SHAREHOLDER DERIVATIVE ACTIONS AND PUBLIC INTEREST SUITS: TWO VERSIONS OF THE SAME STORY?

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I. INTRODUCTION

In 1990 a minority shareholder in Spargos Mining NL brought a successful action in the Supreme Court of Western Australia, obtaining relief under what was then s 320 of the *Companies (WA) Code* - the oppression provision.[1] The shareholder, Mr David Jenkins has been the main force in a shareholder action group which has had a particular interest in the management of the larger group of companies of which Spargos was a part - the Independent Resources group. In this particular action,[2] Jenkins sought to bring to the Court's attention the actions of some directors of Spargos in sacrificing the interests of the company for those of other companies in the group (in which they were also directors). In the result, the court ordered that a new board of directors should be appointed to Spargos. Before coming to this conclusion, one of the Court's tasks was to decide whether Jenkins had standing to bring the action in the first place. It is some seemingly minor and brief comments made by the judge in dealing with this issue that are of interest here. In the course of argument, the judge's

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1 *Re Spargos Mining NL* (1990) 3 ACSR 1.

2 Jenkins has been instrumental in other actions against companies in the IRL group, see for example, *Jenkins v Enterprise Goldmines NL* (1992) 10 ACLC 136.

attention had apparently been drawn to a series of administrative law decisions that deal with the issue of standing in a public law context.[3] The judge, Murray J, disposed of these cases with the following comment: "The question of standing here does not arise in the context of the administrative or public law cases."[4]

The starting point for this article is an interest in the clear distinction which the judge felt able to draw between Jenkin's action, and cases where a plaintiff seeks to protect a matter of public right or interest.[5] "This case", said Murray J, "is, of course, not a case of that type."[6] This article is not concerned with the doctrinal correctness of this aspect of the decision, but with the attitudes and policies which underlie it.[7]

Teachers, students and practitioners of Australian corporate law are now accustomed to the idea that because of the 'federalisation' of company law, their field of interest and expertise requires some familiarity with aspects of Federal administrative law.[8] This article examines aspects of both corporate and administrative law, but not with the aim of providing a primer on administrative law principles for corporate lawyers. Instead, my concern is to explore the idea that the links between these two areas of knowledge or discourse are more fundamental than the simple inclusion in corporate law of the rules and forums of administrative law.[9] Both of these areas of legal discourse have had to confront similar issues, and have produced (albeit in different doctrinal guises) similar responses.

These issues concern the exercise of power within and by middle-to-large sized bureaucratic organisations. These issues are evidenced in the following questions: When is it permissible for a group to exercise decision-making power against the interests of particular members of the group? Under what circumstances will the ideal of majority rule *not* sanction a majority decision? When can a person or group challenge the actions of those who have been appointed to make decisions in the wider group? Who may make such a challenge?

The claim that such issues lie at the heart of *both* corporate and administrative law, and that both discourses have generated similar responses and thus embody similar problems, has been explored in an analysis presented by Gerald Frug in 1984.[10] Frug's reference is to American legal doctrine, and his article undertakes a broad analysis of both corporate and administrative law.

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3 These included *Australian Conservation Foundation Inc v The Commonwealth of Australia* (1980) 146 CLR 493 which is discussed later in this article.

4 Note 1 *supra* at 6.

5 *Ibid* at 4.

6 *Ibid* at 5.

7 Another example of this distinction is found in *Oatmont Pty Ltd v Australian Agricultural Co Ltd* (1991) 5 ACSR 75.

8 See *Corporations Act* 1989 Part 8 Div 2A, applied in each State and the Northern Territory by the application of laws legislation.

9 This inclusion does raise some important concerns and issues that are beyond the scope of this article.

10 G Frug "The Ideology of Bureaucracy in American Law" (1984) 97 *Harv L Rev* 1277.

His particular concern is to give a detailed demonstration of the self-contradictory ways in which these areas of law deal with bureaucratic power. This present article has a slightly different aim to Frug's paper. Using his argument as the starting point, this article compares the areas of company law and administrative law by reference to aspects of the rules of standing in Australia. In particular, I am interested in the application of rules of standing in situations such as the *Spargos Mining* case, where an individual seeks to enforce claims which are attributed to a wider group as opposed to asserting some unique and personal interest arising from membership of that group. Is there a similarity in the ways the law responds to a shareholder who seeks, on behalf of the company, to prosecute a director who has acted in breach of fiduciary duties, and a citizen who seeks, on the grounds of the public interest, to restrain the actions of a government official or agency?

That is the specific focus of this article. However, my purpose in undertaking this exercise goes beyond mere curiosity about the application of an intuitively compelling argument in the Australian context. A broader purpose concerns the question whether the principles which inform modern corporate law should be regarded as being confined to matters of private governance and the ordering of private interests, or whether they should now also be seen as dealing with the status of large corporations as public institutions.[11] Related to this point, I also want to explore the implication in Frug's argument that corporate law and administrative law are not self-contained areas of knowledge. Since my own interest lies in the legal discourses which surround corporations, I want to test the sceptical view that there is no such thing as 'corporate law' if by that term we mean a body of law which is unique, internally self-consistent, and distinct from other areas of law.[12] In this paper, then, I explore the idea that these different doctrines, rules etc are not *sui generis* but are shared and derivative.

