RUGBY LEAGUE FOOTBALLERS AND "OPPRESSION OR INJUSTICE"[1]

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I. RUGBY LEAGUE FOOTBALLERS

Many people in New South Wales, particularly in Sydney, are interested in the practical aspects of the long-running tactical battle[2] between "Wests"[3] and "the League"[4] over Wests' purported exclusion from the Sydney Premiership competition: how many teams will ultimately play in competition; if fewer than hitherto, whether or not Wests will be excluded; if Wests are not excluded, which club will be or should be – and so on. Radio, television and newspapers quickly reported the general effect of the recent decision of the High Court of Australia in *Wayde* v. *New South Wales Rugby League Ltd;*[5] it seems that the League may decide such questions if acting honestly and in the interests of the game.[6] It may reasonably be predicted, therefore, that at some time in the future the number in the competition will be reduced to twelve. Whether or not Wests should be the club to be excluded remains a lively debating point for partisans on either side; whether or not they will, remains to be seen.

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1 Companies Code, s.320: "Remedy in cases of oppression or injustice".

2 The history of events is well documented in the law reports: *Wayde* v. *New South Wales Rugby League Ltd* (1984) 3 ACLC 158 (N.S.W. Sup.Ct), *New South Wales Rugby League Ltd* v. *Wayde* [1985] 1 NSWLR 86 (N.S.W. C.A.) and *Wayde* v. *New South Wales Rugby League Ltd* (1985) 3 ACLC 799 (H.C.A.).

3 The Western Suburbs District Rugby League Football Club, an unincorporated voluntary association, represented in the litigation under discussion by Frederick James Wayde, its Secretary, and John Cochrane, a member.

4 The New South Wales Rugby League Ltd, a company limited by guarantee. Both Wayde and Cochrane were members of the League as representatives of Wests.

5 Note 2 *supra* (H.C.A.).

6 See *e.g. Sydney Morning Herald,* 18 October 1985, 3.

The writer confesses to a culpable lack of curiosity, at least for a resident New South Welshperson, about these aspects of the case. However, professional interest as a student of company law is aroused by the opportunity that the case has given to the High Court to express views on the most recent reformulation of section 320 of the Companies Code; the great majority of reported decisions on the section, its antecedents and equivalent provisions in other jurisdictions have been at first instance.[7] In addition, there is the prospect that the Court may have adopted a generous and sympathetic approach in construing the section. The history of suggested and actual amendments to the section implies quite widespread community dissatisfaction with its operation. On the other hand, the record of litigation shows that the section, in its various forms, has most often been approached cautiously by judges. This may be because of strong considerations encouraging an approach to interpretation which respects rights recognised by the general law;[8] yet the section was designed to alleviate perceived limitations in the protection offered by such rights. It would be auspicious if examination of the judgments here were to show the High Court using the latest reformulation of the section as occasion for a fresh start.[9]

II. BACKGROUND

It is generally accepted that the antecedents of section 320 lie in recommendations made in the United Kingdom in 1945 by the Cohen Committee that:

7 Previous exceptions in Australia are *Re Bright Pine Mills Pty Ltd* [1969] VR 1002 (Vic. Sup. Ct F.C.), *Queensland Co-operative Milling Association Ltd* v. *Hutchison* (1977) 2 ACLR 188 (Qld Sup. Ct F.C.) and *Re Richard Pitt & Sons Pty Ltd* [1979] CLC 32,453 (Tas. Sup. Ct F.C.). Parallel statutory provisions in England seem to have been considered by the House of Lords only once, in *Scottish Co-operative Wholesale Society* v. *Meyer* [1959] AC 324: see *Gower's Principles of Modern Company Law,* 1979 (4th ed.) and 1981 (Supplement), 666 (the writer's researches have discovered none since). One or two English cases have been taken to the Court of Appeal, notably *Re H.R. Harmer Ltd* [1959] 1 WLR 62 and *Re Jermyn St. Turkish Baths Ltd* [1971] 1 WLR 1042. In New Zealand, only *Thomas* v. *H.W. Thomas Ltd* (1984) 2 ACLC 610, discussed *infra,* seems to have gone to the Court of Appeal.

8 Most often clearly expressed as reluctance to intervene in internal management. So, see the following comment on the reformulated s.320 in Ford, *Principles of Company Law,* 1985 supplement to 3rd ed. [1715]: "However, it remains to be seen whether the enlargement of grounds ... will lead to greater readiness on the part of courts to review business decisions of company managers and controllers."

9 Time and space combine to focus discussion here primarily on issues considered in the judgments in the High Court. Some issues raised in the lower Courts are therefore not referred to – for instance, who may apply for relief, whether or not complaint is limited to interference with financial interests, and whether or not the section extends to companies limited by guarantee. Many other things could be addressed in a comprehensive review of the latest version of the section, because many things were attempted in its reformulation: see the explanatory memorandum to the Companies and Securities Legislation (Miscellaneous Amendments) Bill 1983, paras 474-482.

> There be a new section under which ... the Court, if satisfied that a minority of the shareholders is being oppressed and that a winding-up order would not do justice to the minority, should be empowered ... to make such other order ... as to the Court may seem just.[10]

Legislation along these lines followed in a number of jurisdictions; such a provision was included in Australia's so-called Uniform Companies Acts of 1961 as section 186.[11] However, although the intention of the Committee had been "to strengthen the minority shareholders ... in resisting oppression by the majority",[12] and the Committee had thought that "our proposal will give the Court a jurisdiction which it at present lacks",[13] the simple translation of the terminology of the Committee into legislation did not anywhere prove entirely appropriate to achieve those ends.[14] Perhaps this ought to have been anticipated: references to oppression or to injustice were not unknown in cases attempting to elucidate the very principles which the Committee had found wanting,[15] and such a coincidence of terms would seem likely to encourage any tendency the Courts might have to assimilate the new jurisdiction to the old.

In 1962 the report of the Jenkins Committee was published.[16] It stated that the legislation in the United Kingdom (section 210 of the Companies Act 1948) did not "appear ... to have produced the results expected of it",[17] and that "if the section is to afford effective protection, it must extend to cases in which the acts complained of fall short of actual illegality".[18] The Committee went on to say:

> [O]ur own view as to the intention underlying section 210 as originally framed ... [is] that it was meant to cover complaints not only to the effect that the affairs of the company were being conducted in a manner oppressive (in the narrower sense) to the members concerned but also to the effect that those affairs were

10 *Report of the Committee on Company Law Amendment,* Cmd 6659, 95.

