The Corporate Opportunity Doctrine and Directors' Duties – A Critique of the Law in Australia

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The law in Australia on the circumstances in which a fiduciary will be held to have breached their duties by taking a corporate business opportunity does not strike an adequate balance between the interests of corporations and of fiduciaries. This article examines the statutory and common law rules on directors' duties with specific reference to corporate opportunities. It argues that in interpreting the *Corporations Act 2001* (Cth), and in developing the common law, the courts should extend fiduciary duties so as to require a fiduciary to advise a corporation of opportunities falling within the corporation's area of business, even when the opportunities were discovered in circumstances unconnected with the fiduciary's role in the corporation. The article also argues that the current ambiguity in the case law over whether a fiduciary who is a shareholder in a corporation may vote his or her shares when seeking permission from shareholders to take a corporate opportunity ought to be resolved in the negative. Finally, although the fiduciary duties extend to employees, the article argues that since not all employees are fiduciaries, the word 'employee' both in the Act and under the common law should be given a qualified meaning, and that whether an employee is bound by fiduciary duties should depend on the circumstances of the relationship, and in particular on the scope of authority given to the employee and their level within the corporation.

I Introduction

This article argues that the law in Australia relating to the circumstances in which a person who stands in a fiduciary relationship with a corporation may take a corporate opportunity is in need of reform. This reform could be achieved through judicial interpretation of the statutory duties contained in the *Corporations Act 2001* (Cth) and the common law duties that carry on in existence in parallel with the statutory duties.[1] Part II of the article explains the content of the statutory and common law duties and the interplay between them. Part III examines the two criteria relevant to the question of whether a fiduciary is to be found liable for taking a corporate opportunity: the connection between discovery of the opportunity and office-holding in the corporation, and whether the opportunity falls within the scope of the corporation's business and, after analysing recent case law from the United Kingdom, argues in favour of a re-interpretation of the former. Part IV discusses the applicability of fiduciary duties to employees, and argues that only certain classes of employee should be held to be subject to fiduciary duties. Part V discusses the circumstances in which a fiduciary may be permitted by shareholders to take a corporate opportunity, and in particular whether a fiduciary who is also a shareholder should be permitted to vote his or her shares. The article concludes in Part VI which contains recommendations for reform.

II The statutory background

Directors' duties have been put into statutory form in ss 180-184 of the *Corporations Act 2001* (Cth). However s 185 of the Act states that these provisions apply in addition

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[1] The continued existence of the common law is expressly stated in s 184 of the Act.

to, and not in substation for, the common law. This means that the common law continues to operate in parallel with the statutory duties. This is useful in that existing case law can be used to give meaning to the statutory duties but, as is discussed below, also creates complexity because the common and statute law duties differ in scope, and so conduct which may not breach one type of duty may still constitute a breach of the other.

The classification of duties in the Act departs from the traditional common law taxonomy, which recognised fiduciary duties to act in the best interests of the company, to exercise powers for a proper purpose, to exercise an independent discretion and to avoid conflicts of interest, along with the tort-based duty to act with due care. Instead the Act recognises a duty of care (s 180(1)), a duty to act in the best interests of the corporation and to exercise powers for a proper purpose (s 181), a duty not to use position as a director to harm the corporation or to make a profit for ones-self or for someone-else (s 182) and a similarly-phrased duty prohibiting misuse of information (s 183).

Section 181 states:

> **181 Good faith – civil obligations**
> (1) A director or other officer of a corporation must exercise their powers and discharge their duties:
> (a) in good faith in the best interests of the corporation; and
> (b) for a proper purpose.

Section 182 states:

> **182 Use of position--civil obligations**
> *Use of position--directors, other officers and employees*
> (1) A director, secretary, other officer or employee of a corporation must not improperly use
> their position to:
> (a) gain an advantage for themselves or someone else; or
> (b) cause detriment to the corporation.
> (2) A person who is involved in a contravention of subsection (1) contravenes this subsection.

Similarly, s 183 states:

> **183 Use of information—civil obligations**
> *Use of information—directors, other officers and employees*
> (1) A person who obtains information because they are, or have been, a director or other officer
> or employee of a corporation must not improperly use the information to:
> (a) gain an advantage for themselves or someone else; or
> (b) cause detriment to the corporation.
> (2) A person who is involved in a contravention of subsection (1) contravenes this subsection.

Whereas it is common, and unobjectionable, to use the term 'directors' duties' as a convenient shorthand when referring to the duties owed to a corporation by its fiduciaries, it is important to recognise that these section impose duties on a far wider class than directors. All three sections refer to directors and officers. In addition, ss 182 and 183 impose duties on employees.

The words 'director' and 'officer' are given a broad definition by the Act. Section 9 defines 'directors' as including

> someone appointed to the position of director (whatever called), and
> someone not validly appointed as director but who

> (i) acts as a director or
> (ii) is someone upon whose directions the directors are accustomed to act.

People falling within sub-part (i) are commonly referred to as 'de facto' directors, while those in sub-part (ii) are referred to as 'shadow' directors. In *Deputy Commissioner of Taxation v Austin* (1998) 28 ACSR 565 the court held that whether a person was a de facto director would be determined in light of a number of factors, including the size of the corporation, its internal practices and how the person was viewed by outsiders. Thus the focus is on what tasks the person performs rather than on their nominal title or status within the corporate structure: The key question is whether the person exercised 'top level management functions.' So far as shadow directors are concerned, the court in *Bluecorp Pty Ltd (in liq) v ANZ Executors and Trustee Co Ltd*[2] held that for a person could be found to be a shadow director, the board has to be found to act on their instructions, not merely stand aside for them and acquiesce in their actions.