These are the broad concerns that motivate this paper. As mentioned above, the paper is actually constructed around more specific issues. In Part II, I outline Frug's thesis and the themes it raises. In Part III, I explain why rules about standing offer a useful testing ground for this thesis, particularly in the context of derivative actions. Then in Part IV I outline recent developments in Australian administrative and corporate law doctrine and explore the linkages before drawing some conclusions in the final section.

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11 For an example of this argument see SM Beck "The Shareholders' Derivative Action" (1974) 52 *Canadian Bar Review* 159 at 159-60.

12 For an historical analysis of the role that university law schools have played in creating narrow specialisations, see D Sugarman "Legal Theory, the Common Law Mind and the Making of the Textbook Tradition" in W Twining (ed) *Legal Theory and Common Law* (1986) ch 3.

II. LAW AND BUREAUCRATIC POWER

Frug commences his argument by pointing out that, considered as bureaucratic organisations, modern public bureaucracies and large-scale business corporations have much in common.[13] Certainly there is an intuitive appeal in this argument. Both public and private bureaucracies operate on the basis of a separation between those who manage the enterprise, and those who are the intended beneficiaries. This separation results, amongst other things, from the fact that each constituency - the general public, and shareholders - is widely dispersed and therefore is unable itself to perform the tasks of management effectively. Moreover, these dispersed constituencies face similar difficulties in monitoring the actions of those to whom the power of management has been delegated. Yet despite the absence of any *de facto* control, both types of bureaucracy are clothed in a legal and political rhetoric which is designed to assure us, either as citizens or shareholders, that we retain some form of control in principle.

Legal doctrine plays a large part in this. As Frug argues:

> corporate and administrative law, [are] the two most important areas of legal doctrine devoted to explaining and justifying large-scale bureaucratic power.[14]

That is, we can read the doctrines that constitute these two areas of law as attempts to both legitimise the existence and operation of bureaucratic organisations, and also to provide some reassurance about the potential violation of individual freedoms which such organisations represent. This argument is certainly implicit in much company law writing, although only a few have scholars recognised it expressly. Mary Stokes, for example, begins her widely-read analysis of the theoretical framework of company law with the claim that "much of company law can be understood as a response to the problem of the legitimacy of corporate managerial power", a power which "potentially threatens the political-economic organization we associate with a liberal democracy".[15]

The point of Frug's argument is that not only do the doctrines of company law and administrative law attempt a similar task, but they undertake this task in very similar ways. Reviewing both areas of law, Frug constructs four different models (or ideal types) which have been generated to explain and justify the exercise of power by corporations and administrative agencies. He argues that these models, taken together, "encapsulate all the principal themes of corporate *and* administrative law".[16] In what follows I describe them only in general

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13 This argument is developed more fully in G Frug "The City as a Legal Concept" (1980) 93 *Harv L Rev* 1057.

14 Note 10 *supra* at 1277.

15 M Stokes "Company Law and Legal Theory" in W Twining (ed) *Legal Theory and Common Law* (1986) pp 155-6.

16 Note 10 *supra* at 1281, emphasis added. Whether these models do capture all such themes is open to argument. As will become apparent, they do not specifically refer to the role of governmental regulatory

terms, omitting the more detailed analysis and critique of each model which is to be found in Frug's article.

The first is the 'formalist model', in which bureaucracy is portrayed "as a rationalized, disciplined mechanism for implementing the wishes of its creators",[17] whether they be shareholders or citizens. In this model, bureaucratic organisations are regarded as neutral agencies, operating under the technical control of those to whom specialised managerial power has been delegated by constituents. Bureaucracies are therefore merely vehicles by which the interests of a collection of individuals can be expressed and effectuated.

Frug finds instances of this model in those tenets of administrative law which stress that because the role of the legislature is to give effect to the wishes of the electorate, then there should be strict limitations on those who exercise governmental decision-making authority. In Australia we find this embodied in the notion of responsible government, that is, the idea that there should be defined hierarchical lines of accountability which connect government departments to ministers, and ministers to Parliament.[18] Corporate law doctrine has expressed the same concerns by categorising directors as fiduciaries who must act by reference to 'the interests of the shareholders',[19] rather than their own personal interest.

Frug describes the second attempt to legitimise bureaucracy as the 'expertise model'. This model recognises that it is usual (indeed, necessary) for bureaucratic managers to exercise a wide range of discretionary power. However, this power is kept in check, so this model tells us, by the expertise and professionalism of those managers. In other words, bureaucracy "is built on loyalty rather than on discipline".[20] Constituents (eg shareholders) necessarily defer to the knowledge and expertise of the managers who are in effect 'the brains' of the bureaucracy. As Frug describes it, constituents:

> allow the executive the flexibility he needs to do his job and rely on his professionalism to advance their common interests in the best way possible.[21]

From the corporate law area, Frug points to the American business judgement rule as an expression of the expertise model. This rule aims to provide a 'safe harbour' for a director whose business decisions are made honestly, impartially, and on the basis of information gained from reasonable inquiries. The intention behind this rule, in Frug's words, is "to insulate from shareholder attack (or

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agencies, such as the Australian Securities Commission ("ASC"), nor to non-judicial methods of review, such as the Ombudsman.

17 *Ibid* at 1282. Note that the formalist model assumes that shareholders are, in a real sense, the owners - and thus the creators - of the company.

18 Writing from a US perspective, Frug refers to the "nondelegation doctrine" to make the same point, see *ibid* at 1300-1.

