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The Dangerous Dichotomy: Abandoning the 'Proscriptive' and 'Prescriptive' Classification of Fiduciary Duties and the 'Proscriptive Limitation'

Nicholas Saady
Herbert Smith Freehills Sydney

The Dangerous Dichotomy: Abandoning the 'Proscriptive' and 'Prescriptive' Classification of Fiduciary Duties and the 'Proscriptive Limitation'

NICHOLAS SAADY*

Abstract

The 'proscriptive' (negative) and 'prescriptive' (positive) dichotomy of fiduciary duties has attracted great contemporary interest, as the High Court has held that fiduciary duties are only proscriptive. The 'dichotomy' and 'proscriptive limitation' have been debated by scholars and judges. This article provides some perspective to the debate. It suggests that the proscriptive limitation is misleading because fiduciary duties are dynamic and unfixed, and because some fiduciary duties are positive. It also suggests that classifying duties within the dichotomy is unnecessary, overly complex, and potentially productive of error because it detracts from the proper focus of the fiduciary inquiry.

I Introduction

Scholars and practitioners have become fascinated with the dichotomy of 'proscriptive' (negative) and 'prescriptive' (positive) fiduciary duties. The High Court has inspired this fascination by holding that fiduciary duties are proscriptive.[1] Practitioners and judges have therefore sought to classify duties within the dichotomy to establish whether they are 'fiduciary' or 'non-fiduciary', and to determine their scope. Dissenters have suggested

* LLB (University Medal and First Class Honours); Graduate, Herbert Smith Freehills Sydney, and former Tipstaff to the Honourable Justices John Sackar and Monika Schmidt. My sincere thanks to Justice Sackar, Jennifer Darmody and Brigid McManus for their assistance during the writing of this article.

1 *Breen v Williams* (1996) 186 CLR 71, 113 ('*Breen*'); *Pilmer v Duke Group Ltd (in liq)* (2001) 207 CLR 165, 197–8 [74]; *Youyang Pty Ltd v Minter Ellison Morris Fletcher* (2003) 212 CLR 484, 501 [41]; *Friend v Brooker* (2009) 239 CLR 129, 160 [84]; *Howard v Commissioner of Taxation* (2014) 253 CLR 83, 98–9 [31]–[32] (French CJ and Keane J), [56] (Hayne J and Crennan J).

that the dichotomy and proscriptive limitation are illusory,[2] despite their judicial[3] and academic[4] acceptance.

Debate surrounding the dichotomy led Justice Edelman to remark extra-curially that the proscriptive limitation is 'controversial and different countries, and different courts, have reached different conclusions' about it.[5] This article provides some perspective to the debate. It will not simply argue that the High Court's prohibition of prescriptive fiduciary duties should be reconsidered,[6] or that its removal is practically insignificant,[7] but rather explain three reasons why the dichotomy and proscriptive limitation should be abandoned.

First, fiduciary duties are dynamic, flexible and unfixed. Precedent and the facts of certain relationships may warrant a court imposing positive fiduciary duties to ensure fiduciary loyalty. Therefore, the proscriptive limitation may inhibit the ability of the fiduciary principle to achieve its purposes and produce error if applied too rigidly. Second, applying the dichotomy makes the fiduciary inquiry unnecessarily complex, because every duty may be phrased as positive or negative, and there is no settled definition of a 'proscriptive' or 'prescriptive' fiduciary duty. Third, the proscriptive limitation is inappropriate because positive fiduciary duties have been held to exist.

II The Fiduciary Inquiry and Flexibility of Fiduciary Duties

While the fiduciary principle has been extensively analysed,[8] there is no single, authoritative test to determine the existence of a fiduciary

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2 Dyson Heydon, Mark Leeming and Peter Turner, '*Meagher, Gummow and Lehane's Equity Doctrines & Remedies*' (Lexis Nexis, 5th ed, 2015) 210–224 [5-380]–[5-440]; Leon Firios 'Precluding Prescriptive Duties in Fiduciary Relationships: the Problems with the Proscriptive Limitation' (2012) 40(3) *Australian Business Law Review* 166. See also the Canadian position in *McInerney v MacDonald* [1992] 2 SCR 138; *M(K) v M(H)* (1992) 96 DLR (4th) 289; *Norberg v Weinrib* (1992) 92 DLR (4th) 449; *Hodgkinson v Simms* (1995) 117 DLR (4th) 161.

3 *Aequitas Ltd v Sparad No 100 Ltd* (2001) 19 ACLC 1006 [283]–[285]; *Fitzwood Pty Ltd v Unique Goal Pty Ltd (in liq)* (2001) 188 ALR 566 [31]–[33]; *Dresna Pty Ltd v Linknarf Management Services Pty Ltd* (2006) 156 FCR 474 [132]; *P and V Industries Pty Ltd v Porto* (2006) 14 VR 1; *Gibson Motorsport Merchandise Pty Ltd v Forbes* (2006) 149 FCR 569 [12]; *Australian Securities and Investments Commission v Citigroup Global Markets Australia Pty Ltd (No 4)* (2007) 160 FCR 35 [375]; *Motor Trades Association of Australia Superannuation Fund Pty Ltd v Rickus (No 3)* (2008) 69 ACSR 264 [70].

4 Peter Millett, 'Equity's Place in the Law of Commerce' (1998) 114 *Law Quarterly Review* 214, 222–3; Richard Nolan, 'A Fiduciary Duty to Disclose?' (1997) 113 *Law Quarterly Review* 220, 222; Matthew Harding, 'Two fiduciary fallacies' (2007) 2 *Journal of Equity* 1, 3; Gillian Dempsey and Andrew Greinke, 'Proscriptive fiduciary duties in Australia' (2004) 25 *Australian Bar Review* 1, 13; John McGhee, *Snell's Equity* (Thomson Reuters London, 32nd ed, 2010) [7-011].

5 James Edelman, 'The role of status in the law of obligations: common callings, implied terms and lessons for fiduciary duties' (Paper presented at the DePaul University conference, Chicago, 19–20 July 2013) 7.

6 Firios, above n 2, 166.

7 Heydon, Leeming and Turner, above n 2, 224 [5-440].

8 See, eg, Paul Finn, *Fiduciary Obligations* (LawBook, Sydney, 1977); Paul Finn, 'The Fiduciary Principle' in Timothy Youdan (ed), *Equity, Fiduciaries and Trusts* (Carswell, 1989); Matthew Conaglen, *Fiduciary Loyalty: Protecting the Due Performance of Non-fiduciary*

relationship or the duties attaching to it. The courts have been reluctant to 'fetter' their jurisdiction over fiduciary relationships 'by defining the exact limits of its exercise'[9], because a test applicable in one relationship or context 'might be quite inappropriate for another.'[10] Thus, there have been innumerable characterisations of how to determine whether a fiduciary relationship exists and the duties attaching to it.

However, precedent reveals two consistent elements of the fiduciary inquiry.[11] First, ascertaining whether a fiduciary relationship exists. Second, determining the existence and scope of the duties which bind the fiduciary. The legal principles applied in these two procedural elements give uniformity to the determination of fiduciary relationships and duties. They promote consistency in the law and the coherent application of the fiduciary doctrine.

As there is no established methodology, the relevant court's preference will determine which element is approached first, when it is pleaded that a fiduciary relationship or duty exists. However, the two elements are not mutually exclusive. As the Honourable Paul Finn explained, 'a fiduciary is not subject to fiduciary obligations because he is a fiduciary; it is because he is subject to fiduciary obligations that he is a fiduciary.'[12] Similarly, it has been remarked that the scope of the duties imposed upon a fiduciary will 'almost automatically'[13] emerge from the nature of the fiduciary relationship.

In practical terms, the connection between the two elements may be basically described as follows. First, a court may hold that a fiduciary relationship exists, upon which the fiduciary is 'automatically' bound by the overarching duty of loyalty and 'no profit' and 'no conflict' rules.[14] Second, a court may hold that a person owes a fiduciary duty to another, and because of this holding, a fiduciary relationship will 'almost automatically' be held to exist between them. The approach to determining the existence of fiduciary relationships and duties will be described more precisely below.