11 In Australia, similar provisions had appeared earlier in some of the States: see Ford, note 8 *supra,* 3rd ed. [1713].

12 Note 10 *supra,* para.60. The report referred to "the minority shareholders of a private company", but s.186, like other legislation based on the report, was not expressed to be so limited.

13 *Ibid.*

14 See *e.g.* Richardson J. in the New Zealand Court of Appeal in *Thomas* v. *H.W. Thomas Ltd,* note 7 *supra,* 614-615, commenting on experience in New Zealand and in the United Kingdom: "But despite the apparent breadth of the new jurisdiction its exercise proved difficult and there were no reported cases in which an order was made under sec. 209 [the New Zealand equivalent of s.186] and it seems only two such cases under its United Kingdom counterpart ... before both the New Zealand and the United Kingdom provisions were replaced in 1980."

15 See *e.g.* the judgment of Dixon J. in *Peters' American Delicacy Company Ltd* v. *Heath* (1939) 61 CLR 457, 506-507, which includes reference to United Kingdom authority to similar effect.

16 *Report of the Company Law Committee,* Cmnd 1749.

17 *Id.,* para.200.

18 *Id.,* para.203.

> being conducted in a manner *unfairly prejudicial* to the interests of those members. We think that the section should be amended to make this clear . . . [19]

Amendments based on this view have since been enacted in many jurisdictions.[20] The common thread throughout is resort, in one way or another, to the words "unfairly prejudicial"; apart from that, individual sections vary widely. The differences permit interesting comparisons to be made between the various sections but suggest that decisions in one jurisdiction deserve rigorous analysis before being accepted as authoritative in another.

III. UNITED KINGDOM

Section 75 of the Companies Act 1980 introduced the new terminology into the United Kingdom. The relevant provisions have since been re-enacted as Part XVII (sections 459 to 461) of the Companies Act 1985. They contain no reference at all to "oppression"; the fundamental question is solely whether or not conduct is "unfairly prejudicial".[21] The powers of the Court are simply expressed:

> If the court is satisfied that a petition under this Part is well founded, it may make such order as it thinks fit for giving relief in respect of the matters complained of.[22]

As section 75, the new provisions have been considered a number of times by the Courts,[23] although not yet at appellate level. Two cases have concerned the effect of the words "unfairly prejudicial". The first was *Re a Company (No. 004475 of 1982).*[24] Lord Grantchester Q.C., delivering judgment, regarded as "germane to the problem"[25] before the Court the following passage from section 28-13 of the 43rd edition of *Gore-Browne on Companies:*

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19 *Id.*, para.204, emphasis added. See also the recommendations of the Committee in para.212(c), using the same terminology. In para.204 the Committee explained its view further, citing with approval a dictum of Lord Cooper in *Elder* v. *Elder & Watson Ltd* [1952] SC 49, 55: "[T]he essence of the matter seems to be that the conduct complained of should at the lowest involve a visible departure from the standards of fair dealing, and a violation of the conditions of fair play on which every shareholder . . . is entitled to rely".

20 For an extensive survey of jurisdictions affected, see G. Shapira, *Minority Shareholders' Protection – Recent Developments* (1982) 10 NZULR 134. The author systematically discussed "unfair prejudice", including Canadian material in his review of authority. Decisions considered there are not considered further here.

21 Companies Act 1985 (U.K.), s.459(1): "A member of a company may apply to the court by petition for an order under this Part on the ground that the company's affairs are being or have been conducted in a manner which is unfairly prejudicial to the interests of some part of the members (including at least himself) or that any actual or proposed act or omission of the company (including an act or omission on its behalf) is or would be so prejudicial".

22 *Id.*, s.461(1); s.462(2) suggests a range of orders "[w]ithout prejudice to the generality of subsection (1)".

23 As well as those discussed here, reported decisions to date on s.75 include *Re a Company (No. 003324 of 1979)* [1981] 1 WLR 1059, *Re Bird Precision Bellows* [1984] Ch 419 and *Re O.C. Transport Services* (1984) 81 LSGaz 1044.

24 [1983] 1 Ch 178.

25 *Id.*, 189.

> Clearly a "dictionary definition" of "unfairly prejudicial" conduct ... will require a more liberal approach to the problems of minority shareholders in small companies. If "prejudicial" may be defined, in dictionary terms,[26] as "causing prejudice, detrimental to rights, interests, etc.," and "unfair" as that which is *not* "just, unbiased, equitable, legitimate," then clearly the new standard (as the Jenkins Report intended) will be less demanding of the petitioning shareholder in respect of the burden of proof and of the kind of conduct of which he is entitled to complain. Seemingly, what he must show is that the value of his shareholding in the company has been seriously impaired as a consequence of the conduct of those who control the company in a way that is "unfair".[27]

However, Lord Grantchester emphasised that the legislation was confined by its terms to "'unfair prejudice' of a petitioner 'qua member'".[28] He went on to say:

> I do not consider that *In re Westbourne Galleries Ltd* [1973] A.C. 360, which was a decision involving section 210 [the predecessor of section 75] in very different circumstances, requires a wider scope to be given to section 75. The decision in that case was primarily concerned with the rights of a member to obtain a winding up order on just and equitable grounds, and not on what constituted 'oppression' for section 210 purposes.[29]

Similar conclusions were reached in the second case, *Re London School of Electronics.*[30] Nourse J. held that conduct by the principal shareholder was "both unfair and prejudicial to the petitioner [the other, minority, shareholder] as a member of the company". However, counsel for the principal shareholder had argued that the petitioner was not entitled to relief because

> the just and equitable test should be imported into section 75 ... from its precursor, section 210 ..., and ... the petitioner must come to court with clean hands.

Nourse J. decided that "section 75 must be construed as it stood". The petitioner's conduct might be relevant to the issue of unfairness, but

> [t]here was no independent and overriding requirement that it should be just and equitable to grant relief, or that the petitioner should come to court with clean hands.

IV. NEW ZEALAND

In 1980 the new terminology was introduced into New Zealand,[31] in a revision of section 209 of the Companies Act 1955. By comparison with the United Kingdom, a belt and braces technique was adopted: under the amended sub-section 209(1), a member of a company

> who complains that the affairs of the company have been or are likely to be conducted in a manner that is ... oppressive, unfairly discriminatory, or unfairly prejudicial, to him ... may make an application to the Court ...