19 Earlier judicial descriptions of directors as agents of the shareholders fell even more clearly within this model. See, for example *Great Eastern Railway Company v Turner* (1872) LR 8 Ch App 149.

20 Note 10 *supra* at 1318.

21 *Ibid* at 1320.

other outside review) any management decision that is informed, is not arbitrary, and involves no disabling conflict of interest".[22] Australian law has not yet expressly recognised the business judgement rule as such.[23] Nevertheless, there are aspects of our corporate law which have much the same effect. Australian courts have, at least until recently, demonstrated considerable reluctance about interfering with management decisions. As one High Court decision has put it:

> Directors in whom are vested the right and duty of deciding where the company's interests lie and how they are to be served may be concerned with a wide range of practical considerations, and their judgement, if exercised in good faith and not for irrelevant purposes, is not open to review in the courts.[24]

Similar to the business judgement rule, s 1318 of the *Corporations Law* is also intended to relieve a director or officer of liability for negligence or breach of duty where that person has acted honestly and reasonably.[25]

Although he is not able to identify a comparable administrative law doctrine within this model, Frug argues that:

> concept of administrative expertise... is part of the rhetoric of administrative law opinions that invokes the same kind of deference to bureaucratic decisions.[26]

Thirdly, the 'judicial review model' is described as a response to concerns that neither control by constituents nor the exercise of managerial expertise can effectively limit the exercise of bureaucratic power in all cases. Ultimately, effective limitation has to be located "in the ability of the courts to review and, *when necessary*, to overturn the actions of bureaucratic organizations."[27] Thus, while this model accepts the legitimacy of both previous models, it nevertheless assumes that in the end bureaucracy can only be limited effectively by the rule of law. The words "when necessary" in the previous quotation are important. A preoccupation of this model is to determine the extent to which courts should intervene in the exercise of bureaucratic power, to balance the perceive need for judicial control with the ideal of bureaucratic autonomy. In the corporate law area, there is debate about the extent to which corporations should be seen as essentially private bodies, thereby limiting the occasions for outside review, or whether they are better regarded as entities established and operating under the aegis of state legislation, justifying an increasing role for external regulation.

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22 *Ibid* at 1322

23 The Senate Standing Committee on Legal and Constitutional Affairs has recommended the statutory introduction of such a rule in Australia, see *Company Directors' Duties: Report on the Social and Fiduciary Duties and Obligations of Company Directors* (1989) p 31. The Corporate Law Reform Bill 1992 has not followed this recommendation, but claims to have "taken the business judgement rule into account" in framing proposals for new provisions on directors' care and diligence, see *Draft Legislation and Explanatory Paper* (1992) p 278.

24 *Harlowe's Nominees Pty Ltd v Woodside (Lakes Entrance) Oil Co. NL* (1968) 121 CLR 483 at 493.

25 The Companies and Securities Law Review Committee *Company Directors and Officers: Indemnification, Relief and Insurance* Discussion Paper No. 9 (1989) p 47 argues that s 1318 and the business judgement rule both "rest on the same basic idea".

26 Note 10 *supra* at 1322.

27 *Ibid* at 1283 (emphasis added).

As has already been noted, courts in Australia have exhibited a general reluctance to intervene in what are seen as business decisions, and this issue has been particularly important in developing rules of standing.

Finally, Frug identifies the more recently developed 'market/pluralist model', which argues that either the free operation of market forces or the interplay of interest-group politics will act as a disciplinary check on administrative or corporate bureaucratic power.[28] In Australia at least, legal doctrine does not provide any clear expressions of this model. The market forces version of this model has been developed largely by law and economics scholars; in the corporate sector, for example, they argue that the ever-present possibility of a takeover (the market for corporate control) acts as an incentive for incumbent managers to maximise the value of the firm.[29] The pluralist variant can be found in those arguments which suggest that the board of a corporation should represent a cross-section of the entire constituency of the corporation. In other words, interest-group representation is seen as a necessary check on managerial excess.

Thus, to repeat, Frug's thesis is that both company and administrative law attempt to justify the existence of large-scale bureaucracies in modern society, and that both areas of law employ the same basic models to provide these justifications. Note, too, that in Frug's argument none of these models supersedes the others; each of the above models is available for use, often in combination.[30] There is more to his argument than this, however.

Writing from the perspective of the critical legal studies movement, Frug is concerned to do more than show the commonality of themes between these two areas of legal discourse. Whatever its flaws,[31] CLS analysis has shown that considerable insights can be gained from examining the ways in which dichotomous concepts determine the structure of liberal legal thought (an example is the difference between rules-based and standards-oriented approaches to legal regulation).[32] According to this analysis, traditional legal scholarship seeks to resolve cases and formulate doctrines by reference to certain supposedly incontrovertible ideals (for example, the rights of the individual). CLS tells us that these ideals are really "paired rhetorical arguments",[33] and that the process of deciding legal issues involves making, and then justifying, choices along one or more of these dichotomies.

Corporate law is structured by reference to several such dichotomies. In his analysis, Frug refers to the dichotomy between *objectivity and subjectivity*. As

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28 *Ibid* at 1355-77.

29 For a comprehensive introduction to the 'law and economics' analysis of corporate law see F Easterbrook and D Fischel *The Economic Structure of Corporate Law* (1991).