A *The Existence of a Fiduciary Relationship*

Fiduciary relationships are of many different types and lead to the imposition of different duties.[15] There are established categories of

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Duties (Hart Publishing, 2010); *Pilmer v Duke Group Ltd (in liq)* (2001) 207 CLR 165; *Breen v Williams* (1996) 186 CLR 71.

9 John Sackar, 'Life is a Lottery' (Paper presented at the Supreme and Federal Court Judges' Conference, Sydney, January 2018) 6, citing *Tate v Williamson* (1866) LR 2 Ch App 55, 61.

10 *Hospital Products Ltd v United States Surgical Corporation* (1984) 156 CLR 41, 69. See also *Breen* (1996) 186 CLR 71, 106.

11 See John Lehane, 'Fiduciaries in a Commercial Context' in Paul Finn (ed), *Essays in Equity* (Lawbook, London, 1985) 96.

12 Finn, *Fiduciary Obligations*, above n 8, 2.

13 Lehane, above n 11, 104.

14 Although other more specific fiduciary duties may be later held to bind the fiduciary: see Section II(B), below.

15 *Hospital Products Ltd v United States Surgical Corporation* (1984) 156 CLR 41, 69; *Breen* (1996) 186 CLR 71, 82; *Chan v Zacharia* (1984) 154 CLR 178, 195.

fiduciary relationships.[16] These categories are not closed;[17] however, they are not endlessly extensible.[18] A fiduciary relationship falling outside these categories may be held to exist where precedent and the facts of a case necessitate such a conclusion. As Mason J articulated in *Hospital Products v United States Surgical Corporation,*[19] 'the critical feature' of such a relationship, as with the established categories, 'is that the fiduciary undertakes or agrees to act for or on behalf of or in the interests of another' when exercising a power or discretion, 'which will affect the interests of that other person in a legal or practical sense'.[20]

An incident of this is that the beneficiary reposes trust and confidence in the fiduciary and is vulnerable to the exercise of the fiduciary's powers.[21] However, 'trust and confidence' and 'vulnerability' are neither necessary for, nor conclusive of, the existence of a fiduciary relationship.[22] They remain indicators, along with the other 'various circumstances' such as those identified by Gaudron and McHugh JJ in *Breen v Williams* ('*Breen*')[23] and by Finn,[24] which 'point towards, but do not determine'[25] whether a fiduciary relationship exists. These indicia simply assist the court in making its determination.

The proscriptive limitation is not directly relevant to this first element (that is, determining whether a fiduciary relationship exists), because its application only prohibits the imposition of positive fiduciary duties. It does not restrict the recognition of fiduciary relationships. However, the proscriptive limitation may be indirectly relevant where a court first holds that a fiduciary duty exists, because this holding may 'almost automatically' render a fiduciary relationship to exist.[26] In such a case, applying the

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16 *Breen* (1996) 186 CLR 71, 92.

17 *Hospital Products Ltd v United States Surgical Corporation* (1984) 156 CLR 41, 68 (Gibbs CJ), 96 (Mason J). See also *United Dominions Corporation Ltd v Brian Pty Ltd* (1985) 157 CLR 1.

18 *Howard v Commissioner of Taxation* (2014) 253 CLR 83, 100 [34].

19 *Hospital Products Ltd v United States Surgical Corporation* (1984) 156 CLR 41, 96–7.

20 See also *Pilmer v Duke Group Ltd (in liq)* (2001) 207 CLR 165, 196 [70]; *John Alexander's Clubs Pty Limited v White City Tennis Club Limited* (2010) 241 CLR 1, 34–5 [87]; *News Ltd v Australian Rugby Football League Ltd* (1996) 64 FCR 410, 541; Sir Frederick Jordan, *Chapters on Equity in New South Wales* (Thomas Henry Tennant, 6th ed, 1945) 114–15; Finn, *Fiduciary Obligations*, above n 8, 201; James Edelman 'When Do Fiduciary Duties Arise?' (2010) 126 *Law Quarterly Review* 302.

21 *John Alexander's Clubs Pty Limited v White City Tennis Club Limited* (2010) 241 CLR 1, 36–7 [93]; *Furs Ltd v Tomkies* (1936) 54 CLR 583, 590; *Day v Mead* [1987] 2 NZLR 443, 458.

22 *Hospital Products Ltd v United States Surgical Corporation* (1984) 156 CLR 41, 69; *Gibson Motorsport v Forbes* (2006) 149 FCR 569, 574 [11]; *Pilmer v Duke Group Ltd (in liq)* (2001) 207 CLR 165, 217–20 [136]; *King v Adams* [2016] NSWSC 1798 (14 December 2016) [32]–[33] upheld on appeal in *King v Adams* [2017] NSWCA 277 (6 November 2016).

23 *Breen* (1996) 186 CLR 71, 107. These circumstances include 'the existence of a relation of confidence; inequality of bargaining power; an undertaking by one party to perform a task or fulfil a duty in the interests of another party; the scope for one party to unilaterally exercise a discretion or power which may affect the rights or interests of another; and a dependency or vulnerability on the part of one party that causes that party to rely on another. '

24 Finn, 'The Fiduciary Principle', above n 8, 46.

25 *Breen v Williams* (1996) 186 CLR 71, 107.

26 See Section II, below.

proscriptive limitation may prevent a positive fiduciary duty from being imposed, and hence indirectly prevent the holding that a fiduciary relationship exists. In turn, this may deprive a potential beneficiary of more advantageous relief arising from a breach of fiduciary duty, as explained below.[27]

B *The Existence and Scope of Fiduciary Duties*

Where a fiduciary relationship is held to exist between the parties, it is recognised that the fiduciary owes an overarching duty of loyalty to their beneficiaries.[28] All fiduciaries are bound by this overarching duty, with the fiduciary relationship and duty of loyalty described as 'so much co-extensive as to be, in effect, alternate descriptions of the same thing.'[29] Two recognised 'rules' anchor all fiduciaries to their overarching duty of loyalty: the 'no conflict' rule and the 'no profit' rule.[30] The former obliges a fiduciary to ensure that their interests do not conflict with their role as a fiduciary,[31] and the latter obliges a fiduciary not to obtain any unauthorised advantage through the fiduciary position.[32]

While the 'no profit' and 'no conflict' rules are essentially proscriptive, this article posits that these two rules are not the only fiduciary duties.[33] That being so, it is inappropriate to reason that because they may be described as proscriptive, all fiduciary duties are proscriptive. It is suggested that the two rules are better viewed as broad and expansive duties which bind each fiduciary – being, as held by Deane J in *Chan v Zacharia,*[34] two overarching and overlapping 'themes' which permeate all fiduciary relationships. However, as just stated, they are not the only fiduciary duties and they do not identify the duties of each fiduciary with enough precision to make them effective in reality.

Therefore, bespoke fiduciary duties attach to certain 'statuses' or 'types' of fiduciary relationships. These are more precise duties than the 'no profit' and 'no conflict' rules and are tailored to the particular relationship. For example, where there is a 'conflict', a solicitor owes a fiduciary duty to their client to 'act in perfect good faith and make full disclosure of his

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27 See Section II(B), below.

28 Matthew Conaglen, 'The nature and function of fiduciary loyalty' (2005) 121 *Law Quarterly Review* 452, 452–4; *Bristol and West Building Society v Mothew* [1998] Ch 1, 18; *Boulting v Association of Cinematograph, Television and Allied Technicians* [1963] QB 606, 636; *Bank of New Zealand v New Zealand Guardian Trust Co Ltd* [1999] 1 NZLR 664, 680–1, 687; Millett, above n 4, 219.

29 Jay Shepherd, *Law of Fiduciaries* (Carswell, 1981) 48.

30 *King v Adams* [2016] NSWSC 1798 (14 December 2016) [42]; *Breen* (1996) 186 CLR 71, 113; *Pilmer v Duke Group Ltd (in liq)* (2001) 207 CLR 165 [74]; *Chan v Zacharia* (1984) 154 CLR 178, 198–9; *Blythe v Northwood* (2005) 63 NSWLR 531.

