisions are used by the applicant. When a creditor brings an action to bring to an end a DOCA, section 445D is just one weapon in the creditor's arsenal. In comparison, when a member is seeking a personal remedy under section 232, the action often stands on its own, or is the primary action brought by the applicant.[163]

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162 For example, it is the creditors that determine the fate of the company at the second creditors meeting in a voluntary administration, not the members: *Corporations Act* (n 1) s 439C. See also Teele Langford and Ramsay (n 153) for the shift towards creditors' interests when a company approaches insolvency.

163 Due to section 232 covering such a wide range of behaviour, and its now broad interpretation by the courts, in the majority of cases, it is the primary (or sole) action brought by the member who has been subjected to unfair conduct. However, it is still possible for members to bring alternate actions, which are normally secondary to an action under section 232. These alternate actions are usually more specific, often derive from the general law, and provide for a narrow range of outcomes – whereas section 232 has a greater flexibility as to the outcomes able to be ordered by the court, which is why it is argued in the first instance. For example, if the alleged conduct has resulted in an expropriation of rights, the member may also argue that the expropriation is invalid under the *Gambotto* principles: *Gambotto v WCP Ltd* (1995) 182 CLR 432. If the conduct relates to an infringement of the member's personal rights, then the member can additionally enforce those rights under the general law. If the conduct that is argued to be oppressive relates to a breach of directors' duties, the member may bring an oppression claim alongside a statutory derivative action in part 2F.1A of the *Corporations Act* (n 1), but it is important to note that relief granted under part 2F.1A will flow to the company, and not to the member. Applicants will often argue oppression over a statutory derivative action, as it is simpler procedurally and provides for the remedy to flow to the member directly. Finally, in his study on the oppression remedy, Ramsay identified that in almost 30%

In relation to a creditor seeking to bring a deed to an end, the creditor can use a variety of actions under a variety of sections to make this happen. The creditor is not limited to seeking termination of the DOCA under section 445D. The creditor can additionally seek that the deed should be set aside or varied,[164] if the deed is executed as a result of a related creditor voting in favour of the deed, that the resolution passing the deed be set aside,[165] and lastly, that the deed should be brought to an end under the general powers of the court.[166] Each of these sections will be expanded upon in turn. It is not unusual to see numerous applications by a creditor argued in the alternative.

In addition to bringing multiple applications, when applying to terminate a deed under section 445D(1), a creditor will often argue various grounds within that section. If the creditor's major concern is regarding the contents of the investigation reports, then the creditor will often rely upon paragraphs (a), (b) and (c). However, if the creditor is concerned with the effect of the deed, then the creditor will often rely upon a combination of paragraphs (e), that effect cannot be given to the deed without injustice or undue delay, and (g) that the deed should be terminated for some other reason, in addition to oppression ground provided for in paragraph (f). If the creditor can establish multiple grounds under section 445D, this will be a factor taken into account by the court when exercising its discretion to terminate the deed.[167]

If the creditor believes that the deed was not entered into in accordance with part 5.3A, for example, if the deed is unlikely to result in the business of the company continuing, or if the creditor is not receiving more than they would under an immediate winding up, then the creditor can seek that the deed, or a provision of it, is declared void under section 445G. If the deed, or a provision of it, is declared void, the court may vary the deed with the consent of the deed administrator.[168]

If the creditor believes that the resolution to execute the deed was passed as a result of the votes of a related creditor, with a related creditor being a related entity who is also a creditor,[169] for example a creditor director, or family members of a director, or a company that shares a mutual director with the debtor company, then the creditor can apply to have the resolution passing the execution of the deed set aside.[170] Before the resolution is set aside, the creditor must establish that the passing of the resolution 'is contrary to the interests of the creditors as a group or of that class of creditors as a group' or 'has prejudiced, or is reasonably likely to

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of oppression cases, the member also argued that the company should be wound up on just and equitable grounds under section 461(1)(k): Ramsay (n 38) 29. A winding up application will result in only one remedy, a winding up, whereas a section 232 action has that greater remedial flexibility, which is often desirable to applicants.

164 *Corporations Act* (n 1) s 445G.