30 Note 10 *supra* at 1284.

31 For example, see P Drahos and S Parker "The Indeterminacy Paradox in Law" (1991) 21 *Univ WA L Rev* 305.

32 This example is particularly relevant given the current debate about the need for so-called 'fuzzy' (or standards-oriented) corporate law.

33 M Kelman *A Guide to Critical Legal Studies* (1987) p 3.

he sees it, each of the above models seeks to invoke 'objective' concepts (eg, expertise, judicial review or market forces) to constrain the arbitrary exercise of bureaucratic power. This is done in order to preserve a space within bureaucratic organisations for the realisation of subjective values (such as individual autonomy). Much of Frug's analysis is taken up with showing how each model has failed to maintain any rigid distinction between the objective and the subjective, and that the results have been indeterminate and contradictory.

Without denying the relevance of the subjective/objective dichotomy to analyses of corporate law, this article analyses rules of standing by reference to two other dichotomies.[34] One is the attempt to divide social, economic and political life between the realms of private interests and public duties. As a generalisation, liberal legal doctrine is oriented in favour of protecting private interests from unwarranted public intervention. However, these days it seems to be widely accepted amongst political theorists that the distinction between private and public obscures much that is interesting in modern society. Certainly, it seems to have impeded the possibility of analysing the similarities between the operation and regulation of corporate and governmental bureaucracies. Recognising this, it is nevertheless important to bear in mind that the categories of public and private continue to exert a pull on the development of corporate law doctrine and regulatory policy.[35]

The second dichotomy is the division that is said to exist between the individual and the group as the loci of legal analysis. Generalising again, it is the individual which forms the analytical basis of liberal legal thought. Of course, the law has also had to deal with the fact that individuals associate with each other and form form groups of varying permanence and complexity. This issue has been fundamental to the development of company law doctrine. As Christopher Stone has noted:

> at the time the law was in its formative stages, it was individual identifiable persons, operating outside of complex institutional frameworks, who trespassed, created nuisances, engaged in consumer frauds, killed, and maimed. The law responded with rules and concepts built upon contemporary notions about individuals - about what motivated, what steered, what was just toward *them*... [W]hile the legal system was prepared to recognize corporations as actors it was not prepared to adjust to their presence by significant revisions of its human-oriented premises.[36]

The tension that exists between the interests of the individual and those of the group becomes most apparent when one asks whether individuals (either shareholders or citizens) should have standing to bring actions against corporate or governmental decisions on behalf of that group-entity (ie derivative actions).

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34 This section of the article draws upon a more detailed argument I have made in "Taking Corporations Seriously: Some Considerations for Corporate Regulation" (1990) 19 *Fed L Rev* 203.

35 *Ibid* at 219.

36 C Stone *Where the Law Ends: The Social Control of Corporate Behaviour* (1975) pp 1-2.

It is, of course, artificial to treat these different paired concepts in isolation from each other. They merely represent particular aspects of the general liberal ideological presumption in favour of individualism, private and subjective value choices, and self-determination.[37] It is only for the purposes of analysis that they are separated here.

To conclude this part, if rules of standing are the reference point for comparing company and administrative law, then the individual/group and public/private dichotomies provide the criteria for comparison.

III. THE SIGNIFICANCE OF STANDING

That the exercise of bureaucratic power in our society is supported or legitimated by legal rules is hardly surprising - social theorists since Max Weber have told us that bureaucracy "is a necessary, inevitable feature of modern life".[38] Rules of standing have an important role in this process of legitimation. They seek to set threshold requirements, albeit in sometimes vague terms, defining the occasions and grounds upon which individuals can formally challenge the exercise of bureaucratic power.[39]

As will be seen, there are similarities between the ways in which rules of standing are applied to business and governmental bureaucracies. In the case of a company, there is a basic legal presumption that it is the company as a separate legal entity which must assert the rights of the company as a whole, while, generally speaking, shareholders are confined to asserting their own personal rights.[40] Similarly, administrative law works from the assumption that it is the task of representative government to assert the public interest, leaving citizens to look after their own private rights.[41] I will examine both of these positions in more detail in the next section. For the moment it is useful to consider the general significance of standing in a little more detail.

A wide range of functions have been attributed to rules of standing. For example, Scott has suggested that these rules, especially when applied restrictively, are a device by which the court system can both ration its scarce resources and also divert cases towards other methods of dispute resolution.[42] The first of these suggestions has also been expressed as the familiar argument that the 'floodgates of litigation' would open in the absence of standing requirements. Further, it is argued that a requirement of standing is a guard against that other nemesis of the court system, the 'vexatious litigant'. Finally,

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37 Note 34 *supra* at 213.

38 Note 10 *supra* at 1280.

39 Of course rules of standing apply to litigation between any parties, whether individuals or groups. As noted earlier, however, my concern is with suits brought by individuals against groups.

40 This, of course, is the rule in *Foss v Harbottle* (1843) 2 Hare 461; 67 ER 189, which is discussed in the next part of this article.

41 *Gouriet v Union of Post Office Workers* [1978] AC 435.

42 K Scott "Standing in the Supreme Court - A Functional Analysis" (1973) 86 *Harv L Rev* 645.

standing rules are said to prevent the possibility that a single defendant will be harassed by a multiplicity of claims relating to the same issue. All of these arguments are open to debate, although that is not the purpose of this article.[43] What is interesting are the assumptions which underpin each of these arguments.