31 *Phipps v Boardman* [1967] 2 AC 46, 111-112 (Lord Hodson), 123-127 (Lord Upjohn); *Bray v Ford* [1896] AC 44, 512; *Chan v Zacharia* (1984) 154 CLR 178, 198–9

32 *Chan v Zacharia* (1984) 154 CLR 178; *Hospital Products Ltd v United States Surgical Corporation* (1984) 156 CLR 41.

33 See also *Bell Group Limited (in Liq) v Westpac Banking Corporation & Ors (No 9)* (2008) 39 WAR 1, 572 [4569].

34 (1984) 154 CLR 178, 198–9.

[conflicting] interest.'[35] A company director owes fiduciary duties to act in his or her company's best interests and for proper purposes.[36] Such duties may be described as prescriptive in nature, or at least as requiring prescriptive behaviour.[37]

Where there is no recognised 'status' or 'type' of fiduciary relationship between the parties, or where a court has not yet considered whether a fiduciary relationship exists, the existence and scope of fiduciary duties between them will be determined by analysing 'the nature of the [parties'] relationship and the facts of the case.'[38] This analysis may take into account: the non-fiduciary legal duties binding each party (such as under contract[39] or in tort — as 'most fiduciary relationships are fiduciary only in part');[40] any agreement or understanding between the parties (written or otherwise); the character and purpose of their relationship; and the course of dealings between them.[41] In such cases, this analysis will determine — in practical reality rather than at a general level — precisely what the duty of loyalty demands of the fiduciary. However, 'fiduciary duties are not infinitely extensible'[42] and care must be taken to ensure that fiduciary duties imposed are consistent with the 'protective rationale'[43] of the fiduciary doctrine.[44]

Applying this approach in non-status based fiduciary relationships, or where a court has not yet considered whether a fiduciary relationship exists — rather than simply classifying all prescriptive duties as non-fiduciary — is a more appropriate method of determining the existence and scope of fiduciary duties. It prevents a favouring of the 'form' of these duties (as 'positive' or 'negative') over their 'substance'.[45] It also enables courts to impose positive fiduciary duties where they are supported by precedent and are consistent with the protective rationale of ensuring fiduciary loyalty.

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35 *Law Society of New South Wales v Harvey* [1976] 2 NSWLR 154, 170.

36 *Mills v Mills* (1938) 60 CLR 150, 163–5, 177, 185, 187–8; *Streeter v Western Areas Exploration Ltd (No 2)* (2011) 278 ALR 291, 368 [447]; *Angas Law Services Pty Ltd (in liq) v Carabelas* (2005) 226 CLR 507, 532 [67]. The author notes, and will assess, the debate about whether these duties are truly fiduciary in Section IV, below.

37 See Section IV, below.

38 *Howard v Federal Commissioner of Taxation* (2014) 253 CLR 83, 100 [34]; *Grimaldi v Chameleon Mining NL (No 2)* (2012) 200 FCR 296, 345 [179]; *King v Adams* [2016] NSWSC 1798 (14 December 2016) [38]–[39] and the cases there cited.

39 Fiduciary duties must accommodate themselves to the terms of a contract, which may modify or extinguish a fiduciary obligation that one party to the contract would otherwise owe to the other. See *Hospital Products Ltd v United States Surgical Corporation* (1984) 156 CLR 41, 97; *John Alexander's Clubs Pty Limited v White City Tennis Club Limited* (2010) 241 CLR 1, [91]–[93].

40 Paul Finn, 'Fiduciary reflections' (2014) 88 *Australian Law Journal* 127, 135.

41 *Pilmer v Duke Group Ltd (in liq)* (2001) 207 CLR 165, 199 [79]; *Consul Development Pty Ltd v DPC Estates Pty Ltd* (1975) 132 CLR 373, 378; *New Zealand Netherlands Society 'Oranje' Inc v Kuys* [1973] 1 WLR 1126, 1129; *Kelly v CA & L Bell Commodities Corporation Pty Ltd* (1989) 18 NSWLR 248, 256; Conaglen, above n 28, 476–7 and the cases there cited.

42 *Howard v Commissioner of Taxation* (2014) 253 CLR 83, 100 [32], [35].

43 Ibid.

44 See also *Chan v Zacharia* (1984) 154 CLR 178, 205; *Breen* (1996) 186 CLR 71, 110.

45 See *Parkin v Thorold* (1852) 51 ER 698, 701 [66]; Heydon, Leeming and Turner, above n 2, 95 [3-220].

Conversely, rigid application of the proscriptive limitation may lead to the oversight of certain facts which warrant imposing positive fiduciary duties on fiduciaries to ensure they adhere to the overarching duty of loyalty, and favours 'form' over 'substance'. It may therefore be productive of error and inhibit the ability of the fiduciary principle to operate as an 'instrument of public policy',[46] engaged where facts and precedent necessitate its intervention. It may also deprive beneficiaries of more advantageous relief for breaches of fiduciary duty that they should be entitled to.

As Kirby P explained in *Breen*, '[a]s society becomes more complex, it is both necessary and appropriate for courts to recognise new fiduciary obligations and to protect incidents of new or changing relationships.'[47] Recognising only proscriptive fiduciary duties may prove to be problematic in a changing contemporary society. Modern fiduciaries are vested with a greater scope of discretion than their predecessors, which they may be tempted to abuse and which may cause more significant negative consequences if abused.[48] As Professor Low explained, 'a narrowly defined and exclusively proscriptive view of fiduciary accountability may not be suitable for controlling the modern fiduciary.'[49]

The fiduciary principle should not be restricted by the proscriptive limitation, but rather extended in circumstances demanding the principled intervention of Equity. It is necessary for Equity and the fiduciary principle to develop with a changing legal and social milieu. This will cement the flexibility of the fiduciary principle to 'do justice'[50] in appropriate cases and provide beneficiaries with appropriate relief when fiduciaries breach their duties. It is also crucial to achieving the purpose of the equitable jurisdiction to 'temper the rigours of the law'[51] and ensure fiduciaries act in accordance with 'the highest standards of probity'[52] that their office demands.

Such development should not occur arbitrarily, but with a strong 'insistence on principle' and grounding in precedent. In every case '[t]he nature of the fiduciary relation must be such that it justifies the interference.'[53] As Millett LJ explained extra-curially, any enlargement of equitable doctrines such as the fiduciary doctrine must only occur where there is a 'proper import license.'[54]

In light of the above, this article asserts that fiduciary duties are dynamic, flexible and unfixed. Therefore, it is conceptually and practically artificial to classify them as positive or negative, or active or inactive, to

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46 Finn, 'The Fiduciary Principle', above n 8, 26.
47 *Breen v Williams* (1994) 35 NSWLR 522, 543.
48 Kevin Low, 'Fiduciary Duties: The Case for Prescription' (2016) *Trust Law International* 3, 9.
49 Ibid.
50 *Hospital Products Ltd v United States Surgical Corporation* (1984) 156 CLR 41, 100.
51 Hepburn, above n 50, 1211.
52 Conaglen, above n 28, 472.
53 *Re Coomber* [1911] 1 Ch 723, 729.
54 Millett, above n 4, 215.

determine their existence and scope. As Professor Conaglen explained, 'the true determinant of whether a particular "fiduciary" duty exists ought to be whether the duty serves part of fiduciary doctrine's protective function'[55] in deterring disloyalty 'rather than merely whether it is positive or negative.'[56]

The approach to determining fiduciary duties should be unencumbered by the proscriptive limitation and dichotomy. They do not assist in reality because fiduciary relationships are unique, and may require fiduciaries to adhere to various duties (including prescriptive duties) to uphold their overarching duty of loyalty to their beneficiaries, and the broad 'no profit' and 'no conflict' rules. Their application is also unnecessary in the fiduciary inquiry. It is only necessary to apply settled fiduciary law principles, particularly those explained in this Part, to determine the existence and scope of fiduciary duties.