So far as 'officers' are concerned, s 9 defines them as including

> (a) a director or secretary of the corporation; or
> (b) a person:
> (i) who makes, or participates in making, decisions that affect the whole, or a substantial part, of the business of the corporation; or
> (ii) who has the capacity to affect significantly the corporation's financial standing; or
> (iii) in accordance with whose instructions or wishes the directors of the corporation are accustomed to act (excluding advice given by the person in the proper performance of functions attaching to the person's professional capacity or their business relationship with the directors or the corporation).

Section 9 also states that receivers, administrators and liquidators are also officers of corporations. Sub-sections (b)(i) – (iii) have been interpreted by the courts as encompassing a broad category of persons, extending below the level of the board and including senior managers. In *Shafron v ASIC*,[3] the High Court, focussing on people falling within the scope of (b)(i), held that in every case it will be a matter of degree as to whether what a person does within a corporation amounts to participating in decisions which affect the whole of a corporation or a substantial part. The court also emphasised that 'participation' in the making of decisions can occur even if the ultimate decision is made by some other person or body, and held that when the appellant, who was in-house legal counsel in a company, formulated negligent advice to the board on which the board then acted, he was someone who was 'participating' in the board's decision-making within the meaning of (b)(i). The court also held that in determining whether a person is an officer within the meaning of (b)(i), the focus is not solely on whether that person was involved in the making of the *particular* decision which was a breach of directors' duties – a person may be found to be an officer on the basis of making *other* decisions and, for that reason, be found to be an officer of the company and liable for the decision under scrutiny.

Finally, the fact that, in contrast to ss 180(1) and 181 which apply only to directors and officers, ss 182 and 183 also apply to employees, gives the statutory duties a wider applicability than the common law duties, as under the common law, employees are not automatically in a fiduciary relationship with employers.[4] Thus conduct by an

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[2] (1994) 13 ACSR 386.
[3] (2012) 247 CLR 465.
[4] R.P. Austin, I.M. Ramsay, and H.A.J. Ford, *Ford, Austin and Ramsay's Principles of Corporations Law* (Lexis-Nexis, 18th ed, 2018) 661.

employee that would not be prohibited by the common law can amount to a breach of the statutory duties. This is further discussed in Part IV.

Which of the statutory duties are breached through the taking of a corporate opportunity depends on the circumstances of the breach. Given that, by its very nature, the taking of a corporate involves the director acting in his or her own best interests rather than those of the corporation, every act of that type would constitute a breach of s 181. If the taking of the opportunity originates in the director misusing his or her position, it will also amount to a breach of s 182. Similarly, if the breach is the result of the misuse of corporate information, s 183 will have been breached. Conceivably the taking of a corporate opportunity could amount to a breach of all three sections, where the director misuses both position and information in order to take an opportunity. Conversely, taking of an opportunity could amount to a breach only of the duty contained in s 181 if there was no connection between the opportunity and either the director's position or the misuse corporate information.

III Identifying when an opportunity belongs to a company

The taking of a corporate opportunity is but one circumstance in which directors' duties can be breached, and identification of what constitutes the taking of a corporate opportunity is determined through their interpretation of the statutory duties. This is why the preservation of the common law by s 185 is important, as it allows the courts to draw on existing case law in determining when the duties are breached. Courts have also drawn upon case law from other common law jurisdictions. But whereas the common law is used in giving meaning to the statutory duties, s 185 makes it clear that the common law carries on in existence *independently* of the statutory duties, and that proceedings can still be brought for breaches of the common law. This means that two potential sources of liability have to be considered, and that one may arise in circumstances where the other does not.

A *The two conditions for liability for taking a corporate opportunity*

Under current law an opportunity is said to belong to a corporation, and is thus not able to be exploited by a director, if two criteria are fulfilled: There must be a causal relationship between the director's discovery of the opportunity and his or her position as a director (remembering that the term 'director' must be read as encompassing the broad class of persons identified in Part II), and the opportunity must fall within the current business activities of the corporation or into those business activities into which it might reasonably be expected to expand.

B *Causal connection between office-holding and opportunity*

Under the statutory regime, the language of ss 182 and 183 makes it clear that a person will be liable for taking a corporate opportunity only if the opportunity was learned of as a result of being a director. A breach of s 182 occurs only where a person has improperly used their position as a director to gain an advantage for themselves or someone else or to cause detriment to the company, while s 183 is breached only in circumstances where a person obtains information 'because they are, or have been, a director or other officer or employee of a corporation' and improperly uses that information to gain an advantage for themselves or someone else or to cause detriment to the company. It follows that these sections of the Act prohibit a person from taking a corporate opportunity only if the discovery of the opportunity arises from their position in the company or from the use of corporate information.

Whether a causal connection between office-holding and discovery of an opportunity is a condition of liability under the common law is unsettled. Given that the statutory duty in s 181 is likely to be interpreted in light of the common law, the same can also be said to be true of that duty. The duty to act in good faith and in the interests of the company is often expressed as encompassing two rules – the 'conflict rule' and the 'profit rule' – the first being a duty not to allow a conflict of interest to exist between the director's personal interests and the interests of the company, the second being the prohibition on the director from making a profit as a consequence of his position.[5] However, the courts have stated that these rules are simply dimensions of the general duty of good faith.[6]

The conflict rule, as formulated by Lord Cranworth LC in in *Aberdeen Railway Company v Blaikie Bros,*[7] is that no-one who owes fiduciary duties

> .. shall be allowed to enter into engagements in which he has, or can have, a personal interest conflicting, or which possibly may conflict, with the interests of those whom he is bound to protect.