First, the requirement to establish standing is a device which symbolically separates individuals from the formal arenas of review and remedy in our society. Whilst some may argue that there are good reasons for this (eg, filtering out 'vexatious litigants') nevertheless the rules of standing constitute part of the boundary which defines the courts as a closed system. These rules invoke an image of courts and tribunals as public forums which are separate from the world of private individuals.

Secondly, in both its application and its imagery the idea of standing fosters an ideological preoccupation with the role of the individual in society. In the context of derivative actions, rules of standing demand that individuals (or classes of individuals)[44] must justify their position as plaintiffs before advancing any legal argument on behalf of a general group. Arguments about standing are structured in a way which treats the interests of the individual as severable from and independent of any wider context of interests. Winter has summarised this point as follows:

> 'Standing' is a conceptualization of the individual as the primary rights-holder, to the exclusion of his or her place in a larger community of interdependent legal and social interests.[45]

It should be added that while standing rules are grounded in a view of society as comprised of individuals, this is not to say that either individual or group interests will prevail in all cases in some predictable way. The present point concerns the mode by which cases are argued, not the outcomes of those cases.

A third point is that questions of standing have the capacity to deflect our attention from important substantive issues. Again, Winter makes the point well:

> the question 'who may sue?' is really a question of 'what are rights and how may they best be effectuated?' - a question at the heart of law. Standing obscures consideration and analysis of the underlying questions of rights and remedies, of policies and values, by imposing a single, unidimensional conceptual ordering of the process of adjudication.[46]

Moreover, a requirement that individual plaintiffs should have standing to sue expresses liberalism's concern with the importance of procedure in achieving justice. Winter continues:

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43 See Australian Law Reform Commission *Standing in Public Interest Litigation* (Report No. 27, 1985) at [186] - [206].

44 Under s 33D of the *Federal Court of Australia Act* 1976 the possibility of representative actions is premised upon each individual having standing to commence the proceeding.

45 S Winter "The Metaphor of Standing and the Problem of Self-Governance" (1988) 40 *Stan L Rev* 1371 at 1454.

46 *Ibid* at 1392.

> A determination of who has standing... is a determination about the way society is shaped and structured. In structuring and ordering the universe of legal relationships, standing law inevitably orders the way rights and other legal interests may be distributed.[47]

The extent to which the rules of standing restrict the possibility of challenges to bureaucratic action is an indication of how far our society is prepared to go in sanctioning the exercise of bureaucratic power. As is apparent from Frug's description of the different justificatory models, legal analysis permits some flexibility in both the formulation and the application of these rules. They may be framed restrictively or openly, and they permit the expression of different views about the nature of democratic process in bureaucratic structures. To the extent that both corporate law and administrative law are concerned with the exercise of bureaucratic power in our society, the rules of standing offer a useful ground on which to examine Frug's thesis about the similarity between company and administrative law in the Australian context.

IV. STANDING TO SUE: RECENT DEVELOPMENTS

It is beyond the scope of this article to review the rules of standing in their entirety. Instead, I simply intend to examine enough of these rules to illustrate their basic similarities and differences. As already indicated, I will do this by focussing on actions brought by individuals to assert the interests of the broader group. I will discuss the basic principles in each area, and then assess some recent and possible future developments.

A. COMPANY LAW

The leaden impact of the rule in *Foss v Harbottle*[48] on the capacity of minority shareholders to bring a derivative action where the directors or controllers of a company have breached their duties to the company is well known to students of Australian corporate law. As summarised in the later case of *Burland v Earle*, the rule is expressed as two principles. The first is 'the internal management principle':

> the Court will not interfere with the internal management of companies acting within their powers, and in fact has no jurisdiction to do so.

Secondly, 'the proper plaintiff principle' states that:

> in order to redress a wrong done to a company or to recover moneys of damages alleged to be due to the company, the action should prima facie be brought by the company itself.[49]

It is the combination of these two principles which has been used to restrict the standing of individual company members to bring derivative actions to

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47 *Ibid* at 1393.

48 (1843) 2 Hare 461; 67 ER 189.

49 [1902] AC 83 at 93.

remedy wrongs allegedly done to the company. A number of rationales for this rule have been suggested, the principal one being that it properly leaves the responsibility of deciding to mobilise the law in the hands of the corporate entity which has suffered the wrong, and that it protects those who manage the company from the prospect of unreasonable interruption caused by self-interested individual members. Of course, the power to decide whether a company will initiate legal action will, in most instances, be vested in and exercised by the board of directors.[50] In some cases, for example where a court stays proceedings to test the matter, the issue may be put to a general meeting of the members.[51] In either case, where the board or a majority of the members decide against legal action then, generally speaking, under the rule in *Foss v Harbottle* that is the end of the matter. The "best interests of the company",[52] determined either via the directors as fiduciaries or by a majority vote in a general meeting, trump the wishes of the individual minority shareholder. This point was decisive in *Foss v Harbottle* itself:

> The very fact that the governing body of proprietors assembled at the special general meeting may so bind even a reluctant minority is decisive to show that the frame of this suit cannot be sustained whilst that body retains its functions.[53]