III Difficulties with the Dichotomy

A *Practical Issues with Applying the Dichotomy*

Application of the dichotomy and proscriptive limitation raises numerous practical issues. First, as stated above, their application may lead to errors in determining the existence and scope of fiduciary duties. This is practically significant because it may affect the relief available to aggrieved fiduciary beneficiaries. Proving a breach of a fiduciary duty provides access to a range of powerful equitable remedies which are not available under statute, contract or tort law[57] – for example, equitable compensation, which requires a lower causal threshold for recovery than common law damages,[58] and an account of profits, which may operate more broadly than similar common law relief such as restitutionary damages.[59] Breach of a fiduciary duty also gives rise to third party liability pursuant to the rule in *Barnes v Addy*,[60] and may permit the application of more generous rules of limitation, remoteness and causation than the common law and statute.[61]

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55 Matthew Conaglen, above n 8, 203.

56 Ibid. The author recognises that Professor Conaglen posits that fiduciary duties are only proscriptive in nature.

57 See Julian Svehla, 'Directors' Fiduciary Duties' (2006) 27(2) *Australian Bar Review* 192, 197–200. *Bristol & West Building Society v Mothew* [1998] Ch 1 is a good example of the importance of classifying such duties as equitable or not to determine the availability of equitable relief.

58 See *Re Dawson (dec'd)* [1966] 2 NSWR 211, 214–15; *In re MF Global UK Ltd (in special administration) (No 4)* [2014] 1 WLR 1558, 1581; Katy Barnett, 'Equitable Compensation and Remoteness: Not so Remote from the Common Law After All' (2014) 38(1) *University of Western Australia Law Review* 48.

59 See Sam Doyle and David Wright, 'Restitutionary Damages — The Unnecessary Remedy?' (2001) 25(1) *Melbourne University Law Review* 1; Peter Devonshire, 'Account of Profits for Breach of Fiduciary Duty' (2010) 32(3) *Sydney Law Review* 389.

60 (1874) LR 9 Ch App 244.

61 Dyson Heydon, 'Are the Duties of Company Directors to Exercise Skill and Care Fiduciary?' in Simone Degeling and James Edelman (eds), *Equity in Commercial Law* (Thomson Reuters, 2005) 189; Fabian Gleeson, 'Proscriptive and Prescriptive Duties: Is the Distinction Helpful

Therefore, proving a duty is 'fiduciary' may be vital for the victim of a breach. This makes refraining from applying the dichotomy and proscriptive limitation critical in practice, because errors produced by their application may deprive aggrieved beneficiaries of relief that they should be entitled to, and thus, inhibit fiduciary law from achieving its purposes. At the least, their application may make the path to relief more treacherous for aggrieved beneficiaries.

Second, there is no precise definition of a 'proscriptive' duty. Is it a duty that only requires a fiduciary to refrain from acting (that is, behave negatively)? Is it a duty that obliges a fiduciary to serve their beneficiaries' interests while subordinating their own, by either acting or refraining from acting? The latter definition seems appropriate. However, as such a duty requires both action and inaction (that is, positive and negative behaviour), is it technically correct to describe it as proscriptive? The lack of a precise definition makes the line between proscriptive and prescriptive duties difficult to ascertain, and breeds confusion and complexity in the fiduciary inquiry – as duties are sought to be classified within an undefined dichotomy. This confusion and complexity is unnecessary, because applying the dichotomy and proscriptive limitation is, as stated above, unnecessary in the fiduciary inquiry.

Third, almost every fiduciary duty can be described as prescriptive or proscriptive. This is because the 'English language is flexible enough to allow action to be recast into inaction.'[62] Thus, duties may fit within either category, depending on how they are phrased. This makes the dichotomy undesirable for two reasons: first, it induces unnecessary complexity as judges seek to cast and re-cast duties as positive or negative to determine whether they are fiduciary; and second, it makes classification within the dichotomy an inappropriate method of determining the nature of duties (as fiduciary or non-fiduciary) because duties can be simply rephrased to render them proscriptive. To illustrate the second point, hypothetically, if a practitioner (on behalf of their client) were to plead and argue a fiduciary duty in prescriptive terms, it may be rejected by a court rigidly applying the proscriptive limitation. However, if the same duty were to be rephrased, and pleaded and argued in proscriptive terms, it could be considered consistent with the proscriptive limitation, and therefore held to be a fiduciary duty binding the relevant person or entity.

This example highlights how applying the dichotomy and proscriptive limitation is inappropriate to determine whether a duty is fiduciary, as it relies on form rather than substance. The appropriate focus should be on applying the settled fiduciary law principles explained in Part One, particularly whether the relevant duty is consistent with the overarching duty of loyalty and the 'protective rationale'[63] of the fiduciary doctrine,[64]

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and Sustainable, and if so, What are the Practical Consequences?' (Paper presented at the Supreme Court Corporate and Commercial Law Conference, Sydney, 15 November 2017) 4.

62 Firios, above n 2, 168.

63 *Howard v Commissioner of Taxation* (2014) 253 CLR 83, 100 [32], [35].

64 Also see *Chan v Zacharia* (1984) 154 CLR 178, 205; *Breen* (1996) 186 CLR 71, 110.

to determine the nature of duties (as fiduciary or non-fiduciary) — not the dichotomy and proscriptive limitation. Owen J's judgment in *Bell Group Limited (in Liq) v Westpac Banking Corporation & Ors (No 9)* ('*Bell*'),[65] examined below, also highlights the complexity associated with, and the artificiality of, describing duties as positive or negative to determine whether they are fiduciary or non-fiduciary.

Fourth, even a proscriptive duty may require a fiduciary to behave 'prescriptively'. As Kirby J explained, 'omissions quite frequently shade into commissions.'[66] Breach is not, in every case, a wrong of omission. For example, the proscriptive duty to avoid conflicts will usually require a fiduciary to act positively to relinquish a relationship with, or duty to, another. Similarly, the proscriptive duty to refrain from making an unauthorised profit may compel a fiduciary to affirmatively renounce a business opportunity. This again raises the problem of there being no definition of a 'proscriptive' duty, as it is questionable whether duties can be properly labelled as 'proscriptive' when they require both positive and negative behaviour. This may unnecessarily misdirect and confuse those who infer, it is submitted quite reasonably, that a proscriptive duty only requires negative behaviour – because in reality it does not. This provides another practical reason to abandon the dichotomy.

B *Examples of the Unnecessary Complexity Caused by Attempts to Classify Duties within the Dichotomy*

In *Bell,*[67] Owen J was obliged by the precedent of *Breen*[68] and *Pilmer v Duke Group Ltd*[69] to classify the relevant directors' fiduciary duties as proscriptive, or to hold them to be non-fiduciary. His Honour preferred the latter, holding that 'a close analysis of the substance' of the duties 'reveals that they are proscriptive.'[70] The learned editors of *Meagher, Gummow and Lehane's Equity: Doctrines and Remedies* described Owen J as twisting and torturing language to analyse the nature of these duties (as fiduciary or non-fiduciary) and come to this conclusion.[71] It also made this part of the judgment complex and long (taking over twenty-four pages of discussion).

An example of this complexity is his Honour's description of directors' 'proper purposes' duty, which was expressed in both positive and negative terms. First, to 'act in the interests of the company'[72] and then, that directors' powers 'cannot be exercised in the interests of someone other than the company and (or) in a way that is not in the best interests of the company.'[73] This made his Honour's reasoning hard to follow and implied

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65 (2008) 39 WAR 1.
66 *Pilmer v Duke Group Ltd* (2001) 207 CLR 165, 214 [128].
67 (2008) 39 WAR 1.
68 (1996) 186 CLR 71.
69 (2001) 207 CLR 165.
70 *Bell Group Limited (in Liq) v Westpac Banking Corporation & Ors (No 9)* (2008) 39 WAR 1, 574 [4574]-[4588].
71 Heydon, Leeming and Turner, above n 2, 220 [5-410].
72 *Bell* (2008) 39 WAR 1 [4582].
73 Ibid [4581].

that the duty was not truly proscriptive. It also illustrated the ease with which duties can simply be rephrased to make them appear proscriptive or prescriptive.