A director who acts in accordance with their personal interests rather than those of the company will be found to have breached the conflict rule irrespective of whether they make a profit or the company suffers a loss,[8] but if they have made a profit as a result of the conflict they will be liable for it to the company, as was held in *Furs v Tomkies*.[9] The conflict rule was subsequently refined in *Phipps v Boardman*,[10] where Lord Upjohn (in dissent) held that the phrase 'which possibly may conflict' in *Aberdeen Railway*, should be interpreted as referring to circumstances where there was 'a real sensible possibility of conflict'. This formulation was subsequently adopted in *Queensland Mines v Hudson*,[11] while in *Chan v Zacharia*[12] Deane J referred to a 'significant possibility' of conflict and in *Hospital Products Ltd v United States Surgical Corp*[13] Mason J phrased the test as being whether there was 'a real or substantial possibility of conflict.'

The profit rule prohibits a directors from making a profit as a consequence of their relationship with a corporation and which makes him or her liable to surrender such profits to the company. The leading case on the rule is *Regal (Hastings) Ltd v Gulliver*,[14] in which Russell LJ held that a fiduciary must account for a profit made 'by reason of'[15] and 'in the course of'[16] his office holding. Under this approach, the director would be obliged to bring to the company's attention only those opportunities which he or she discovered as a consequence of being a director, and is free to exploit those opportunities discovered in other circumstances – even if they fall within the company's line of business. However, academic commentators have questioned whether the words used by Russel LJ were meant to impose a limitation on the profit

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[5] Jason Harris, Anil Hargovan and Michael Adams, *Australian Corporate Law* (Lexis-Nexis, 6th ed, 2018) 472.
[6] See *Grand Enterprises Pty Ltd v Aurium Resources Ltd* (2009) 72 ACSR 75.
[7] (1854) 1 Macq 461.
[8] Harris, Hargovan and Adams, above n 5, 478.
[9] (1936) 54 CLR 583.
[10] [1967] 2 AC 46.
[11] (1978) ALR 1.
[12] (1984) 154 CLR 178, at 199.
[13] (1984) 156 CLR 41 at 103.
[14] [1967] 2 AC 134.
[15] Ibid 145.
[16] Ibid 147.

rule in such a way as to restrict the liability of a director to surrender profits to a company only if they were made as a result of his or her office-holding.[17]

In determining the circumstances in which the taking of a business opportunity would amount to a breach of fiduciary duty, it is important to note that even if, in accordance with *Regal (Hastings) Ltd v Gulliver*, the profit rule operates to make a director liable for taking an opportunity only if the opportunity was connected to office-holding, the question remains as to whether liability to the company can nevertheless arise under the conflict rule even in circumstances where no connection exists between the taking of the opportunity and holding a position in the company. In addressing this question, courts have referred to the decision in *London and Mashonaland Exploration Company Limited v New Mashonaland Exploration Company Limited*,[18] in which the court refused to grant an injunction prohibiting a director who sat on the board of the plaintiff company from sitting on the board of the competing defendant company. The case thus became cited as authority for the proposition that it is not a breach of fiduciary duties for a director to sit on the board of a competing company.

The rule in *New Mashonaland* has however come under criticism,[19] and has also been qualified in subsequent cases which have held that a director may not use confidential information gained as a result of being a director of one company in such a way as to benefit another,[20] that an express[21] or implied[22] term of a contract of service that an executive director has with the company may preclude him or her from being the director of another (although it would appear that, according to these authors, non-executive directors are not to be considered subject to such an implied clause),[23] and that a director cannot ask customers of a company to cease dealing with it in favour of the other company of which he or she is a director.[24]

More significantly for the discussion on corporate opportunities however, is the fact that the rule in *New Mashonaland* was extended in *Bell v Lever Brothers*,[25] where Lord Blanesburgh held that the principle that a director could sit on the board of a competing company meant that he himself could compete personally with a company of which he was director, on the ground that 'What he could for a rival company, he could of course, do for himself.'[26] If *Bell v Lever Brothers Ltd* was correctly decided, and if *Regal (Hastings) Ltd v Gulliver* does require a causal connection between office-holding and profit-making, the implication of these decisions is that there is nothing unlawful *per se* in a director taking for himself an opportunity which falls into the area of business in which the company is engaged. Is this correct?

C *Critique of the law relating to the connection between office-holding and liability*

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[17] Austin, Ramsay and Ford, above n 4, 635.
[18] [1891] WN 165.
[19] See for example *Scottish Co-operative Wholesale Society Ltd v Meyer* [1959] AC 324.
[20] *Riteway Express Pty Ltd v Clayton* (1987) 10 NSWLR 238 and *On The Street Pty Ltd v Cott* (1990) 101 FLR 234.
[21] *Hivac v Park Royal Scientific Instruments Ltd* [1946] Ch 169.
[22] *On The Street Pty Ltd v Cott* (1990) 101 FLR 234.
[23] Austin, Ramsay and Ford, above n 4, 672-3. See also Pamela Hanrahan, Ian Ramsayn and Geof Stapledon *Commercial Applications of Company Law* (Oxford University Press, 19th ed, 2018) 295.
[24] *Mordecai v Mordecai* (1988) 12 NSWLR 58.
[25] [1932] AC 161.
[26] Ibid 195.