This principle fits within the formalist model described by Frug, although he does not address it specifically. Judicial faith in the idea of majority rule allows us to separate the process by which decisions are made from the values or ethics that those decisions embody. The majority rule principle provides a mechanism by which those decisions can be justified in an objective way, and be conveyed to those whose task it is to manage the corporation. The fact of a majority vote says nothing about either the decision-making competence of the group, or "the nature of the questions which are to be submitted for plebiscitary determination by the group's members."[54] The resulting action (or, in the context of *Foss v Harbottle*, inaction) of the corporation is justified simply on the grounds that it is what most of the constituents have demanded. As one judge has put it, "[e]ven if the minority is profoundly convinced that a decision not to sue is wrong, the minority is a minority and not the majority."[55] If the company's resulting (in)action is thought by some to be wrong or reprehensible then their task is to persuade members of the error of their ways - the fault lies amongst the members, not with the corporation.[56]

Whilst the majority rule principle seems axiomatic to the idea of democratic decision-making, it also has its dark side - the prospect of majority oppression. For this reason the rule in *Foss v Harbottle* is usually expressed as a 'prima

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50 Most companies will adopt an equivalent of Table A art 66, giving the board a general power to manage the business of the company.

51 HAJ Ford and RP Austin *Ford's Principles of Corporation Law* (6th ed, 1992) at [1728].

52 *Allen v Gold Reefs of West Africa* [1900] 1 Ch 656 at 671.

53 (1843) 2 Hare 461 at 494; 67 ER 189 at 204.

54 W Kendall *John Locke and the Doctrine of Majority-Rule* (1959) p 31.

55 *Eastmanco (Kilner House) Ltd v Greater London Council* [1982] 1 All ER 437 at 443 per Megarry V-C.

56 Note 10 *supra* at 1299.

facie' position. Since *Foss v Harbottle*, it seems to have been clearly accepted that majority rule has its limitations, and should be supplemented by some system of judicial review (Frug's third model). As Megarry V-C has put it:

> Plainly there must be some limit to the power of the majority to pass resolutions which they believe to be in the best interests of the company and yet remain immune from interference by the courts.[57]

Over the years the courts have introduced a number of exceptions to this rule, that is, instances when an individual shareholder may be permitted to bring a case. Two are of interest here. One is the so-called 'personal rights' exception.[58] Where a member seeks to protect rights that are personal to one or more individual members from intervention by the company then that member may bring a personal action against those who threaten those rights. This unsurprising rule expresses the view, fundamental to liberal theory, that individual rights and interests must be protected, and that the *primary* responsibility for this lies with the individual concerned.

Another possible way around the restriction of *Foss v Harbottle* is the 'fraud on the minority' exception. One of the preconditions of a court invoking this exception is that it must be satisfied that the wrongdoers in the company form a decision-making majority, thereby precluding the chance of any voluntary legal action being brought in the company's name. In such a case, assuming that there is also evidence that the majority's actions constitute a 'fraud on its power', a court may then allow an individual member to bring a derivative action, suing as a representative of the company.[59]

In summary, the rule in *Foss v Harbottle* juxtaposes the notion of individual interests with a less clearly articulated conception of the interests of the company as a group-entity. The rule, together with its exceptions, presumes that it is possible to maintain a clear distinction between these two sets of interests. Beginning with principles drawn from the formalist model, later supplemented by those from the judicial review model, this rule seeks to prevent either set of interests from usurping the other.

The difficulty, as with all dichotomies, is that there is no accepted foundation for maintaining a clear distinction between these supposedly opposite interests. For one thing, we have no way of defining one set of interests without referring to the other. The idea of 'the group' is constituted, in part, by the notion of 'the individual', and individual-ness is something we define, in part, by reference to groups:

> these concepts can be understood only in terms of their relationships to each other: each takes on meaning only through those relationships.[60]

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57 Note 55 *supra* at 444.

58 Several commentators have argued that since personal, rather than company, rights are involved, that this is not strictly speaking an 'exception' to the rule at all. See, however, G Stapledon "Locus Standi of Shareholders to Enforce the Duty of Company Directors to Exercise the Share Issue Power for Proper Purposes" (1990) 8 *Co & Sec LJ* 213 at 223-4.

59 *Ibid* at 216.

60 Note 10 *supra* at 1381.

Neither concept seems possible without the other.[61] Even when we try to consider them in isolation, these concepts have no firm meanings. The point at which the personal interests of individual shareholders merge with or are superseded by those of the company is not self-evident in all cases. A further example can be found in judicial consideration of the concept of 'the interests of the company' in recent years. Does (or should) this concept embrace the interests of creditors, employees, or even consumers?[62]

As a consequence of this indeterminacy, the role of judicial discretion in deciding questions of standing is significant. In the course of reviewing the application of *Foss v Harbottle* by Australian courts, Sealy has commented that:

> A judge has only to assert that he regards the case as raising a matter of individual rights to give himself jurisdiction; alternatively he has the choice of declaring that the wrong was one done to the company and he can show the plaintiff the door.