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26 Cited in Gore-Browne as *Concise Oxford Dictionary.*
27 Note 24 *supra,* 188-189.
28 *Id.,* 189. Gore-Browne was again quoted in support.
29 *Ibid.*
30 7 March 1985; noted in *The Times,* 9 April 1985. Quotations in this paragraph are taken from that note, a formal report not yet being available to the writer.
31 By s.11 of the Companies Amendment Act 1980.

This retains the old test, adds that suggested by the Jenkins Committee and includes, as well, a further test not hitherto encountered.[32] The provision of alternative tests seems to invite the separate construction of each, and there is the possibility of each interacting with the others.

The complications do not end there; in sub-section 209(2), the role of the Court is specified in completely different language:

> If on any such application the Court is of the opinion that it is just and equitable to do so, the Court may make such order as it thinks fit . . .

This seems to impose an additional limitation on the power of the Court: the implication is that the Court must first assess the propriety of an application on one set of criteria and subsequently determine whether or not to grant a remedy on another. In addition, a question arises as to the meaning in this context of the words "just and equitable": is it the same as when those words are used elsewhere in the legislation?[33]

In 1984, section 209 was comprehensively and systematically construed by the New Zealand Court of Appeal in *Thomas* v. *H.W. Thomas Ltd.*[34] The principal judgment was delivered by Richardson J. who, after traversing the history of the legislation, decided to treat "oppressive, unfairly discriminatory, or unfairly prejudicial" as a "wider global expression":[35]

> I do not read the subsection as referring to three distinct alternatives which are to be considered separately in watertight compartments. The three expressions overlap, each in a sense helps to explain the other, and read together they reflect the underlying concern of the subsection that conduct of the company which is unjustly detrimental to any member of the company whatever form it takes and whether it adversely affects all members alike or discriminates against some only is a legitimate foundation for a complaint under sec. 209. The statutory concern is directed to instances or courses of conduct amounting to an unjust detriment

32 The source of the further test may be found in the report in New Zealand in 1973 of the Macarthur Committee *(Final Report of the Special Committee to Review the Companies Act).* Para.364 reads, in part: "It has been suggested that the term 'oppressive' is too strong a word to be appropriate in all cases calling for relief under the section. On the other hand it has been urged that the term should be widened by adding to the word 'oppressive' the words 'discriminatory or unfairly prejudicial'. We would agree with this view". Who was responsible for the urging is not revealed. See also, the recommendation of the Committee in para.372(a).

33 These further complications seem to have had their origin in paras 363 and 371 of the report of the Macarthur Committee. But the Committee saw the words "just and equitable" as extending rather than as limiting the jurisdiction of the Court; it may therefore be doubted that the draftsman has succeeded in giving effect to the Committee's intentions. Compare the recommendations in para.372 of the report, where there is no reference to the words "just and equitable". Whatever the truth, the resulting section was regarded as "somewhat difficult" by Sir Thaddeus McCarthy in *Thomas* v. *H.W. Thomas Ltd,* note 7 *supra,* 620.

34 Note 7 *supra.* The official report is not yet available to the writer. For another discussion of the case, see R. Baxt, *The New Remedy in Oppression* (1985) 3 *C & SLJ* 21.

35 Note 7 *supra,* 616. In coming to this view, Richardson J. seems to have rejected the traditional definition of oppression, saying, " . . . it would I think be wrong to assume that the new section was intended to adopt the meaning accorded to 'oppressive' under the old English provision . . ." (*ibid.*). He then proceeded to cite, from the *Shorter Oxford English Dictionary,* definitions for all the terms used in the section but did not expressly adopt any of them, continuing with the statement next above quoted.

> to the interests of a member or members of the company. It follows that it is not necessary for a complainant to point to any actual irregularity or to an invasion of his legal rights or to a lack of probity or want of good faith towards him on the part of those in control of the company. Putting the focus of the compendious expression "oppressive, unfairly discriminatory, or unfairly prejudicial" on the justice and equity of the particular case harmonises the test under subsec. (1) with the just and equitable standard provided under subsec. (2) . . .[36]

The tension between the first two subsections of section 209 was thus resolved by assimilating the meaning of the more complicated formula in the first to the words "just and equitable" in the second. The other judges did not express disagreement with Richardson J. on this point.[37] However, while in principle such a construction of the first formula may not be untenable,[38] one may but speculate on what would have been the approach of the Court to the first formula standing alone.

Richardson J. then proceeded to consider the words "just and equitable", concluding that the Court should adopt the same sort of approach to their application here as in winding up cases.[39] He continued:

> Where the member is adversely affected . . ., the determination as to whether it is unjustly so within subsec. (1) calling for the granting of relief under subsec. (2) must turn on an overall assessment of the position in the company. Fairness cannot be assessed in a vacuum or simply from one member's point of view. It will often depend on weighing conflicting interests of different groups within the company. It is a matter of balancing all the interests involved in terms of the policies underlying the companies legislation in general and sec. 209 in particular . . .[40]

It is hard to decide precisely the place of this statement in the logic of the judgment as a whole. In order of reasoning it certainly follows immediately after consideration of "just and equitable", yet in terminology it seems to relate more directly to the words "unfairly discriminatory, or unfairly prejudicial". What is strongly suggested is an assimilation of the second formula to the first, the reverse of what was noted above. In determining where the emphasis properly lies, it may be significant that Sir Thaddeus McCarthy, who expressed doubts about the appropriateness of the winding up cases to a proper

36 *Id.*, 617.

37 The expression of their views was not unequivocal. Somers J. briefly considered the facts in terms of "[o]ppression, or unfairness attached to discrimination or prejudice" (*id.*, 619) but did not attempt to elucidate that phrase. He concluded: "For the rest I am in general agreement with the reasoning of Richardson J." (*id.*, 620). Sir Thaddeus McCarthy said: "I agree with his [Richardson J.'s] conclusion . . . and I do so generally for the reasons which he has developed in his judgment" (*ibid.*). He then added: "But the powers given by sec. 209 are ones which in my view should not be lightly exercised, especially so when a lack of probity or want of good faith is not established. These powers can invade the traditional rights of the shareholders . . ." (*ibid.*).