This complexity was unnecessary because classifying the directors' duties in *Bell* within the dichotomy was, in practical terms, insignificant. It was not needed to establish whether these duties were 'fiduciary' (and thus, whether the plaintiff had access to *Barnes v Addy* relief),[74] because Owen J had already held that both duties were 'fiduciary' duties stemming from the directors' duty of loyalty to the company.[75] Nor was it needed to establish how the duties obliged the directors to act or whether the directors' conduct constituted a breach of these duties. Hypothetically,[76] it could have been found that the directors breached their 'proper purposes' and 'best interests' duties by allowing the restructuring transactions between some Bell Group companies and the banks to occur, without classifying them as proscriptive or prescriptive.

As such, Owen J's judgment in *Bell* shows the futility of attempting to fit fiduciary duties within the dichotomy and the unnecessary complexity this task produces.[77] The undesirable results of rigidly applying the dichotomy are an unfortunate, yet common product of its application. Recently, they were illustrated in *Duncan v Independent Commission Against Corruption*,[78] where MacDougall J explained:

> No doubt, there may be situations where, to observe the proscriptive obligations imposed on fiduciaries, it may be necessary for a fiduciary to perform some positive act. But that does not mean that there is a prescriptive element to the fiduciary duty. It means that, to avoid a conflict of interest (or to avoid profiting at the expense of the beneficiary), it is necessary for the fiduciary to take some positive step.[79]

On appeal, this characterisation was criticised by Basten JA, who explained that the description of fiduciary duties 'as "proscriptive" rather than "prescriptive" is unlikely to be determinative and, if treated as conclusive, may lead to error.'[80] It is also difficult to reconcile how there is no 'prescriptive element' to a fiduciary duty which requires a 'fiduciary to take some positive step'. At the least, this passage is hard to follow, again highlighting the unnecessary complexity induced by discussion of the dichotomy and attempts to classify fiduciary duties within it.

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74 (1874) LR 9 Ch App 244.

75 See also Section IV(A), below.

76 This term is used because Owen J was bound by the precedent of *Breen* and *Pilmer,* and therefore obliged to classify the relevant directors' duties within the dichotomy.

77 It is noted that, on appeal from Owen J's judgment, Lee, Drummond AJJA and Carr JA (forming the Western Australian Court of Appeal) similarly assessed the dichotomy and proscriptive limitation when determining whether the relevant directors' duties were fiduciary. However, they placed less emphasis on it in determining the nature of these duties and, subsequently, avoided the complexity it breeds.

78 [2014] NSWSC 1018.

79 *Duncan v Independent Commission Against Corruption* [2014] NSWSC 1018 [205].

80 *Duncan v Independent Commission Against Corruption* [2016] NSWCA 143 [623].

Judges have recently acknowledged the problems associated with trying to fit fiduciary duties within the dichotomy, refraining from rigidly construing it and using more tempered language to describe it. For example, in *Brendan Wilfred King v Robert Lawrence Adams,*[81] Sackar J explained that the proscriptive limitation was simply a 'starting point for determining the scope of any fiduciary obligations,'[82] holding that 'the scope of a fiduciary relationship will be ascertained according to the particular facts of the case.'[83] Writing extra-curially, Gleeson JA described the dichotomy as simply being 'useful at a general level.'[84] The Full Court of the South Australian Supreme Court in *State of South Australia v Lampard-Trevorrow*[85] held that fiduciary duties were 'usually' proscriptive and 'usually' not prescriptive.[86] These judges have forecasted the necessity of no longer applying the dichotomy and proscriptive limitation.

C *Anxiety Surrounding the Removal of the Proscriptive Limitation*

When assessing the proscriptive limitation, it is crucial to distinguish fiduciaries' purely 'fiduciary' duties from their 'non-fiduciary' duties. As stated above, fiduciaries' non-fiduciary duties will affect the determination of the existence and scope of their fiduciary duties. For example, where a fiduciary owes their beneficiary non-fiduciary, contractual duties, any fiduciary duty determined to exist must 'accommodate itself to the terms of the contract so that it is consistent with, and conforms to, them.'[87]

It is suggested that abandoning the proscriptive limitation may allow opportunistic counsel to argue for the recognition of prescriptive fiduciary duties,[88] which are disconnected from the protective rationale of the fiduciary doctrine[89] and encroach into areas governed by such non-fiduciary duties, where there is often 'no need, or even room, for the imposition of fiduciary obligations.'[90] For example, it may lead fiduciary law to operate inconsistently with contract (as above), tortious duties of care, or other areas of Equity such as the doctrines of undue influence and unconscionability. Thus, it is suggested that where an issue of disloyalty is not involved, the desirable approach is not to impose prescriptive duties because such matters will be 'actionable through those primary bodies of law which constitute or govern the ordinary incidents of the relationship in

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81 [2016] NSWSC 1798 (14 December 2016).
82 Ibid [42].
83 Ibid [38].
84 Fabian Gleeson, above n 65, 29.
85 (2010) 106 SASR 331.
86 *State of South Australia v Lampard-Trevorrow* (2010) 106 SASR 331 [337].
87 *Hospital Products Ltd v United States Surgical Corporation* (1984) 156 CLR 41, 97. See also *John Alexander's Clubs Pty Limited v White City Tennis Club Limited* (2010) 241 CLR 1, 36–7 [91]–[93].
88 Peter Birks, 'The Content of Fiduciary Obligation' (2000) 34(1) *Israel Law Review* 3, 5.
89 Also see *Howard v Commissioner of Taxation* (2014) 253 CLR 83, 100–1 [35]; *Chan v Zacharia* (1984) 154 CLR 178, 205; *Breen* (1996) 186 CLR 71, 110.
90 *Breen* (1996) 186 CLR 71, 93.

question."[91] It is also argued that extending the fiduciary principle might lead it to become 'an unruly horse of public policy, pressed into service whenever existing doctrines are perceived to be inapplicable or inadequate' [92] and 'an independent source of positive obligations ... creating new forms of civil wrong.'[93]

However, it is submitted that the extension of the fiduciary principle should not be restricted because of apprehension towards it operating in unison with other areas of law, such as contract or tort. As the Honourable Dyson Heydon explained, such a proposition:

> suggests that ideally a particular controversy will never throw up a variety of possible causes of action which overlap. Why should it not do so? The suggested view would seem to stultify legal development. It is very common for overlaps to take place. In some circumstances one cause of action will succeed and another fail. But in other circumstances both may succeed, possibly with differing remedial consequences. None of these outcomes outflanks, renders superfluous or displaces the body of law which does not suit the plaintiff in a particular case.[94]

More importantly, the risks stated above are appropriately addressed by the principles explained in Part One. These principles ensure that any extension of the fiduciary doctrine has 'an ancestry founded in history and in the practise and precedents of courts administering equity.' [95] For example, the principle that fiduciary duties imposed must be consistent with their protective rationale,[96] prevents arbitrary broadening of the 'fiduciary mantle.'[97] Similarly, the principle that contractual terms 'can modify or extinguish a fiduciary obligation that one party to the contract would otherwise owe to the other'[98] prevents fiduciary law from operating inconsistently with contract law.

Proper application of these principles safeguards against the imposition of fiduciary duties on an ambiguous and indeterminate, 'special' basis,[99] and ensures that the fiduciary doctrine is consistently applied in accordance with its purposes. This is precisely how the entire equitable jurisdiction operates — that is, by applying fixed principles to the facts of each case.[100] Such a trait of the equitable jurisdiction makes courts of Equity well-equipped to appropriately and consistently apply these principles. Accustomed to this process, they are unlikely to over-extend the fiduciary principle in a way that has no basis in principle or precedent.

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91 Finn, 'The Fiduciary Principle', above n 8, 28.

92 Albert Oosterhoff, Robert Chambers and Mitchell McInnes, *Oosterhoff on Trusts: Text, Commentary and Materials* (Carswell, 6th ed, 2004) 835; also see *Chan v Zacharia* (1984) 154 CLR 178, 205.

93 *Breen* (1996) 186 CLR 71, 95; Finn, 'The Fiduciary Principle', above n 8, 28–9.