Underlining the indeterminate nature of this process, Sealy adds:

> Characteristically, this vital pre-judgement of the situation is supported by only the barest of reasoning and authority, if any at all; and, of course, the longer that judges go on doing this, the wider the range of potentially contradictory dicta there will be in the reports to confuse further generations.[63]

Many case examples can be cited to illustrate the indeterminate nature of this distinction.[64] Because the focus of this paper is on the current (and likely future) situation, I will refer to just one example, the relatively recent decision in *Residues Treatment & Trading Co Ltd v Southern Resources Ltd (No 4)*.[65]

This case arose in the context of an attempted takeover of Southern Resources. The case involved a challenge by two minority shareholders of that company against a decision by its directors to allot shares to another company. The plaintiffs argued that this allotment was made in order to defeat the takeover and to secure control of the company for the present directors. As such, it was alleged that the directors had not acted in the best interests of the company. It is a basic tenet of corporate law that the duties owed by directors, and any wrongs committed by them, "run exclusively to the corporation".[66] At first instance, the plaintiffs were met with the argument, upheld by the court, that they had no standing to bring the action, on the basis of the rule in *Foss v Harbottle*. On appeal, the plaintiffs argued successfully that their claim fell within the *personal rights* exception to that rule. Giving the main judgement, King CJ began by recognising the proper plaintiff aspect of the rule in *Foss v Harbottle*. He went on to note that the rule "has no application where

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61 I am paraphrasing Frug's discussion of subjectivity and objectivity here, *ibid* at 1289.

62 This question has attracted considerable attention outside the courts. See, for example, the Senate Standing Committee on Legal and Constitutional Affairs *Company Directors' Duties - Report on the Social and Fiduciary Duties and Obligations of Company Directors* (1989).

63 LS Sealy "The Rule in Foss v Harbottle: the Australian Experience" (1989) 10 *The Company Lawyer* 52 at 54.

64 Compare, for example, *MacDougall v Gardiner* (1875) 1 Ch D 13 with *Pender v Lushington* (1877) 6 Ch D 70.

65 (1989) 14 ACLR 569.

66 S Beck note 11 *supra* at 170.

individual membership rights as opposed to corporate rights are involved."[67] His Honour was struck by the difficulty in making these distinctions:

> It must be acknowledged that there has often been a lack of clear differentiation in the cases between the situation in which the company is the only proper plaintiff, the situations in which a shareholder may prosecute a derivative action for a remedy in favour of the company and situations in which a shareholder may bring an action on his own behalf for a personal remedy.[68]

The solution which King CJ adopted to resolve this dilemma was to expand the category of personal rights.[69] His Honour concluded that although there was no express judicial authority on the point, there was what he called "a clear trend in cases of the highest authority" to indicate that each member of a company has a personal right not to have her/his/its voting power diluted by the improper actions of directors:

> [This] is a right to have the say in the company which accrues to [the shareholder] ... by virtue of the voting rights which are attached to his shares by his contract with the company, preserved against improper actions by the company or the directors who manage its affairs.[70]

In assessing this decision we should begin by reminding ourselves that *Foss v Harbottle* was decided at a time when the most common form of business structure was the partnership-like unincorporated joint stock company. Even though the actual company in *Foss v Harbottle* was incorporated by Act of Parliament, the judge in that case observed that "[c]orporations like this, of a private nature, are in truth little more than private partnerships."[71] There is much in this judgement, and in contemporary decisions, to suggest that the courts of the day relied upon the ideal of partnership, with its connotations of mutual, contractual obligations between private, individual business people, to justify the suppression of the wishes of the individual member in the face of the will of the majority. At the very least, this approach would have sent some welcome signals to a burgeoning commercial economy about minimising the risk of unwarranted outside intervention in associational business activity.

In contrast, the *Residues Treatment* case dealt with a corporate group, the quintessential model of corporate business activity in the late twentieth century.[72] In this context the application of the rule in *Foss v Harbottle*

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67 Note 65 *supra* at 575.

68 *Id.*

69 Some commentators have urged a similar strategy, that is, to effectively abolish the rule in *Foss v Harbottle* by regarding provisions in the articles and any breaches of directors' duties as affecting a member's personal rights. See JH Farrar, NE Furey, BM Hannigan *Farrar's Company Law* (3rd ed, 1991) p 448.

70 Note 65 *supra* at 574. It is interesting to speculate on the importance of this decision in the light of the recent introduction of Part IVA into the *Federal Court of Australia Act* 1976, allowing for representative proceedings where more than one person has an individual claim.

71 (1843) 67 ER 189 at 202.

72 The same is true of *Re Spargos Mining NL* (1990) 3 ACSR 1. On the significance of corporate groups see: T Hadden "Inside Corporate Groups" (1984) 12 *International Journal of the Sociology of Law* 271; T Hadden *The Control of Corporate Groups* (1983); T Hadden (1992) 15 *UNSWLJ* 61; P Blumberg *The*

produces different signals. Now, the expression of a belief in the essentially private nature of corporate governance is apt to be read as a too open-ended defence of bureaucratic discretion. In this light, the approach adopted in the *Residues Treatment* decision suggests that group activity ought to be subject to greater public (ie judicial) scrutiny, in order to protect what are classified as the private interests of individual members. It should be noted that this approach has its limitations. King CJ went on to suggest that this personal rights exception can be negated by a majority vote in which the general meeting ratifies the improper actions of the directors.