38 There is certainly a considerable degree of overlap in the reach of the two formulae; however, it seems unlikely that both, independently construed, would produce the same conclusion in every situation.

39 *Id.*, 617. In elucidating "just and equitable", Richardson J. quoted extensively from the judgment of Lord Wilberforce in *Ebrahimi* v. *Westbourne Galleries Ltd* [1973] AC 360.

40 *Id.*, 617-618.

understanding of "just and equitable" in section 209[41] and who also urged a conservative approach to the application of the section,[42] ultimately adopted a comparable opinion:

> All this is doubtless to say no more than Richardson J. has already said, namely that fairness is not to be assessed in a vacuum or simply from one member's point of view: there must be a balancing of all the interests involved.[43]

Richardson J. concluded this part of his judgment with an examination of the elements in the balancing process:

> thus to have regard to the principles governing the duties of a director in the conduct of the affairs of a company and the rights and duties of a majority shareholder in relation to the minority; but to recognise that sec. 209 is a remedial provision designed to allow the Court to intervene where there is a visible departure from the standards of fair dealing: and in the light of the history and structure of the particular company and the reasonable expectations of the members to determine whether the detriment occasioned to the complaining member's interests arising from the acts or conduct of the company in that way is justifiable.[44]

V. AUSTRALIA

1. Legislation

The new terminology did not reach Australia until 1 January 1984, when the Companies and Securities Legislation (Miscellaneous Amendments) Act 1983[45] came into force. The resulting form of section 320 of the Companies Code looks like an amalgam of the provisions in the United Kingdom and in New Zealand, but recast with some additional touches of its own. The primary basis for an application to the Court is set out in sub-section 320(1):

> that affairs of the company are being conducted in a manner that is oppressive or unfairly prejudicial to, or unfairly discriminatory against, a member or members, or in a manner that is contrary to the interests of the members as a whole.[46]

This is reminiscent of the New Zealand approach, although with the addition of a new fourth ground.[47] Sub-section 320(4A) makes it plain that an application may be made by a member who has been affected in some capacity other than as member.[48] This again is like the New

41 "[T]he language of sec. 209 is of course not the same as that in sec. 217, and I am a little doubtful about how much weight can be attributed to the just and equitable cases, when a Court is struggling with the language of sec. 209." (*Id.*, 620) On this point it must be assumed that Somers J. was "in general agreement with the reasoning of Richardson J." (*ibid*).

42 Note 37 *supra.*

43 *Id.*, 620.

44 *Id.*, 618.

45 S.89.

46 Companies Code, s.320(1)(a)(i); (ii) addresses the problems of past and anticipated actions in slightly different terminology.

47 This might be called the belt, braces and safety pin technique. There are a number of other differences of detail between s.320(1) and the New Zealand s.209(1); for instance, the reference here is to "affairs", there to "the affairs", and the member here "believes", there "complains".

48 S.320(4A)(b) and (c).

Zealand section[49] and is in contrast to the United Kingdom provisions.[50]

Sub-section 320(2) provides that "the Court may . . . make such order or orders as it thinks fit",[51]

> [i]f the Court is of the opinion –
>
> (a) that affairs of a company are being conducted in a manner that is oppressive or unfairly prejudicial to, or unfairly discriminatory against, a member or members . . . or in a manner that is contrary to the interests of the members as a whole . . . [52]

Two points may be made. First, the basis for an order is here expressed in a similar way to the basis for an application. In this respect section 320 resembles the United Kingdom legislation although, because such an effect is achieved there by other means,[53] there might conceivably be differences between the two jurisdictions in the granting of remedy; it is, however, quite unlike the New Zealand legislation where, as has been seen, the basis for an order is expressed in entirely different terms from the basis for an application. Secondly, there is no trace here, or anywhere else in section 320, of the words "just and equitable". This coincides with the United Kingdom legislation and diverges from the New Zealand legislation.

These assorted points of resemblance and divergence raise serious questions about the relevance to the interpretation of section 320 of either United Kingdom or New Zealand decisions. A superficial response might be that sub-section 320(1) should be interpreted in the light of New Zealand authority, sub-section 320(2) in the light of United Kingdom authority. But the New Zealand experience also suggests that the two sub-sections are largely interdependent, a relationship which in Australia is more explicit than in New Zealand, as well as quite differently expressed. In any event, while sub-section 320(1) certainly has strong similarities to the New Zealand sub-section 209(1), it has an added classification of its own. The resultant formulation is so detailed and lengthy that it is hard to see how it could reasonably be construed as a "global expression",[54] New Zealand authority notwithstanding.[55]

Section 320 diverges more fundamentally from section 209 in not anywhere using the words so central to sub-section 209(2), "just and equitable". There is therefore no inherent inducement to interpret the list in sub-section 320(1) in those terms. More significantly, the Courts

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49 S.209(1).

50 As interpreted by Lord Grantchester, Q.C., note 28 *supra* and accompanying text.

51 A list is provided, "without limiting the generality of the foregoing".

52 S.320(2)(a); (b) addresses past and anticipated actions in slightly different terminology – *cf.* s.320(1)(a)(ii).

53 "If the court is satisfied that a petition . . . is well founded . . .": Companies Act 1985 (U.K.) s.461(1).

54 Note 35 *supra.*

55 Other differences of detail between the Australian and New Zealand sections (referred to note 47 *supra*) cast further doubt upon the general applicability of New Zealand authority to s.320.

in the United Kingdom in the similar absence of the words from the provisions there have so far, as has been seen,[56] resolutely refused to import them. The parts of New Zealand judgments which clearly relate to the use of those words ought therefore to be applied to section 320 with reservations, if at all.