165 *Corporations Act* (n 1) sch 2 s 75-41 ('*IPSC*').

166 *Corporations Act* (n 1) s 447A.

167 *Bidald* (n 74) 539 [138] (Campbell J).

168 *Corporations Act* (n 1) s 445G(4).

169 *IPSC* (n 165) s 75-41(4). Note that the creditor could also bring an application to have the resolution set aside if the resolution is passed by the chair (usually the administrator) exercising their casting vote in favour of the deed being executed: at s 75-42.

170 Ibid s 75-41(3).

prejudice, the interests of the creditors who voted against the proposal'.[171] Helpfully, the matters to be taken into account to determine if there has been unreasonably prejudice to the interests of the creditors are set out in section 75-41(2) of schedule 2 of the *Corporations Act* ('*IPSC*'). These matters include: the benefit resulting to the related creditor if the proposal is passed; the nature of the relationship between the related creditor and the company; and any other relevant matter.

Under section 447A, a creditor can apply for the court to make any order as it thinks appropriate as to how part 5.3A of the *Corporations Act* is to operate in relation to a particular company.[172] This can include terminating a deed for any reason, setting aside or varying a deed for any reason, granting orders in relation to how a deed should operate. This is a very wide 'catch-all' power available to the courts to remedy any concerns in relation to the administration of a company, and the implementation of a DOCA.

As can be seen from the above discussion, a creditor wanting to have a deed brought to an end has various options available. If the deed is unfair or oppressive to a creditor, or contrary to the interests of the creditors as a whole, then the deed can be brought to an end in numerous ways, under various sections of the *Corporations Act*. Similar arguments can be presented for each action. For example, if a creditor is unfairly discriminated against under the deed, resulting in a return that is lower than they would receive in an immediate winding up, the creditor can argue oppression under section 445D(1)(f), as well as the deed not being entered into in accordance with part 5.3A, allowing for the deed to be set aside under section 445G. If the deed was executed as a result of a related creditor vote, then both section 75-41 of the *IPSC* and section 445D(1)(f) of the *Corporations Act* can be argued, as the deed will have prejudiced the interests of the creditor who voted against it.

With numerous actions being brought by most creditors in this situation, and with the courts covering similar principles and arguments for each action, this may be a pragmatic reason why courts are not going into as much depth in section 445D(1)(f) discussions as the court may do when considering oppression under section 232.

With the context playing a vital part in the interpretation of statutes, these various differences in context likely play a part (whether visibly or not) in the way the courts approach each provision.

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171 Ibid s 75-41(1)(c).

172 For a detailed consideration of section 447A of the *Corporations Act* (n 1), see Jason Harris, 'The Constitutional Basis of s 447A: Is It a Power without Limit?' (2006) 14(3) *Insolvency Law Journal* 135; Jason Harris and Bruce Gordon, 'Lost in Transition: Section 447A and the Question of Members' Rights when a Company Transitions from Voluntary Administration to a Creditors' Voluntary Liquidation' (2005) 13(2) *Insolvency Law Journal* 96.

V IS IT POSSIBLE TO HAVE A UNIFORM APPROACH WHEN CONSIDERING OPPRESSION UNDER BOTH SECTIONS 232 AND 445D(1)(F)?

After discussing the courts' differing approaches under sections 232 and 445D(1)(f), and the reasons why these approaches might be different, the next question to consider is whether there should be one standardised approach to consider oppression, and if yes, what that approach might be?

Having one standardised approach across both sections would create harmony and consistency when dealing with the identical language of 'oppressive', 'unfairly prejudicial' and 'unfairly discriminatory' in the corporate space. Regardless of the context (be it in relation to members or creditors), the terms have a similar meaning. Having a standardised approach will allow the audience to understand how oppression is to be determined regardless of the context.

Section 232 has a definitional or principled approach, where the key components of the section are defined, and additional principles exist to build around those definitions. The section 232 case law does not contain factors to help determine how oppression should be tested. In comparison, the case law of section 445D(1)(f) has developed a set of factors to work through to determine if the deed is oppressive and if the deed should be set aside. However, the section 445D(1)(f) case law does not include a definition of what 'oppressive' is.