The fundamental problem with the decisions in *Regal (Hastings) Ltd v Gulliver* and *Bell v Lever Brothers Ltd*[27] is that by leaving directors free to take in their private capacity opportunities that fall within the company's area of business, they significantly undermine the protection to which companies, as fiduciaries, are entitled. To take a hypothetical example if, in his spare time, a director of a gold mining company reads an article in a mining journal which states that a geological survey indicates that there is a high likelihood of gold being found in a particular area, an application of those cases leads to the conclusion that he would be able to exploit those claims privately, rather than bring their existence to the attention of the board. This in turn means that whether the duty to avoid a conflict of interest is operative would depend on the timing of the information coming to the director's attention – which might be quite random – and suggests that the director can 'switch off' his obligation to act in the interests of the company rather than in his own personal interests. This, I would argue, is fundamentally incompatible with the principle underlying the fiduciary duties which, in the words of Upjohn LJ in *Boulting v Association of Cinematograph, Television and Allied Technicians,*[28] is that a company is entitled to 'the undivided loyalty of its directors.'

Notwithstanding the decision in *Bell v Lever Brothers Ltd*, there has been a line of cases from the United Kingdom in which the lawfulness of directors taking opportunities that arise in a 'private' capacity has been reconsidered:[29]

In *Bhullar v Bhullar,*[30] a family-owned property-development company was in the process of being divided between two branches of the family. It was agreed that during this process, no new property would be bought. Two of the directors bought property on their own account for the anticipated benefit of their branch of the business. The court held that the directors had breached their duty to the still existing family company, even though it was no longer pursuing business opportunities and, significantly, even though they discovered the opportunity in circumstances unrelated to their duties as directors. In similar vein, in *Item Software (UK) Ltd v Fassihi,*[31] Lady Justice Arden, referring *inter alia* to the decision in *Bhullar* said:[32]

> These authorities go to show that the fact that a director was acting otherwise than as a director in making a secret profit is no answer to a claim by the company to recover the profits.

In *Sharma v Sharma,*[33] the respondent, who was a director of a company that owned dental practices, bought two practices on her own account. The issue in the case was whether the shareholders had al consented to her taking the opportunities in circumstances where, at a shareholder meeting, two of the shareholders stayed silent. Although the court found that, in the particular circumstances of the case, the silence of the shareholders had amounted to consent, it is clear, in light of the following statement by Jackson LJ,[34] that but for the consent, the defendant's conduct would have been unlawful:

> A company director is in breach of his fiduciary or statutory duty if he exploits for his personal gain (a) opportunities which come to his attention through his

[27] [1932] AC 161.
[28] [1963] 2 QB 606 at 636.
[29] For a discussion of some of these cases see Simon Witney, 'Corporate opportunities law and the non-executive director' (2016) 16 *Journal of Corporate Law Studies* 145, 180-3 and Chris Shepherd and Ann Ridley, *Company Law*. (Routledge, 2015) 193-5.
[30] [2003] EWCA Civ 424.
[31] [2004] EWCA Civ 1244.
[32] Ibid [38].
[33] [2013] EWCA Civ 1287.
[34] Ibid [52].

> role as director or (b) any other opportunities which he could and should exploit for the benefit of the company.

Of particular significance here was Jackson LJ's inclusion of 'any other opportunities which he could and should exploit for the benefit of the company,' as distinct from those opportunities learned of as a result of being a director, because it means that a director has a duty to bring to the attention of the company such opportunities as fell within the company's area of business, rather than take them himself.

Similarly, in *Wilkinson v West Coast Capital*,[35] Warren J held that if the director who wanted to take advantage of the opportunity was also a shareholder who could (in that capacity) prevent the company from taking advantage of the opportunity, then it would not be a breach of duty for him to exploit it personally. However - and what is important for purposes of corporate opportunities – Warren J also said that there might be an obligation for directors at least to bring the opportunity to the attention of the board, even if discovered 'other than in their capacities as directors.'[36]

Finally, and most importantly, the decision of the Scottish Court of Session in *Commonwealth Oil and Gas Company Limited v Baxter and Eurasia Energy*[37] calls into question the use of *London and Mashonaland Exploration Company Limited v New Mashonaland Exploration Company Limited*[38] and *Bell v Lever Brothers Ltd*[39] as authority for the proposition that a director may compete with the company to which they owe fiduciary duties. In this case, a non-executive director pursued private business opportunities in the same area of business as the company. The court held that compliance with fiduciary duties required the director to bring such opportunities to the attention of the company. The Lord President[40] rejected the argument that the duty to avoid conflicts of interest applies only when a director is acting in his capacity as a director. In discussing the decision in *Bell v Lever Brothers Ltd*, the Lord President[41] noted that Lord Blanesburgh's reliance on *Mashonaland* as authority for the rule that a person may be a director of competing companies was restricted to circumstances where there was no conflict between a director's duty to a company and his own personal interests, and had no application in cases where such conflicts did exist.[42] He also noted that neither of the other two members of the court had referred to *Mashonaland* in their judgments and thus could not be taken to have endorsed it. Lord Nimmo Smith[43] adopted the same view of *Mashonaland*, and concluded as follows:

> An attempt was made by counsel for Mr Baxter to persuade us that the principle in *Aberdeen Railway Co v Blaikie Bros* only applies where the conflict arises between a director's personal interests (whether as an individual or through the medium of another company) in relation to commercial opportunities of which he had become aware in the exercise of his function as director of the company or which, as it was put, he had been "tasked" to pursue on behalf of the company. I am entirely unable to accept this argument, which is not supported by the leading authorities. To go back to *Aberdeen Railway Co v Blaikie Bros*, Lord Cranworth said that the directors are a body to whom is delegated a duty of managing the general affairs of the company. No doubt some members of a board may be executive directors and others non-executive, and executive

[35] [2005] EWHC 3009 (Ch).
[36] Ibid [300].
[37] [2009] CSIH 75.
[38] [1891] WN 165.
[39] [1932] AC 161.
[40] [2009] CSIH 75 [11].
[41] Ibid [4] – [5].
[42] This was also noted by Lord Nimmo Smith in his judgment, at [77].
[43] Ibid [75] - [79].