All this seems to lead to the conclusion that a proper understanding of sub-section 320(1)[57] will best be achieved if it is approached from scratch. This may in turn imply the careful separate consideration of each alternative which the sub-section embraces. In that case, "oppressive" may be taken to have its accepted meaning,[58] and "unfairly prejudicial" may be elucidated by United Kingdom authority.[59] Any dicta in New Zealand which can be accepted as applying primarily to the words used in sub-section 320(1) rather than to the words "just and equitable" may also be relevant.[60]

However, it is recognised that such an approach runs the risk of operating in a legalistic way. Perhaps section 5A and the proposed section 5B of the Companies and Securities (Interpretation and Miscellaneous Provisions) Code can be called in aid on the side of generosity. If so, the explanatory memorandum on section 320 prepared by the Commonwealth Attorney-General's Department[61] may assist. According to the memorandum, the amendments were proposed as "in many respects along the lines recommended by the Jenkins Committee (para. 212)";[62] that Committee was seen as proposing

> that a number of limitations which had been imposed on the oppression remedy by the restrictive interpretation given to it by the Courts and which substantially limited its effectiveness should be removed.[63]

The words "unfairly prejudicial" were acknowledged to have had their origin in the Committee's recommendations.[64] The memorandum continued:

> Gower at page 668 states that the use of the words "unfairly prejudiced" are [sic] intended to make it clear that it is not necessary to show "actual illegality or invasion of legal rights". The new terms are objective in nature and would cover cases where the company is run, even if in the best of good faith, in a way which is clearly unfair in its consequences to the complaining shareholder.[65]

56 Notes 29 and 30 *supra* and accompanying text.
57 And, similarly, of s.320(2).
58 Much has been written on this meaning, and it is not proposed to repeat it here. For a useful outline, see Ford, note 8 *supra*, 3rd ed. [1714].
59 For further comment on "unfair", see Ford, *ibid.*
60 Notes 40, 43 and 44 *supra* and accompanying text. For another opinion of the tests in the new s.320, see Ford, note 8 *supra*, [1715].
61 Explanatory memorandum to the Companies and Securities Legislation (Miscellaneous Amendments) Bill 1983, paras 474-482.
62 *Id.*, para.477.
63 *Id.*, para.475.
64 *Id.*, para.482.
65 *Ibid.* Para.482 is a long one with much to say on the intended operation of the new section but it elucidates only as quoted here the meaning of the grounds in s.320(1).

2. Litigation

These aspects of the operation of the new section 320 were first considered in the middle of 1984, in *Re G. Jeffery (Mens Store) Pty Ltd.*[66] Crockett J. dealt separately with each of the elements in section 320(1)(a). He decided first, upon a review of the facts, that "it has not been established that the affairs of the companies have been conducted in a manner contrary to the interests of the members as a whole".[67] He then proposed as four separate "questions for determination" each of the remaining elements in the clause,[68] commenting: "If any of these questions should be answered in the affirmative the Court is free to exercise a discretion in favour of winding up."[69]

Crockett J. proceeded to construe "oppressive", on the basis that "[it] must be given the same interpretation as it was prior to the amendment of the subsection".[70] Having briefly reviewed relevant authority, he decided that oppression in the appropriate sense had not been established in the case before him.[71] He went on to say:

> Now the newly introduced expressions "unfairly prejudicial to" and "unfairly discriminatory against" clearly contemplate conduct of greater amplitude than is understood by the term "oppressive". The new subsection has made the task of the applicant shareholder less onerous in respect of the conduct about which he is entitled to complain: *Re A Company* [1983] Ch. 178.[72]

But once again he decided that the applicant had not made out a case:

> The applicant's complaint is that he is required to abide by the decisions of the majority of shareholders or directors (as the case may be). There is nothing unfair in his being required to do so and, in consequence, it cannot be said that he has been unfairly prejudiced.[73]

And, quoting word for word from the judgment of Ongley J. in the New Zealand High Court in *Re H.W. Thomas Ltd*:[74]

> I take "acting in a discriminatory manner" in this context to mean acting in a manner which makes a difference or distinction between one shareholder and another or others or between groups of shareholders. No difference or distinction has been made between any other member and the petitioner.[75]

While the judgment makes no claims to construe section 320(1)(a) exhaustively, a number of important ideas can be gleaned from it. The approach adopted is the separate consideration and application of each element in the clause. "Oppression" is related to earlier authority. "Discriminatory" is defined. Suggestions emerge as to the meaning of

66 (1984) 2 ACLC 421 (Vic. Sup. Ct). The case dealt with two family companies with identical shareholders and boards of directors. For an earlier discussion, see Baxt, note 34 *supra.*

67 *Re G. Jeffery (Mens Store) Pty Ltd,* note 66 *supra,* 425.

68 *Ibid.* He also proposed a fifth question, "is it just and equitable that the companies be wound up", because an application in the alternative had been sought under s.364 on that ground.

69 *Ibid.*

70 *Ibid.*

71 *Ibid.*

72 *Id.,* 425-426. Crockett J. elsewhere in his judgment accepted "as a general guide" certain other comments in *Re A Company: id.,* 427.

73 *Id.,* 426.

74 (1983) 1 ACLC 1256, 1262-1263.

75 Note 66 *supra,* 426.

"prejudicial". Above all, the importance of "unfairly" is emphasised. However, in all this it is apparent that Crockett J. relied heavily on the judgment of Ongley J. at first instance in *Re H.W. Thomas Ltd.*[76] Discussion above has shown that quite a different approach to the New Zealand legislation was later taken in the same litigation by the New Zealand Court of Appeal. But for reasons already adduced it is submitted that the analysis of the Australian legislation by Crockett J. can stand alone, independently of the status of any New Zealand authority.

One other element in the judgment of Crockett J. deserves notice. In considering together "unfairly prejudicial ..., or unfairly discriminatory", he made the following comment:

> In relation to commercial questions such as retention of profits for use in the business I should in this case (despite the warning given in relation to the adoption of such an approach by Lord Wilberforce in *Ebrahimi* v. *Westbourne Galleries Ltd* [1973] A.C. 360 at p. 381) be unprepared to take any action so long as the managing director was acting bona fide and in what he honestly believed were the best interests of each company's members.[77]

Without attempting to evaluate the operation of this statement in the particular case, there is reason to sound a note of warning. Taken as it stands it seems to be an example of the judicial tendency noted at the outset to approach legislation like section 320 cautiously and in particular to avoid applying it in a manner which interferes with rights recognised by the general law. Undoubtedly the statement was very narrowly expressed. Yet there is a danger that its underlying ideas may be applied in a less restrained fashion in other situations.