Ostensibly, both approaches could take something from the other. Having a factor approach for section 232 is, prima facie, a desirable option. A clear set of factors on which every case is assessed would allow for a clear and systematic approach to judgments. Going through each criterion and explaining how that criterion is established, would result in a more standardised reasoning process, creating clearer and stronger jurisprudence, as the courts will be inclined to explain each and every factor in their reasons.[173] The audience will be left with a clearer understanding of why certain conduct satisfies the oppression provision.

In comparison, while section 445D(1)(f) has the factor approach, the cases do not expressly define what oppression is. It is difficult to establish if oppression exists using a set of factors when you have not first set out that definition. Having a clearly set out definition of what oppression is would provide that nexus between the factors and the determination that the deed is oppressive. The author suspects that the courts, when considering section 445D(1)(f), have not expressly defined oppression on the basis that it has become such a well-known concept in corporate law that the definition of oppression is implicitly considered by the courts, even though it is not expressly stated.

Would it be possible to develop a set of factors for determining if section 232 has been established? It would not be possible to simply substitute the word creditor

173 See Jassmine Girgis, 'The Oppression Remedy: Clarifying Part II of the BCE Test' (2018) 96(3) *Canadian Bar Review* 484, 513–14. In her article, Girgis discusses the Canadian oppression remedy and suggests that the courts can achieve greater clarity in oppression cases by developing a clear framework on which to assess the cases.

with member into the *TiVo* criteria for use in section 232. The *TiVo* criteria are context specific to voluntary administrations, for example, with specific references to part 5.3A and winding up. Therefore, if a factor approach were to be used in relation to section 232, the courts would be required to develop a set of factors tailored to the context of members' oppression. Would it be possible to draw up a set of factors for section 232, or would the factors be so broad, that they would simply restate the same concepts set out in the definitions and tests already used? Would having a criterion of 'unfairness' or 'commercial unfairness' result in a more systematic approach than the current approach?

The author suggests that it would not be possible to develop a useable set of factors for the members' oppression context in section 232. The types of conduct that may be subject to that provision are vast, and the actors responsible for that conduct are varied. The conduct may affect the member applicant in a number of ways, with an almost unlimited range of remedies available to bring that oppression to an end. Any set of factors that could be developed would likely be too broad to provide additional benefits to the definitional approach that is currently used. With section 232 cases being so varied, the courts need the flexibility of the current approach.

VI CONCLUSION

This article has considered the use of the terms 'oppressive', 'unfairly prejudicial', and 'unfairly discriminatory' in two sections of the *Corporations Act*: section 232 (the members' oppression remedy) and section 445D(1)(f) (creditors' oppression under a DOCA). This article considered the courts' approach to each of those sections, noting that the approaches undertaken by the courts are different. Section 232 takes on a more definitional or principled approach, where the courts have defined what oppression is and have created various principles to surround those definitions. On the other hand, the courts have developed a factor approach to determine whether a deed is oppressive and should be terminated under section 445D(1)(f), with cases being examined against those factors.

The reasons why these two approaches differ have been considered in depth. The fact that the two provisions have vastly different histories appears to be a pivotal factor in how the courts have approached the provisions. Section 232 has a much longer and more complex history, with various iterations of the provision resulting in various interpretations with that development often being traced; in contrast, section 445D(1)(f) is a more recent provision which has benefited from the general switch to a more purposive approach in statutory interpretation. The context in which both sections sit is also vastly different, with the courts ostensibly needing to consider the wider insolvency landscape when determining cases under section 445D(1)(f), which is not required when considering section 232. These differences in context have undoubtedly influenced the way that the courts approach each section.

While it may seem desirable to have a uniform approach to determine oppressive conduct in both sections (for both members' generally and creditors in a DOCA), it would be difficult to do so. Section 232 covers a huge array of conduct at the hands of various players, with the oppression occurring in numerous ways. In comparison, the context of section 445D(1)(f) is much more narrow, with a limited scope of application. In the author's opinion, it would not be possible to marry the approach taken for both provisions; the contexts of each are just too different.