94 Dyson Heydon, 'Modern Fiduciary Liability' (2014) 20(10) *Trusts & Trustees* 1020.

95 *Re Diplock's Estate* [1948] 2 All ER 318, 326.

96 *Howard v Commissioner of Taxation* (2014) 253 CLR 83, 100–1 [35].

97 Ibid; *Maguire v Makaronis* (1997) 188 CLR 449, 463–4.

98 *Carr v Commins Hendriks Pty Limited* [2016] FCA 1282 [14] citing *John Alexander's Clubs Pty Limited v White City Tennis Club Limited* (2010) 241 CLR 1, 36 [91]-[92].

99 *Bell* (2008) 39 WAR 1 [4552].

100 See *Gee v Pritchard* (1818) 36 ER 670.

Before progressing, it must be recognised that removing the dichotomy from the fiduciary inquiry would not be a novel step in Australian law. As the editors of *Meagher, Gummow and Lehane's Equity: Doctrines and Remedies* explain:

> the existence of like distinctions in other areas of the law is waning. Thus a negative duty to avoid negligence at common law can entail a positive duty to take precautions. And the nonfeasance/misfeasance distinction in relation to the liability of councils for injury caused by the condition of highways has been overruled.[101]

This sentiment was exemplified in *Board of Bendigo Regional Institute of Technical and Further Education v Barclay* ('*Barclay*'),[102] where the High Court addressed the 'objective' and 'subjective' dichotomy of inquiry applied by courts in *Fair Work Act 2009* (Cth) 'adverse action' litigation. This, like the fiduciary dichotomy, was complicating adverse action litigation.[103] In *Barclay,* the Court held that the 'objective' and 'subjective' dichotomy was indeterminate and 'productive of error',[104] and should not be applied.[105] Analogy may be drawn to the complexity bred by the fiduciary dichotomy and its ultimate insignificance in the court's determination of fiduciary duties. It is submitted that not applying the dichotomy in the fiduciary inquiry would have a similar, beneficial effect. It would simplify the court's inquiry and would not, as the above examples show, be an extraordinary step in Australian jurisprudence.

IV Prescriptive Fiduciary Duties

The most compelling argument for abandoning the dichotomy and proscriptive limitation is that some fiduciary duties are prescriptive. These duties mandate positive behaviour or action. They may therefore be appropriately labelled as prescriptive duties.[106]

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101 Heydon, Leeming and Turner, above n 2, 211–12 [5-385].

102 (2012) 248 CLR 500.

103 A similar problem emerged in the United Kingdom in relation to 'dishonest assistance' cases, where it was variously held that proving dishonesty required the court to make 'subjective' or 'objective' determinations, or a combination of both. See *Royal Brunei Airlines v Tan* [1995] 2 AC 378; *Twinsectra Ltd v Yardley* [2002] 2 AC 164. This induced confusion in the jurisprudence, which was resolved in *Barlow Clowes International Ltd v Eurotrust International Ltd* [2006] 1 WLR 1476, where it was held that only a purely objective test was applicable to prove dishonesty in this context.

104 *Board of Bendigo Regional Institute of Technical and Further Education v Barclay* (2012) 248 CLR 500, 536 [107].

105 For more about this dichotomy and the impact of the *Barclay* decision, see: Nicholas Saady, 'The Balance of Barclay: An Analysis of the Methods Used to Determine 'Adverse Action' Cases' (2018) 45 *Australian Bar Review* 63.

106 It is acknowledged that the nature of these duties cannot be conclusively stated, as there is no precise definition of a 'proscriptive' and 'prescriptive' duty. This is compounded by another practical difficulty with the dichotomy: that every fiduciary duty (including these duties) can be described as prescriptive or proscriptive. While this again shows how the proscriptive limitation is a 'very over-simplified proposition' (*Byrnes v Kendle* (2011) 243 CLR 253, 292 [122]) and one which it is suggested is unnecessary to apply in the fiduciary inquiry, it is submitted that if these duties must be classified within the dichotomy, they are prescriptive because they compel positive behaviour.

A *Prescriptive Duties of Company Director Fiduciaries*

Company directors are bound by two distinct yet overlapping duties: to act in their company's best interests and for proper purposes.[107] Both duties may be classified as prescriptive.

Since as early as 1889,[108] company directors have been held to owe a duty to act *bona fide* in 'what they consider'[109] the best interests of their respective companies.[110] This requires action and inaction. For example, it may require a director to make management decisions about the purchase of assets by their company in its best interests (positive behaviour) and also to refrain from making unauthorised personal profits from such asset purchases (negative behaviour). Further, when making decisions it obliges directors to give 'real and actual consideration to the interests of the company',[111] which entails positive behaviour, such as investigating the providence and risk of a potential transaction. Also, where a director discovers that they may be acting in conflict, the best interest duty compels them to act to explicate themselves from such conflict,[112] again being positive behaviour.

While the 'proper purposes' duty largely restricts the actions of directors by ensuring they do not act for an 'ulterior purpose',[113] it may also be characterised as prescriptively requiring directors to 'act' in accordance with their conferred powers.[114] For example, it may oblige directors to act 'properly' when exercising their power to issue shares, and not to do so for an impermissible purpose such as to control shareholder voting power.[115] When voting on a proposal for the company to purchase land or an asset, the proper purposes duty prescriptively compels directors to act 'properly' in doing so — for example, by ensuring that the transaction is not approved to simply further their own, or other parties', interests.[116]

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107 *Mills v Mills* (1938) 60 CLR 150, 163–5, 177, 185, 187–8; *Streeter v Western Areas Exploration Ltd (No 2)* (2011) 278 ALR 291, 328 [447]; *Angas Law Services Pty Ltd (in liq) v Carabelas* (2005) 226 CLR 507, 532 [67].

108 *Re Cawley and Co* (1899) 42 Ch D 209, 233.

109 *Re Smith and Fawcett Ltd* [1942] 1 All ER 542, 543–4.

110 *Hogg v Cramphorn Ltd* [1967] Ch 254, 266–7; *Whitehouse v Carlton Hotel Pty Ltd* (1987) 162 CLR 285, 292–3; *Advance Bank Australia Ltd v FAI Insurances Ltd* (1987) 9 NSWLR 464, 485; *Permanent Building Society (in liq) v Wheeler* (1994) 11 WAR 187, 218; *Bell Group Ltd v Westpac Banking Corp (No 9)* (2012) 270 FLR 1 [902], [1962], [1969], [1978].

111 *Australasian Annuities Pty Ltd (in liq) v Rowley Super Fund Pty Ltd* (2015) 318 ALR 302, 349–50 [225]; *Ying Mui & Ors v Frank Kiang Ngan Hoh & Ors (No 3)* [2017] VSC 29 [393]; *Netglory Pty Ltd v Caratti* [2013] WASC 364 [379]; *Brentwood Village Limited (in liq) v Terrigal Grosvenor Lodge Pty Limited (No 4)* [2016] FCA 1359 [39]. Note that much of this recent jurisprudence is focused on discussing the duty to act in the interests of the relevant company in the context of ss 181 and 182 of the *Corporations Act 2001* (Cth).

112 See *Daniels v Anderson* (1995) 37 NSWLR 438, 593–8.

113 *Whitehouse v Carlton Hotel Pty Ltd* (1987)162 CLR 285.

114 See Pearlie Koh, 'A Director's duty of loyalty and the relevance of the Company's scope of business: *Cheng Wai Tao v Poon Ka Man Jason'* (2017) 80(5) *The Modern Law Review* 941, 951–3; Robert Austin and Ian Ramsay, *Ford's Principles of Corporations Law* (LexisNexis Butterworths, 13th ed, 2007) [8.200].