Late in 1984, judgment was handed down at first instance in *Wayde* v. *New South Wales Rugby League Ltd.*[78] Hodgson J. decided that the action of the directors of the League "was oppressive within the meaning of sec. 320(2)(b) and was also unfairly prejudicial within the same paragraph."[79] In the course of doing so he adopted the same sort of approach to the construction of sections 320(1) and (2) as had Crockett J. in *Re G. Jeffery (Mens Store) Pty Ltd*[80] (although without referring to that case), that is, he separately considered each of the bases upon which an action may be founded. Also, by his application of the section, although not by exposition of it, he cast some light on "oppression" and "unfairly prejudicial". But otherwise his judgment

76 Note 74 *supra*.
77 Note 66 *supra*, 426.
78 Note 2 *supra* (N.S.W. Sup. Ct).
79 *Id.*, 176.
80 Note 66 *supra*.

raised a number of problems.[81] In any event, it was reversed by the New South Wales Court of Appeal in *New South Wales Rugby League Ltd* v. *Wayde*.[82]

The three members of the Court of Appeal were Street C.J., Kirby P. and Hope J.A., and they delivered a joint judgment. Their view was that "[t]he current Australian legislation is very similar to that enacted in New Zealand",[83] and they therefore referred to the decision of the New Zealand Court of Appeal in *Thomas* v. *H.W. Thomas Ltd.*[84] From the judgment of Richardson J. they quoted the passages reproduced above in which he construed "oppressive, discriminatory or unfairly prejudicial"[85] and in which he described the appropriate approach of the Court to its task,[86] but they excised almost completely his references to the "just and equitable" requirement in the New Zealand section.[87] They concluded: "We are in agreement with that approach to the new Australian provision in s 320 . . ."[88]

It thus seems that they treated and applied the first three elements in section 320(1)(a)(i) as "a global expression".[89] This left unconsidered the additional fourth ground in the Australian section. The Court of Appeal proceeded to deal with it separately:

> Section 320 also permits the court to intervene where the act or omission "was or would be contrary to the interests of the members as a whole". This reflects recognition of a long established principle of company law . . . namely that the corporate decisions whether at director or at shareholder level must be made "bona fide for the benefit of the company as a whole": *Allen* v. *Gold Reefs of West Africa Ltd* [1900] 1 Ch 656 per Lord Lindley at 671. The phrase used in s 320 is "the interests of the members as a whole" . . . [A]s at present advised, it seems difficult to place any meaning on "the interests of the members as a whole" that differs from "the benefit of the company as a whole". The only legitimate interests of the members would be their interests as corporators . . . It follows that the principles that have been evolved in the development of Lord Lindley's basic requirement of "the benefit of the company as a whole" are equally applicable to the statutory element in s 320 of "the interests of the members as a whole".[90]

Ultimately, the Court of Appeal expressed an essentially conservative

81 For instance, there has always been some uncertainty over whether the legislation is directed at the motive or at the effect of conduct. (For a recent discussion, see Ford, note 8 *supra*, [1715].) Hodgson J. saw this in terms of "whether there can be oppression within sec. 320 in any case where the directors do act bona fide in the interests of the company": note 2 *supra* (N.S.W. Sup. Ct), 173. As discussion here has anticipated, having stated the question in such a way, he then felt some reluctance to depart from the conceptual framework of the general law.

82 Note 2 *supra* (N.S.W. C.A.). Judgment delivered 14 February 1985.

83 *Id.*, 95.

84 Note 7 *supra*.

85 Notes 35 and 36 *supra* and accompanying text.

86 Notes 40 and 44 *supra* and accompanying text.

87 See note 39 *supra* and accompanying text. The only reference to remain was the rather indirect one reproduced in the text accompanying note 40 *supra*.

88 Note 2 *supra* (N.S.W. C.A.), 96.

89 The terminology of Richardson J. (note 35 *supra*), although this term was not quoted by the New South Wales Court of Appeal; *cf. id.*, 95-96.

90 *Id.*, 96.

idea of the proper judicial approach to section 320, arguably embracing a more sanguine view of the running of companies than that held by those responsible for enacting the legislation:

> Whilst it is true that the Code should be given a beneficial construction and not unduly narrowed by judicial decisions, the terms of s 320 must not lead courts into assuming the management of corporations, substituting their decisions and assessments for those of directors, who can be expected to have much greater knowledge and more time and expertise at their disposal to evaluate the best interests of the members of the corporation as a whole . . .
>
> Notwithstanding the adoption in Australia, as in New Zealand, of the wider language of "unfair prejudice", to supplement the traditional criterion of oppression, courts should exercise care in invading the traditional roles of directors and shareholders of companies to determine the management of the corporation.[91]

Despite respect for the source of this judgment, it is possible to argue on a number of grounds that the approach which it adopted to the construction of section 320 was less than ideal. The first ground resides in the nature of reliance on the reasoning of the New Zealand Court of Appeal in *Thomas* v. *H.W. Thomas Ltd.*[92] A number of problems appear. The most obvious is the dissection of the four elements in section 320(1)(a)(i) into two parts in a way that is by no means a necessary consequence of the wording of the section. Even if such dissection is accepted without question, issues remain of the significance in Australia of the reasoning of the New Zealand judges, both as to those parts of their reasoning quoted by the New South Wales Court of Appeal and as to those parts omitted. Presumably those parts quoted are to be accepted here solely as commentaries on the words constituting the first three elements in the Australian section; this is by no means an inevitable conclusion in their original context, although it has been suggested above as a possibility.[93] But a corollary may be that the parts of the New Zealand reasoning which were not reproduced by the New South Wales Court of Appeal are not part of the reasoning for Australian purposes, however integral they were to its original process. Certainly, the profound differences which arguably exist between the two jurisdictions through the respective inclusion and omission in their legislation of the words "just and equitable" have been entirely unexplored because unacknowledged; nor has the potential value of authority from the United Kingdom been considered.

Secondly, the approach taken in the judgment to the fourth element in section 320(1)(a)(i) involves but does not acknowledge or resolve a number of conceptual problems. By referring together to decision-making at shareholder and at director level, reasoning in the judgment

91 *Id.*, 102, quoting also the observations on policy in *Thomas* v. *H.W. Thomas Ltd* of Sir Thaddeus McCarthy, note 37 *supra.*

92 Note 7 *supra.*

93 Notes 40 to 43 *supra* and accompanying text.

tends to obscure rather than clarify distinctions between the principles governing the two; by expeditiously (if conditionally) assimilating "the members" to "the company" it ignores continuing debate about the meaning of the latter in the general law and does less than justice to the advertence of the legislature in choosing terminology for the section.