> directors may have specific executive functions which have been delegated to them to perform. But the fact that he has an executive function does not alter a director's status: he is a director of the company as a whole, and his duties to the company are to manage the general affairs of the company and are not confined to the responsibilities arising from his executive function. A director's fiduciary duty of loyalty is owed to the company as a whole; and the duty to avoid a conflict of interest must be related to the interests of the company as a whole.

Apart from its rejection of the idea that a director is free to take corporate opportunities discovered in his private capacity, a significant feature of this dictum is that directors are affixed with the same duties in this regard irrespective of whether they are executive or non-executive directors, which runs contrary to the view of some academic writers discussed above who have taken the view that non-executive directors are fee to act in ways not permitted of executive directors.[44]

The above cases, all decided since 2003, point to a move towards a stricter interpretation of fiduciary duties and of what amounts to the unlawful taking of a corporate opportunity in the United Kingdom. Most significantly, they stand in support of the proposition that a director may be found to be in breach of their duties even if they take an opportunity that they learned of in circumstances unconnected with their office-holding. Academic criticism has also been levelled at the traditional view of what the decision in *New Mashonaland* meant. Le Miere emphasises that the court in *New Mashonaland* was being asked to issue an injunction – a remedy which is granted only where the applicant will suffer irreparable harm for which damages would not be adequate compensation if the injunction was not granted – and that on the facts of the case, there was no evidence that an injunction was the only avenue open to the applicant which could, for example, have requested that the director not to serve on the board of the rival company, or could have removed him from its own board.[45] On that view, the case was not one which decided whether a director may serve on the board of competing companies, but was rather one relating to the rules governing when an injunction should be granted. For this reason, Le Miere argues, it was incorrect for Lord Blanesburgh in *Bell v Lever Brothers Ltd*[46] to rely on what he called 'the *New Mashonaland* principle' to formulate a rule that a director acting in his personal capacity could compete with the company to which he owes fiduciary duties.[47]

To refer back to the example adduced at the start of this section, it is surely consistent with the reasonable expectations of a gold mining corporation that a director who learns that a geological survey of an area indicates a likelihood that it contains gold-bearing ore should inform the company of that fact, and give it the chance to explore the opportunity before taking it himself. To say that it is only if a corporation can prove that the director learned of the opportunity in circumstances connected with his or her office-holding is to put an artificial boundary on the director's fiduciary duties. It would also create evidentiary problems which would be very difficult to surmount.

To take another example, suppose that in a conversation at a social function unconnected with work, a guest mentions to a person who is the director of a biotech company that a particular university has developed a drug that might cure influenza. If one adopts the approach in *Regal (Hastings) Ltd v* Gulliver and *Bell v Lever*

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[44] Above n 23.

[45] Dominique Le Miere, 'London and New Mashonaland Exploration Co Ltd v New Mashonaland Exploration Co Ltd: Is it Authority that Directors Can Compete with the Company?' (2017) 42 *University of Western Australia Law Review* 98, 102-103.

[46] [1932] AC 161.

[47] Le Miere, above n 45, 107. See also the critique of *New Mashonaland* in Michael Christie, 'The Director's Fiduciary Duty not to Compete' (1992) 55 *Modern Law Review*, 506.

Brothers Ltd (as commonly understood), the director is obligated to bring this news to the attention of her board only if (i) her interlocutor knew that she was a director of a biotech company *and* (ii) the director *herself* knew that the interlocutor knew that she was a director. Only then could it be said that she was aware that she received the information *because* she was a director and was therefore under an obligation to disclose the potential opportunity to the company. In many, perhaps most, instances, it will be impossible for the director to know, or even have an opportunity to discover, what was in the mind of the person giving the information. Making the operation of the fiduciary duty contingent on something which will probably be unknowable is impractical. In these circumstances, the director's conscience, as directed by her duty not to allow her own interests to conflict with the company or to make a profit from an opportunity lying within its area of business, should guide her and should compel her to make the company aware of the opportunity. How the statutory duties should be reformed in light of this argument is discussed in Part VI.

D *The relationship between the opportunity and the company's business*

The second criterion that must be fulfilled for a director to be liable for taking a corporate opportunity is that the opportunity must be one that is connected to the company's line of business. The law on this has been developed over a number of decades but is now well settled. In *Canadian Aero Services Ltd v O'Malley*,[48] Laskin J held[49] that whether an opportunity was one which belonged to the company depended upon whether it was a 'maturing business opportunity which the company is actively pursuing.' The test was subsequently expanded in *SEA Food International Pty Ltd v Lam*,[50] in which Cooper J held that an opportunity belongs to a company if there is a connection between it and the 'nature and extent of the company's operations and anticipated future operations.'[51] In other words, a court must consider not only what activities a company is currently engaged in but those into which it might reasonably expand in light of its current scope of operations. Business opportunities lying outside these parameters may not be exploited by a director. Conversely, in the absence of such a connection, the director is free to keep the opportunity for him or her-self without disclosing it to the company.

IV Employees and corporate opportunities

As noted in Part I, the statutory duties differ in their scope. The duty of good faith and of acting in the best interests of the company in s 181 apply only to directors and officers, whereas the duties relating to misuse of position and information contained in ss 182 and 183 apply to directors, officers and employees. By so doing, ss 182 and 183 cast their obligations more widely than does the law of other jurisdictions which have put directors' duties into statutory form, as for example the United Kingdom, where ss 170 - 177 of the *Companies Act 2006* (UK) impose duties only on directors, and New Zealand where the same is true of ss 131-138 of the *Companies Act 1993* (NZ).