115 See *Whitehouse v Carlton Hotel Pty Ltd* (1987) 162 CLR 285.

116 See *Permanent Building Society v Wheeler* (1994) 11 WAR 187, where directors were held to have breached the proper purposes duty by voting in favour of the company purchasing

The *Bulfin* duty,[117] which is binding upon company directors, must also be recognised. Linked to the 'best interests' and 'proper purposes' duties, the *Bulfin* duty is similarly prescriptive and has been held to be fiduciary.[118] Its existence also places doubt upon the validity of the proscriptive limitation. As Gleeson JA, writing extra-curially, recently questioned, '[c]ould all of these distinguished equity judges be said to have been operating under the same mistake [that the *Bulfin* duty is not fiduciary]? One might pause to doubt that suggestion when considering the rigidity of the dichotomy.'[119]

The examples and holdings cited above show how the best interests and proper purposes duties may be classified as 'prescriptive' duties, and therefore challenge the viability of the proscriptive limitation. However, there is debate about whether they are properly labelled as 'fiduciary'. This debate is compounded by the lack of a High Court judgment specifically dealing with this issue. Historically, these two directors' duties have been treated as 'fiduciary'.[120] But, the increased focus on the dichotomy and proscriptive limitation has induced arguments that they are non-fiduciary.[121]

Some maintain that they are not exclusively fiduciary duties, but rather arise from the unique position directors hold and are a manifestation of the doctrine of fraud on a power.[122] Professor Flannigan has argued that the two duties are 'nominate', or non-fiduciary duties, which arise from the agency contract between directors and their relevant companies,[123] and that judicial failure to understand the parallel, but independent, operation of fiduciary and non-fiduciary duties in common law jurisdictions has led to the mischaracterisation of these duties as fiduciary.[124] Similarly, Professor

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industrial land, for the improper purposes of assisting the vendor (to purchase another business and provide it with working capital) and serving their own interests in another company (which was indirectly engaged in commercial negotiations with the vendor).

117 This duty compels directors, when advising or urging a particular action or course of conduct upon members of the company, to make full disclosure of all facts within their knowledge which are material to enable the members, or class of members, to determine their action: *Bulfin v Bebarfalds Ltd* (1938) 38 SR (NSW) 423, 440.

118 *Commonwealth Bank of Australia v Fernandez* [2010] FCA 1487 [44]; *Chequepoint Securities Ltd v Claremont Petroleum NL* (1986) 11 ACLR 94, 96; *ENT Pty Ltd v Sunraysia Television Ltd* [2007] NSWSC 270 [15]–[18], [33]–[35].

119 Fabian Gleeson, above n 65, 13.

120 See *Bell* (2008) 39 WAR 1 [4553]–[4568] and the authorities there cited.

121 *Permanent Building Society (in liq) v Wheeler* (1994) 11 WAR 187; *Bristol & West Building Society v Mothew* [1998] Ch 1. See also Beth Nosworthy, 'A Directors' Fiduciary Duty of Disclosure: The Case(s) Against' (2016) 39(4) *University of New South Wales Law Journal* 1389.

122 Conaglen, 'The Nature and Function of Fiduciary Loyalty', above n 28, 457–8; Pamela Hanrahan, *Funds Management in Australia: Officers' Duties and Liabilities* (LexisNexis Butterworths, 2007) [8.35]; John Glover, *Equity, Restitution and Fraud* (LexisNexis Butterworths, 2004) [4.59]; Rosemary Langford, 'The Fiduciary Nature of the Bona Fide and Proper Purposes Duties of Company Directors: *Bell Group Ltd (in liq) v Westpac Banking Corp (No 9)*' (2009) 31 *Australian Bar Review* 326, 336.

123 See Robert Flannigan, 'Fiduciary Duties of Shareholders and Directors' (2004) *Journal of Business Law* 277 ('*Fiduciary Duties of Shareholders and Directors*'); Robert Flannigan, 'The Adulteration of Fiduciary Doctrine in Corporate Law' (2006) 122 *Law Quarterly Review* 449.

124 Flannigan, *Fiduciary Duties of Shareholders and Directors*, above n 126, 288.

Worthington has stressed the need to differentiate between fiduciary obligations of loyalty, equitable obligations of confidence (which are not breaches of fiduciary obligation) and equitable obligations to exercise powers in good faith and for proper purposes (such as directors' best interests and proper purposes duties).[125]

Conversely, as above, the best interests and proper purposes duties have been continually held to be fiduciary in Australian authorities,[126] most recently by Owen J in *Bell,*[127] and on appeal in those proceedings by Lee AJA, Drummond AJA and Carr JA.[128] Consistently with these decisions, writing extra-curially Heydon J explained the rationales for holding that directors' duties are fiduciary in nature[129] – noting in particular that there is no basis in principle for classifying these duties as non-fiduciary and that they are a manifestation of directors' fiduciary duty of loyalty to their company.[130] In relation to the 'best interests' duty, Dr Langford has argued that, given it 'has traditionally been classified as fiduciary, strong justification for the downgrading of its classification needs to be provided.'[131] Such justification is yet to be provided.

Consistently with precedent, and adopting the arguments referenced above, it is submitted that the best interests and proper purposes duties are 'fiduciary' duties arising from directors' overarching duty of loyalty to their company. They anchor directors to this duty of loyalty and ensure that they act in accordance with the high standards of conduct that their fiduciary office demands. Contrary to what Flannigan posits, they are therefore consistent with what he labels the 'function of fiduciary accountability': to control fiduciaries' (directors') opportunism when dealing with the assets of others (company assets).[132] In reality, they do so more effectively as fiduciary duties than as non-fiduciary duties, because of the serious consequences of breaching a fiduciary duty.[133] They prophylactically regulate directors' conduct and prevent the detrimental consequences of improper directorial behaviour.

As such, the potential classification of the 'best interests' and 'proper purposes' duties as prescriptive, fiduciary duties (and the inability to classify them as totally proscriptive duties) challenges the sustainability of the proscriptive limitation.

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125 Sarah Worthington, 'Corporate Governance: Remedying and Ratifying Directors' Breaches' (2000) 116 *Law Quarterly Review* 638, 641.

126 See Langford, above n 125, 334 and the authorities there cited.

127 See *Bell* (2008) 39 WAR 1 [4574].

128 *Westpac Banking Corporation v The Bell Group (in liq) (No 3)* (2012) 44 WAR 1, 167 [922]–[923], [932] (Lee AJA), 344–8 [1961]–[1978] (Drummond AJA), 522 [2733] (Carr JA).

129 See Heydon, above n 63, 185–237.

130 Heydon, above n 63, 217.

131 Rosemary Langford, 'Best Interests: Multifaceted but not Unbounded' (2016) 75(3) *Cambridge Law Journal* 505, 519.

132 Flannigan, *Fiduciary Duties of Shareholders and Directors*, above n 126, 278.

133 See Section II(B), above.

B *Prescriptive Duties of Trustee Fiduciaries*

All trustees owe a duty to 'exercise reasonable care' to conduct trust business in the same manner as an ordinary prudent person of business.[134] Many authorities have held this to be a 'fiduciary' duty, and it is a duty undoubtedly requiring some positive behaviour.[135] Trustees are also bound by a fiduciary duty to distinguish between trust funds that have been mixed or mingled with their own funds.[136] Further, trustees of discretionary trusts have been held to owe a fiduciary duty to consider whether, and in what way, to exercise their discretionary powers of appointment,[137] which may be characterised as prescriptive. Trustees of managed investment schemes owe a positive fiduciary duty to provide information about the quantum of the trust property and investments made using trust property.[138] Despite not covering the field, these examples of prescriptive fiduciary duties binding trustees suggest that the proscriptive limitation is not universally applicable.

However, it is argued that such recognised positive duties of trustees are not truly 'fiduciary'.[139] Gummow J stated that trustees' positive duties arise from particular characteristics of trust arrangements, and not 'fiduciary obligations generally.'[140] Professor Birks explained that trustees' duty to account, for example, 'is indubitably separable from the rest of'[141] trustees' equitable duties and 'arises only from the contract [trust deed] and cannot be independently attributed to the fiduciary relationship'.[142] Further, the legal ownership of property, which is universal in trust arrangements but not so in fiduciary relationships generally, is cited to distinguish between trustees' equitable and fiduciary duties.[143]

In contrast, others posit that there is no justification for distinguishing between trustees' fiduciary and non-fiduciary duties. It has been argued that the distinction between trusts and general fiduciary relationships is illusory because both have a shared origin and involve the capacity to affect another's interests.[144] Noting that 'not all the duties of a fiduciary are

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134 *Austin v Austin* (1906) 3 CLR 516, 525; *Nestle v National Westminster Bank plc* [1993] 1 WLR 1260, 1282; *ASC v AS Nominees Ltd* (1995) 62 FCR 504, 516; *Breen* (1996) 186 CLR 71, 137.