Finally, at a number of points in the judgment, the operation of section 320 is related or referred to concepts of the general law, especially to duties of good faith.[94] As a result, intentions of mitigating inadequacies in the operation of such concepts expressed by those responsible for the reformulation of the section may be in danger of being unrealised – not, perhaps, in the case before the Court but in future cases if similar perspectives and sentiments continue to hold sway.

The fate of this litigation was, of course, finally resolved by appeal to the High Court of Australia. That appeal was unanimously dismissed.[95] The principal judgment in the High Court was delivered jointly by four of the five judges who heard the case, Mason A-C.J. and Wilson, Deane, and Dawson JJ. Discussion of section 320 was quite brief, and observations on some of the points traversed above were almost cryptic. The reasons for the decision[96] were summed up in the third last sentence:

> It has not, however, been shown that they [the decisions of the Board of Directors of the League] were oppressive or unfairly prejudicial or discriminatory or that their effect was such as to warrant the conclusion that the affairs of the League were or are being conducted in a manner that was or is oppressive or unfairly prejudicial.[97]

It is clear that this sentence reproduces the elements in section 320. There is thus a strong if not overwhelming implication that ultimately the approach of the Court was to measure up the actions in issue against each of the elements specified in the section. There is certainly no trace here of the abridgement of those elements propounded in the Court of Appeal.

Unfortunately, nowhere in the judgment were any of the terms used in section 320 directly construed. The closest approach may be found in some observations on

> a case where the directors of a company, in the exercise of the general powers of management of the company, ... bona fide adopt a policy or decide upon a course of action which is alleged to be unfairly prejudicial to a minority of the members of the company.[98]

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94 Other instances could be added to those which appear in extracts reproduced here: *e.g.* observations on the role of the court, note 2 *supra* (N.S.W. C.A.), 99, which even if ostensibly directed to the case seem to carry wider implications.

95 Note 2 *supra* (H.C.A.). Judgment delivered 17 October 1985.

96 That is, on the s.320 argument. The other argument, "that the decisions ... were beyond the power of the Board" (*id.*, 802), is not separately discussed here.

97 *Id.*, 804. The word "unfairly" is emphasised in the report, but such emphasis does not appear in the judgment issued by the Court. *Cf.* note 105 *infra.*

98 *Id.*, 803.

For such general powers[99] attacked on such a basis, the observations in the judgment addressed, and hence emphasised, the issues raised by the word "unfairly":

> In that kind of case it may well be appropriate for the Court, on an application for relief under sec. 320, to examine the policy which has been pursued or the proposed course of action in order to determine the fairness or unfairness of the course which has been taken by those in control of the company. The Court may be required in such circumstances to undertake a balancing exercise between the competing considerations disclosed by the evidence: cf. *Thomas* v. *H.W. Thomas Ltd* (1984) 2 ACLC 610 at pp. 618, 620.[100]

The balancing process proposed in the New Zealand Court of Appeal by both Richardson J.[101] and Sir Thaddeus McCarthy[102] was thus given a measure of approval for Australia, although without reference to the reasons originally associated with it. The implication is strong that it is proper to link the particular parts of the New Zealand judgments here referred to with the terms in the New Zealand section which parallel the terms in the Australian section, and not with those which differ.[103]

But the above observations were obiter dicta: the case before the Court was not a case of the sort described. The Articles of Association of the League contained a provision, Article 76, which according to the judgment

> expressly conferred on the Board, a power to determine the nature and extent of the competition that was to take place in 1985 and the clubs that were to be permitted to participate in it.[104]

Faced with such a specific power, the judgment, in the course of determining that the particular exercise of the power had not been objectionable under section 320, pointed to those considerations which favoured the League, concluding:

> In truth, the Board was confronted with a conflict of immediate interest between Wests on the one hand and the League as a whole on the other and the exercise of the power conferred by Art. 76 must necessarily be prejudicial to one or the other. Given the special expertise and experience of the Board, the bona fide and proper exercise of the power in pursuit of the purpose for which it was conferred and the caution which a Court must exercise in determining an application under sec. 320 of the Code in order to avoid an unwarranted assumption of the responsibility for management of the company, the appellants faced a difficult task in seeking to prove that the decisions in question were *unfairly* prejudicial to Wests and therefore not in the overall interests of the members as a whole."[105]

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99 The judgment is not more specific. Presumably powers of the sort specified in Regulation 66 of Table A in Schedule 3 of the Companies Code would be included.

100 Note 2 *supra* (H.C.A.), 803.

101 Notes 40 and 44 *supra* and accompanying text.

102 Note 43 *supra* and accompanying text.

103 *Cf.* note 93 *supra.*

104 Note 2 *supra* (H.C.A.), 803. This idea was more fully explored earlier in the judgment: *id.*, 802.

105 *Id.*, 803-804. Although not in the report, the emphasis appears in the judgment issued by the Court.

Reversing the thrust of this part of the judgment, it may be possible to infer from the comments made, a list of grounds on which the judges might have been persuaded to make an order under section 320. However, whether any one of those grounds alone would have sufficed is not clear, and whether any such list could be regarded as exhaustive is open to doubt. What does emerge is that where the actions complained of are specifically anticipated and empowered by a clause in the constituting documents, an applicant faces a more difficult task in persuading the court than where the actions complained of arise under a clause more generally expressed.

Brennan J. agreed that the appeal should be dismissed, but delivered a separate judgment in which he considered the effect of section 320 at greater length. He, too, used the actual terminology of the section as his starting point: his view was that, by comparison with relevant principle at general law,[106] "[s]ection 320 ... extends the grounds for curial intervention",[107] and he quoted verbatim from section 320(2)(b) to indicate how.[108] Further, in his opinion:

> Clearly the legislature intends to provide a greater measure of curial protection to members of a company, especially if they be in a minority, than the protection afforded under earlier Companies Acts. In *Thomas* v. *H.W. Thomas Ltd* (1984) 2 ACLC 610, the Court of Appeal of New Zealand held that under a similar but not identical provision ... it was not necessary for a complainant to point "to any actual irregularity or to an invasion of his legal rights or to a lack of probity or want of good faith towards him on the part of those in control of the company": per Richardson J. at p. 617. I would respectfully adopt that observation and apply it to sec. 320.[109]