In contrast to the duties imposed by ss 182 and 183, the omission of employees from the scope of s 181 means that employees are not bound by a statutory duty of good faith and to act in the best interests of a corporation. Thus an employee who takes a corporate opportunity (without using their position or corporate information), does not breach the Act.

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[48] (1973) 40 DLR (3d) 371.
[49] Ibid 382.
[50] (1998) 16 ACLC 552.
[51] Ibid 557.

But leaving aside the Act, are employees fiduciaries under the common law? If they are, then given that s 185 states that the common law carries on in effect notwithstanding the existence of the statutory duties, could an employee who competed with the company be held liable to surrender their profit notwithstanding parliament's evident intent to exclude them from the scope of s 181, as distinct from ss 182-3?

The question of whether employees owe a fiduciary duty to employees is complex and fact-specific.[52] In *Hospital Products Ltd v United States Surgical Corp*[53] Mason J stated that a fiduciary relationship is one in which

> … the fiduciary undertakes or agrees to act for or on behalf of or in the interests of another person in the exercise of a power or discretion which will affect the interests of that other person in a legal or practical sense. The relationship between the parties is therefore one which gives the fiduciary a special opportunity to exercise the power or discretion to the detriment of that other person who is accordingly vulnerable to abuse by the fiduciary of his position.

Mason J included the relationship between employees and employers in his list of relationships that were fiduciary in nature, although he stated that the scope of the duty was to be 'moulded according to the nature of the relationship and the facts of the case,'[54] which suggests that not all employer-employee relationships are automatically fiduciary.

The question of whether employees owe a fiduciary duty to employees has been clouded by the existence of a duty of good faith and fidelity that has long been implied in contracts of employment but differs from fiduciary duty.[55] This point was discussed at length by Elias J in the English case of *Nottingham University v Fishel,*[56] where he stated as follows:

> It is true that in *A.G. v Blake* [1998] Ch 439 Lord Woolf, giving judgment for the Court of Appeal said that the employer-employee relationship is a fiduciary one. But plainly the Court was not thereby intending to indicate that the whole range of fiduciary obligations was engaged in every employment relationship. This would be revolutionary indeed, transforming the contract of employment beyond all recognition and transmuting contractual duties into fiduciary ones. In my opinion the Court was merely indicating that circumstances may arise in the context of an employment relationship, or arising out of it, which, when they occur, will place the employee in the position of a fiduciary. In Blake itself, as I have indicated, it was the receipt of confidential information. There are other examples. Thus every employee is subject to the principle that he should not accept a bribe and he will have to account for it (and possibly any profits derived from it) to his employer. Again, as Fletcher-Moulton L.J. observed in *Coomber v Coomber* [1911] 1 Ch.723 at 728, even an errand boy is obliged to bring back my change, and is in fiduciary relations with me. But his fiduciary obligations are limited and arise out of the particular circumstances, namely that he is put in a position where he is obliged to account to me for the change he has received. In that case the obligation arises out of the employment relationship but it is not inherent in the nature of the relationship itself.

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[52] For an excellent summary of the scope of fiduciary duties see Wood, C., (2018) *Fiduciary Duties*. Retrieved from https://www.13wentworth.com.au/wp-content/uploads/2019/01/Fiduciary-Duties-010518.pdf

[53] (1984) 156 CLR 41, 96-7.

[54] Ibid 102.

[55] The distinction between the two is discussed in Andrew Frazer, 'The employee's contractual duty of fidelity' (2015) 131 *Law Quarterly Review* 53.

[56] [2000] ICR 1462, 1490-3.

> As these examples all illustrate, simply labelling the relationship as fiduciary tell us nothing about which particular fiduciary duties will arise. As Lord Browne-Wilkinson has recently observed in *Henderson v Merrett Syndicates Ltd* [1994] UKHL 5; [1995] 2 AC 145 at 206: "… the phrase 'fiduciary duties' is a dangerous one, giving rise to a mistaken assumption that all fiduciaries owe the same duties in all circumstances. This is not the case". This is particularly true in the employment context. The employment relationship is obviously not a fiduciary relationship in the classic sense. It is to be contrasted with a number of other relationships which can readily and universally be recognised as "fiduciary relationships" because the very essence of the relationship is that one party must exercise his powers for the benefit of another. Trustees, company directors and liquidators classically fall into this category which Dr. Finn, in his seminal work on fiduciaries, has termed "fiduciary offices". (See PD Finn, "Fiduciary Obligations" (1977)). As he has pointed out, typically there are two characteristics of these relationships, apart from duty on the office holder to act in the interests of another. The first is that the powers are conferred by someone other than the beneficiaries in whose interests the fiduciary must act; and the second is that these fiduciaries have considerable autonomy over decision making and are not subject to the control of those beneficiaries.
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> By contrast, the essence of the employment relationship is not typically fiduciary at all. Its purpose is not to place the employee in a position where he is obliged to pursue his employer's interests at the expense of his own. The relationship is a contractual one and the powers imposed on the employee are conferred by the employer himself. The employee's freedom of action is regulated by the contract, the scope of his powers is determined by the terms (express or implied) of the contract, and as a consequence the employer can exercise (or at least he can place himself in a position where he has the opportunity to exercise) considerable control over the employee's decision making powers. This is not to say that fiduciary duties cannot arise out of the employment relationship itself. But they arise not as a result of the mere fact that there is an employment relationship. Rather they result from the fact that within a particular contractual relationship there are specific contractual obligations which the employee has undertaken which have placed him in a situation where equity imposes these rigorous duties in addition to the contractual obligations. Where this occurs, the scope of the fiduciary obligations both arises out of, and is circumscribed by, the contractual terms; it is circumscribed because equity cannot alter the terms of the contract validly undertaken. The position was succinctly expressed by Mason J in the High Court of Australia in *Hospital Products Ltd v United States Surgical Corporation* (1984) 156 CLR …