135 See Antony Goldfinch, 'Trustee's Duty to Exercise Reasonable Care: Fiduciary duty?' (2004) 78(10) *Australian Law Journal* 678 and the cases there cited.

136 *Re Tilley's Will Trusts* [1967] Ch 1179, 1182–9; *Sinclair Investments (UK) Ltd v Versailles Trade Finance Ltd (in administrative receivership) and others* [2012] Ch 453, 492 [138]; *Brady v Stapleton* (1952) 88 CLR 322, 336–9; *Hospital Products Ltd v United States Surgical Corporation* (1984) 156 CLR 41, 109–10.

137 Paul Brereton, 'A Trustee's Lot is Not a Happy One' (Paper presented at the National Family Law Conference, Canberra, 19 October 2010) 10, citing *McPhail v Doulton* [1971] AC 424, 456; *Kennon v Spry* (2008) 83 ALJR 145, 163 [77], [78] (French CJ), 171 [125] (Gummow and Hayne JJ)].

138 *Silkman v Shakespeare Haney Securities Limited in its Capacity as Responsible Entity of the Shakespeare Haney Premium Income Fund* [2011] NSWSC 148 [46].

139 Birks, above n 91, 23–6.

140 *Breen* (1996) 186 CLR 71, 137.

141 Birks above n 91, 27.

142 Ibid.

143 See Firios, above n 2, 170–2.

144 Firios, above n 2, 170–2.

fiduciary',[145] the editors of *Meagher, Gummow and Lehane's Equity: Doctrines and Remedies* have also explained that trustees are bound by 'positive duties which it would be strange to call non-fiduciary'[146] — such as the duties to select discretionary beneficiaries, keep beneficiaries informed, and to find and pay non-discretionary beneficiaries.[147]

While the length of this article prevents detailed analysis and a conclusion being reached on this issue, it is clear from the precedent cited above that the courts have held that trustees owe many fiduciary duties that are prescriptive. This precedent challenges the viability of the proscriptive limitation, especially when it is considered amongst the other prescriptive fiduciary duties examined in this Part.

C *Prescriptive Duties of Other Commercial Fiduciaries*

In addition to trustees and company directors, there are other commercial fiduciaries that are bound by prescriptive, fiduciary duties. For example, in the context of a lotto syndicate organiser, it was explained by the High Court,[148] and most recently the New South Wales Supreme Court,[149] that the organiser has a positive, fiduciary duty to distinguish between lottery tickets held for the benefit of others and property held for themselves — that duty being analogous to a trustee's duty to not mix or mingle trust funds. Similarly, a promoter of a venture has been held to have a fiduciary duty to disclose to prospective parties all material information relating to what they are promoting with the 'utmost candour'[150] — that duty being an 'obligation that … has been spoken of as a positive duty for well over 100 years.'[151]

This is similar to the fiduciary duty binding prospective business partners 'to carry out a single joint undertaking or endeavour'[152] and the broad, positive duty on partners to display complete or utmost good faith in their partnership dealings.[153] Partners have also been held to owe each other a 'fiduciary obligation to co-operate in and act consistently with the agreed procedure for the realization, application and distribution of partnership property' on the winding up of a partnership.[154] All of these duties require positive behaviour and may be described as prescriptive.

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145 Heydon, Leeming and Turner, above n 2, 200 [5-325].

146 Ibid, 213 [5-385].

147 See also Dyson Heydon and Mark Leeming, *Jacobs' Law of Trusts* (LexisNexis Butterworths, 8th ed, 2016) [17-04].

148 *Van Rassel v Kroon* (1953) 87 CLR 298.

149 *King v Adams* [2016] NSWSC 1798 [41]; upheld on appeal in *King v Adams* [2017] NSWCA 277.

150 *Fitzwood Pty Ltd v Unique Goal Pty Ltd* (2001) 188 ALR 566, 575–6 [28]–[33]; *Directors of Central Railway Co of Venezuela v Kisch* (1867) LR 2 HL 99, 113; *Meriton Apartments Pty Limited v The Owners Strata Plan No. 72381* (2015) 105 ACSR 1,87 [447].

151 *Fitzwood Pty Ltd v Unique Goal Pty Ltd* (2001) 188 ALR 566, 576 [33]; *Erlanger v New Sombrero Phosphate Company* (1878) 3 AC 1218, 1229.

152 *United Dominions Corporation Ltd v Brian Pty Ltd* (1985) 157 CLR 1, 5–6 (Gibbs CJ), 12 (Mason, Brennan and Deane JJ).

153 Ibid, 6 (Gibbs CJ).

154 *Chan v Zacharia* (1984) 154 CLR 178, 197.

While they do not encompass all of the fiduciary duties that may require fiduciaries to act positively, and are only assessed briefly, these examples highlight how it is misleading to describe all fiduciary duties as proscriptive – as commercial fiduciaries have been held to owe positive fiduciary duties. They also show that duties requiring fiduciaries to act prescriptively are not limited to the unique 'characteristics'[155] of trustees and company directors. For these reasons, and the others explained in this article, the proscriptive limitation is inappropriate.

V Conclusion

Fiduciary duties are dynamic, flexible and unfixed. Different factual circumstances and relationships warrant imposing different fiduciary duties. Some are necessarily positive, some are negative. Applying the dichotomy and proscriptive limitation may lead to the oversight of facts in certain relationships, which warrant imposing positive fiduciary duties. This may produce errors and inhibits the ability of the fiduciary principle to alleviate the inflexibilities of the common law. It also restricts its capacity to deter fiduciary disloyalty and provide beneficiaries with relief when fiduciaries breach their duties. This erosion of the purposes of fiduciary law makes it important to abandon the dichotomy and proscriptive limitation.

While the 'no profit' and 'no conflict' rules are the core fiduciary duties, they are not the only fiduciary duties. It is misguided to assume that, because these duties are essentially proscriptive, all fiduciary duties are proscriptive. In many decisions, covering different fiduciary relationships, fiduciaries have been held to owe prescriptive, 'fiduciary' duties. This precedent attacks the viability of the dichotomy and provides strong reason for abandoning it. This is especially so because it is unnecessary to apply the dichotomy and proscriptive limitation in the fiduciary inquiry. Judgments such as Owen J's judgment in *Bell* show that they only complicate the fiduciary inquiry,[156] by compelling the classification of duties within an undefined dichotomy and inducing confusion because most fiduciary duties can be stated in proscriptive and prescriptive terms.

Application of the principles explained in Part One, not the dichotomy and proscriptive limitation, appropriately guide the exercise of judicial discretion in determining the existence and scope of fiduciary duties. Attention should not be directed to the taxonomy encouraged by the dichotomy, but rather on the substance of fiduciary duties, in accordance with the equitable maxim that substance prevails over form.[157]

A High Court decision holding that the dichotomy and proscriptive limitation should not be used in the fiduciary inquiry will not fundamentally change fiduciary law. The overarching duty of loyalty and the 'no profit' and 'no conflict' rules will continue to ensure that fiduciaries

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155 *Breen* (1996) 186 CLR 71, 135 (Gummow J).
156 (2008) 39 WAR 1.
157 *Parkin v Thorold* (1852) 51 ER 698, 701.

act in accordance with the high standards their office demands. Strict application of the principles explained in Part One will also aptly guide the exercise of judicial discretion in recognising the existence of fiduciary relationships, and imposing fiduciary duties. Courts are accustomed to applying such principles and should be trusted to do so. The extension of fiduciary law should be embraced in circumstances where it is supported by precedent to ensure that it achieves its purposes, rather than being limited by theoretical categorisation within the dichotomy.