All this implies a positive and generous approach to the interpretation and application of the section. Some other parts of the judgment were, however, more guarded in expression. Brennan J. did not venture a definition of "oppressive", since he saw "unfairness" as "the critical question in the present case";[110] and, while he did say that "[i]n the case of some discretionary powers, any prejudice to a member or any discrimination against him may be a badge of unfairness in the exercise of the power",[111] the general tenor of his treatment of "unfairness" was deliberate:

> Prima facie, it is for the directors and not for the Court to decide whether the furthering of a corporate object which is inimical to a member's interests should prevail over those interests or whether some balance should be struck between them ... The question of unfairness is one of fact and degree which sec. 320

106 Outlined in the earlier part of his judgment: *id.*, 804-805.
107 *Id.*, 805.
108 *Ibid.* He later repeated from that quotation what he regarded as "the relevant expressions" to determination of "the present case": *id.*, 806.
109 *Id.*, 805-806. In the sentences which immediately follow, Brennan J. specifically adverted to the reference in the New Zealand section to justice and equity. But he drew no comparative conclusions, merely observing: "That textual difference may be material, but I do not pause to consider it now ... ".
110 *Id.*, 806.
111 *Ibid.*

> requires the Court to determine, but not without regard to the view which the directors themselves have formed and not without allowing for any special skill, knowledge and acumen possessed by the directors.[112]

Ultimately, the benchmark appeared as a species of the reasonable company director:

> The operation of sec. 320 may be attracted to a decision made by directors which is made in good faith for a purpose within the directors' power but which reasonable directors would think to be unfair. The test of unfairness is objective and it is necessary, though difficult, to postulate a standard of reasonable directors possessed of any special skill, knowledge or acumen possessed by the directors. The test assumes (whether it be the fact or not) that reasonable directors weigh the furthering of the corporate object against the disadvantage, disability or burden which their decision will impose, and address their minds to the question whether a proposed decision is unfair.[113]

The effect of these sentiments does not seem markedly different from that part of the majority judgment which accepted the balancing process proposed in the New Zealand Court of Appeal.[114] But there was a clear divergence in the way the tests were applied. As has been seen,[115] the majority confined the relevance of the balancing process to cases concerning "general powers of management". Brennan J., on the other hand, although he had acknowledged that the power in issue was "of such a nature that its exercise is apt to discriminate ... and to prejudice",[116] proceeded to apply to that power the approach which he had just outlined:

> There is nothing to suggest unfairness save the inevitable prejudice to and discrimination against Wests, but that is insufficient by itself to show that reasonable directors with the special qualities possessed by experienced administrators would have decided that it was unfair to exercise their power in the way the League's directors did.[117]

VI. "OPPRESSION OR INJUSTICE"

It is appropriate to attempt some conclusions and make some suggestions from this survey of legislation and litigation. Undoubtedly the starting point must be the decision of the High Court and in particular the joint judgment, however much the separate judgment of Brennan J. may impress for having embraced a simple single rule of construction. In any event, both judgments almost certainly approved a step by step approach to each element in section 320(1)(a). The contrary view, despite its having been espoused by a strong bench in the New South Wales Court of Appeal, has its origins in a New Zealand provision which is fundamentally different in structure, notwithstanding

112 *Ibid.*
113 *Ibid.*
114 Note 100 *supra.*
115 Notes 98 to 100 *supra* and accompanying text.
116 *Id.*, 806.
117 *Id.*, 807.

coincidences in terminology. That view, it is submitted, no longer prevails.

The joint judgment also incorporated helpful observations on the word "unfairly", mentioning in terms of approval, without in the circumstances needing to adopt, the "balancing exercise" described in *Thomas* v. *H.W. Thomas Ltd* by Richardson J. and Sir Thaddeus McCarthy.[118] A similar although not identical approach was adopted by Brennan J. Because section 320 was introduced in order to remedy perceived defects in the operation of the general law, tension with the general law must be inherent in the philosophy of the section. Discussion above has pointed to a persistent judicial tendency to resolve that tension by referring back to the general law, to the detriment of the operation of the section. The balancing approach, operating in Australia through the medium of the word "unfairly",[119] is eminently practical and has the potential to resolve tension with the general law while producing results which are not out of sympathy with the philosophy of the section.

The joint judgment did not otherwise clearly expound the various elements in the section upon which an application may be founded. It therefore seems necessary to look elsewhere for their elucidation. Brennan J. may have provided a convenient general starting point in his approval of the observation of Richardson J. that

> it was not necessary for a complainant to point "to any actual irregularity or to an invasion of his legal rights or to a lack of probity or want of good faith towards him on the part of those in control of the company"[120]

but otherwise his judgment did not carry the search much further. The judgment of the New South Wales Court of Appeal has incorporated the only extensive treatment to date of the clause "contrary to the interests of the members as a whole", even if that treatment is not beyond criticism. For the rest, the observations of Crockett J. in *Re G. Jeffery (Mens Store) Pty Ltd*[121] and, in turn, relevant statements in English authority may still be of assistance.

Where the joint judgment does raise more difficult problems is in its differentiation between cases involving "the exercise of the general powers of management of the company"[122] and cases involving "a power that is expressly conferred on the Board"[123] or, perhaps, cases where "the exercise of the power conferred ... must necessarily be

118 Notes 100 to 103 *supra* and accompanying text.

119 At this point there is a divergence from the New Zealand model if it is accepted that the reason for adopting the balancing approach there lies in the incorporation in the legislation of the words "just and equitable".

120 Note 109 *supra* and accompanying text. If this is accepted as stating the law it is difficult to imagine recourse being had in future to "oppressive" unless, contrary to what is elsewhere argued here, it takes on a new meaning.

121 Note 66 *supra*.

122 Note 2 *supra* (H.C.A.), 803.

123 *Ibid.*

prejudicial to one or the other."[124] While similar distinctions are not unknown to the general law,[125] they are by no means inevitable under the terms of the section, and the judgment of Brennan J. showed that the problem before the Court could equally well be resolved by the application of a single general principle. And if the delineation of classifications adopted is not entirely clear, neither is the content of principle to be applied in cases other than those involving "general powers of management". For the future, it is possible to say only that the exercise of such powers will be difficult to attack under the section and that the nature of the classification and the content of relevant general principle will require clarification in further litigation.

124 *Id.*, 803-804.
125 *Cf. Woods* v. *Cann* (1964) 80 WN (NSW) 1583.