Elias J's approach has been adopted in several Australian cases. In *Prestige Lifting Services Pty Ltd v Williams*,[57] Beach J cited *University of Nottingham v Fishel* in support of the proposition that that an employment relationship does not in itself give rise to fiduciary obligations and, while noting Mason J's inclusion of employees in his list of fiduciaries in *Hospital Products v United States Surgical Corp*,[58] held that the scope of any fiduciary obligations will depend on the particular relationship.[59] The same was said by Ball J in *Blue Visions Management Pty Limited v Chidiac*[60] and by Collier J in *Investa Properties Pty Ltd v Nankervis (No 7)*.[61] Similarly, in both *Woolworths Limited v Olson*[62] and *Victoria University of Technology v Wilson*[63] it was held that the employer-employee relationship is not a fiduciary one as a matter of general principle, but that an employee may become subject to fiduciary duties because of his or her role. An example of this is provided by *Colour Control Centre v Ty*,[64]

[57] [2015] FCA 1063, [196].
[58] (1984) 156 CLR 41, 96-7.
[59] [2015] FCA 1063, [210].
[60] [2017] NSWSC 255, [135].
[61] [2015] FCA 1004, [66].
[62] [2004] NSWSC 849, [214] (Einstein J).
[63] [2004] VSC 33, [145] (Nettle J).
[64] (1996) 39 AILR 5-058.

where Santow J held that employees below the level of senior executives may owe a corporation a fiduciary duty, and that the more senior the employee, the more likely that will be. In *Singtel Optus v Almad*,[65] a middle manager was held to owe a fiduciary duty to the company which employed him.

However, in the recent High Court case of *Ancient Order of Foresters in Victoria Friendly Society Limited v Lifeplan Australia Friendly Society Limited*,[66] Gageler J stated that an employer-employee relationship is fiduciary.[67] Does this pronouncement by the High Court mean that *all* employer-employee relationships are indeed fiduciary and that statements to the contrary in the cases mentioned above are incorrect? I would submit not, for the following reasons: First, Gageler J made his statement without comment and without analysing, much less over-ruling, those cases which have said that whether a relationship is fiduciary in nature is fact-specific. Second, the authorities cited by Gageler J in explaining the content of the duties owed by and employee do not support his broad characterisation of the relationship as inherently fiduciary. The first case, *Gibson Motorsport Merchandise Pty Ltd v Forbes*,[68] related to a joint venture rather than a contract of employment, while the second, *Hospital Products Ltd v United States Surgical Corp*[69] is also, as stated above, not authority for the broad proposition advanced by Gageler J, because Mason J's statement that the employer-employee relationship is fiduciary was subject to the qualification that the scope of the duties was to be 'moulded according to the nature of the relationship and the facts of the case.'[70]

I would therefore argue that the common law does not impose a general fiduciary duty on employees, but rather that the existence of such a duty will depend on the specifics of the relationship. This was eloquently stated by Lord Greene MR in *Hivac v Park Royal,*[71] where he said:

> I can very well understand that the obligation of fidelity, which is an implied term of the contract, may extend very much further in the case of one class of employee than it does in others. For instance, when you are dealing, as we are dealing here, with mere manual workers whose job is to work five and a half days for their employer at a specific type of work and stop their work when the hour strikes, the obligation of fidelity may be one the operation of which will have a comparatively limited scope. The law would, I think, be jealous of attempting to impose on a manual worker restrictions, the real effect of which would be to prevent him utilizing his spare time. ... On the other hand, if one has employees of a different character, one may very well find that the obligation is of a different nature.

Based on this reasoning, I would argue that whether a fiduciary duty attaches to employees under the common law – and thus whether an employee is prohibited from taking opportunities which lie within the corporation's area of business - depends on the level of responsibility held by the employee and his or her capacity to affect the corporation as a whole. Thus, to take a hypothetical example a checkout-operator employed by a corporation that owns a chain of supermarkets who works three days a week for that corporation should not be said to be subject to a fiduciary duty which would prevent him or her from working for another supermarket chain on two other days each week – an occurrence which is surely not uncommon. I would go further and say that such a checkout operator would not be acting unlawfully if they noticed and

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[65] [2013] NSWSC 1427.
[66] [2018] HCA 43.
[67] Ibid [67].
[68] [2006] FCAFC 44.
[69] (1984) 156 CLR 41, 96-7.
[70] Ibid 102.
[71] [1946] Ch 169, 174-5.

exploited an opportunity to open a convenience store that sold groceries and which thus competed with the supermarket chain. These conclusions are based on the fact that a checkout operator is at the bottom of the hierarchy in a supermarket chain and, apart from the obligation to discharge their duties as a checkout operator faithfully, is not vested with the capacity or responsibility to make decisions that affect the corporation's business. Their responsibility is wholly confined to following instructions. By contrast, one could imagine a person who is a mid-level employee in the marketing division of the same supermarket corporation and who is vested with the responsibility of planning advertising campaigns and buying advertising space in newspapers and time on TV stations. Even though that person's role would not meet the definition of an 'officer' of the corporation under s 9 of the Act, I would argue that by virtue of the discretion inherent in their role and their capacity to affect the corporation, they would be under a fiduciary duty not to work for another corporation. In light of the argument presented in Part III, I would argue that they would also be under an obligation to draw to their corporation's attention business opportunities falling within the corporation's line of business and of which they became aware.

V Circumstances in which a director is permitted to take a corporate opportunity

Assuming that an opportunity does belong to a corporation, under what circumstances may the corporation relinquish the opportunity, thereby allowing the officer to take it for him or herself?

It is well-established that disclosure to, and consent by, the board is insufficient to allow a director to take a corporate opportunity. This is because of the risk of collusion between board members, which could take the form of the board agreeing to surrender an opportunity to one of their number, with that person then participating in the relinquishment of an opportunity to another board member, and so on. This has led to the rule that acquiescence by the board in an officer's taking of an opportunity is insufficient to shield the officer from liability to the corporation, and that the approval of shareholders in a general meeting is also required, as held in *Furs v Tomkies*.[72]

May a director who is seeking that permission and who is also a shareholder him or her-self vote their shares? In *North-West Transportation Co Ltd v Beatty*[73] it was held that a director does not owe a fiduciary duty in their capacity as shareholder and may therefore participate in a vote which validates conduct that would otherwise be a breach of duties. Ford argues that this precedent still stands.[74] However, the court's statement in *North-West Transportation* was subject to the qualification that that the approval not be 'fraudulent or oppressive to those shareholders who oppose it.'[75] Given that taking a corporate opportunity will be oppressive other than in circumstances where the other shareholders unanimously approve surrender of the opportunity, a director's self-condonation by means of the use of his or her voting power will be oppressive under s 232 of the Act. Furthermore, in the later case of *Cook v Deeks,*[76] the court held that where directors who collectively owned 75% of the shares in a company had used their voting power in a general meeting to validate the diversion of

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[72] (1936) 54 CLR 583. The case of *Queensland Mines Ltd v Hudson* (1978) ALR 1 is sometimes cited as authority for the proposition that the board on its own may relinquish an opportunity to a director. However that is to overlook a key fact of the case which was that collectively the board members owned 100% of the shares in the company and so consent by the board also amounted to consent by shareholders. See Austin, Ramsay and Ford, above n 4, 665-6.
[73] (1887) 12 App Cas 589 (PC), 593. See also *Burland v Earle* [1902] AC 83.
[74] Austin, Ramsay and Ford, above n 4, 663.
[75] (1887) 12 App Cas 589 (PC), 593.
[76] [1916] 1 AC 554.

an opportunity to a separate company they had set up, their ratification of their own breach of duty was ineffective and they and were liable to surrender their profit to the company.

The better view which I would argue that the courts should adopt, is therefore that any vote by shareholders to authorise the taking of a corporate opportunity by a director must be by disinterested shareholders only, and that the director seeking the authorisation may not vote his or her shares.[77]

VI Conclusion and suggested reforms

The argument in this article is that the law in relation to corporate opportunities in Australia is both too narrow and too broad. It is too narrow in that by restricting the liability of fiduciaries for the taking of corporate opportunities only to those opportunities discovered in circumstances where there is a connection between the opportunity and the fiduciary's office-holding, it reduces the fiduciary's obligation always to act in the best interests of the corporation to a 'part-time' one and creates evidentiary problems that will in many instances make it impossible to determine whether such a connection exists, particularly where that depends on the state of mind of a person informing the fiduciary of the opportunity and of the fiduciary when he or she receives that information.

Liability is also too narrow in that there is residual authority to the effect that, when seeking permission from shareholders to take an opportunity, a fiduciary who is also a shareholder may vote their shares. This amounts to the fiduciary validating what would otherwise be his or her own harm to the company.

On the other hand, the law is too broad if one reads the word 'employee' in ss 182 and 183 of the Act as imposing a fiduciary duty on all employees, irrespective of their level and function in the corporation, because this would be to impose liability on a class of people who, according to the common law, do not automatically owe a fiduciary duty to their employer.

In light of this, I would suggest that the following approaches be adopted by the courts in interpreting this area of the law:

- In developing the common law duty of good faith, and in interpreting the s 181 duty to act in the best interests of a corporation, the courts should adopt the rule that directors and officers are under an obligation to bring to a company's attention opportunities that falls within the company's line of business, irrespective of the circumstances in which the opportunities were discovered. There are two ways in which this could be done: The first is by departing from the precedent in *Regal (Hastings) Ltd v Gulliver* that breach of the profit rule applies only in cases where a profit is made as a result of office-holding. The second is by abandoning the traditional view of the conflict rule contained in *London and Mashonaland Exploration Company Limited v New Mashonaland Exploration Company Limited*[78] and *Bell v Lever Brothers Ltd*[79] and adopting instead the new approach in *Commonwealth Oil and Gas Company Limited v Baxter and Eurasia Energy*.[80] Whether the courts changed their approach to either the profit rule or the conflict rule (or both) the effect would be to cast upon directors and officers a duty to draw to the

[77] Hanrahan, Ramsay and Stapledon, above n 23, 328.
[78] [1891] WN 165.
[79] [1932] AC 161.
[80] [2009] CSIH 75.

attention of a company any opportunity falling within the scope of its business irrespective of the circumstances in which it was discovered.

- Where a director seeks the permission of shareholders to take a corporate opportunity in circumstances where the director is also a shareholder him or her-self, the courts should resolve the inconsistency between *North-West Transportation Co Ltd v Beatty*[81] and *Cook v Deeks*[82] in favour of the latter, and should hold that shareholder approval for the taking of a corporate opportunity is invalid if a fiduciary who is also a shareholder and who is seeking permission to take the opportunity votes his or her own shares.

- In interpreting ss 182 and 183 of the Act and the common law, the courts should interpret the term 'employees' as applying only to those employees whose relationship with the corporation is such as to require that they be subject to the statutory duties and to the common law duty of good faith, which should depend on the particular circumstances of the relationship, and in particular on the scope of authority given to employees and their level within the corporation.

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[81] (1887) 12 App Cas 589 (PC). See also *Burland v Earle* [1902] AC 83.
[82] [1916] 1 AC 554.