Rather than leaving it to the possibility that individual judges might find a way around the ideological restrictions of *Foss v Harbottle* by manipulating its underlying concepts, corporate law reformers have increasingly resorted to legislation to supply the impetus. Of the many possible forms of action which are available under the *Corporations Law*, s 1324 (the injunction provision) and s 260 (the oppression provision), seem to offer the greatest potential.[73] However, s 1324 has yet to attract the attention of corporate lawyers,[74] and despite occasional success, such as Jenkin's successful action in *Re Spargos Mining NL*,[75] and substantial amendments,[76] the oppression provision has not enjoyed great success as a response to *Foss v Harbottle*. In a review of the forms of action available under the existing companies legislation, the Companies and Securities Law Review Committee ("CSLRC") concluded in 1990 that it could not:

> be confident that section 320 [now s 260] could, even on a wide interpretation, provide for anyone other than a company to seek to pursue a cause of action belonging to it where the company itself improperly refuses or fails to take action.[77]

This assessment was made as part of the CSLRC's report on the need to introduce a statutory derivative action in Australia. In order to circumvent the *Foss v Harbottle* restrictions, the report recommends the enactment of legislation based on s 245 of the Ontario *Business Corporations Act* 1982. The recommended legislation specifies an open-ended class of applicants who may seek a court order allowing them to bring a derivative action on behalf of a

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Law of Corporate Groups: Procedural Law (1983); CM Schmitthoff, F Wooldridge (eds) *Groups of Companies* (1991).

73 See House of Representatives Standing Committee on Legal and Constitutional Affairs *Report on Corporate Practices and the Rights of Shareholders* (November 1991) at [6.1.3] (the "Lavarch Report") for a list of 26 available statutory remedies in the *Corporations Law*.

74 R Baxt "Will Section 574 of the Companies Code Please Stand Up! (And Will Section 1323 of the Corporations Act Follow Suit)" (1989) 7 *Co & Sec LJ* 388.

75 Note 1 *supra*.

76 In particular, the inclusion of the "unfairly prejudicial" and "unfairly discriminatory" grounds in 1983.

77 Companies and Securities Law Review Committee *Enforcement of the Duties of Directors and Officers of a Company by Means of a Statutory Derivative Action* Report No 12 (November 1990) at [249].

corporation.[78] This proposal has since received general support in the Lavarch Report on the rights of shareholders.[79]

For present purposes there are two things to note about the CSLRC's proposal. One is that the proposed legislation would not itself give standing to bring the derivative action; that decision is vested in the courts.[80] Secondly, the Committee's intention is that in making this decision the court's attention should be directed towards "the merits of the application" and "the suitability of an applicant to prosecute the consequent litigation", rather than the status of the relationship that the applicant has to the company. These points indicate that in the Committee's view there is some public purpose to be achieved by ensuring that the group-interests of a company can be asserted when necessary, and not held hostage by the private strictures of the formalist model. As stated in the report, one aim of the proposal is "to ensure that proper corporate standards are enforced".[81] That this is intended to serve, at least in part, a public purpose was made clear by the Committee when it argued that:

> A change by which it would become easier for a member to take proceedings on behalf of the company might serve a useful purpose in the general scheme of regulation of corporate activity in the interests of investors and creditors. Civil proceedings brought by members might provide enforcement in cases which the regulatory authorities are unable to prosecute because of competing demands on limited resources.[82]

Moreover, the proposal seems to intend that this will be achieved by shifting control over the decision from the formalist model towards a stronger reliance on the judicial review model. This latter point should not be over-stated, however. Although the Committee's proposal would give the courts a discretion to hear a much broader class of applicant, and to make a wide range of orders, space is also reserved for deference to the idea of majority rule. The report allows that in non-urgent cases the court *might* require that a general meeting be held to consider whether the company should initiate legal action. Where the meeting makes a decision in a way that satisfies the criteria in s 260 (the oppression provision), then the decision of the meeting should be binding on the court.[83] This re-affirmation of faith in the validating power of the majority vote, whilst politically unexceptional, is sociologically questionable. Especially in large, widely-held public corporations, general meetings cannot be assumed to be showcases of the democratic process. After all, in democratic theory majority rule is an ideal which presupposes (at the least) mechanisms of

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78 I Ramsay "Corporate Governance, Shareholder Litigation and the Prospects for a Statutory Derivative Action" (1992) 15 *UNSWLJ* 149.

79 Note 73 *supra* at [6.3.30].

80 Note that on this point the Lavarch Report recommends (with some dissenting opinions) that members and former members, and directors/officers and former director/officers should be given standing by the legislation itself, while other applicants would need the leave of the court. Note 77 *supra* at [201].

81 *Ibid* at [25].

82 Companies and Securities Law Review Committee *Enforcement of the Duties of Directors and Officers of a Company by Means of a Statutory Derivative Action* Discussion Paper No 11 (July 1990) at [2].

83 Note 77 *supra* at [117].

consultation, and universal and equal suffrage.[84] Within large corporations, factors such as the adoption of a 'one share, one vote' rule (rather than 'one member, one vote'),[85] differences in the treatment of institutional and small shareholders,[86] and the impact of the proxy voting system[87] make it unsafe to read automatically an expression of the group-will into the fact of a majority vote. The *form* of majority rule frequently masks the *substance* of minority control.[88]

Before commenting any further on these recent developments it is useful to turn to the situation in the area of administrative law.

B. ADMINISTRATIVE LAW

In examining comparable rules of standing within the area of administrative law, my focus is on actions in which a citizen (or group of citizens) seeks to bring an action to assert the interests of the general public.[89] As with corporate law doctrine, administrative law distinguishes between the interests of the individual (in this case, the citizen), and those of the broader group (the public, or the general community). The basis of this distinction has been summarised as follows:

> In democratic theory, although not always in fact, the interests of the Government are aggregates of the interests of a majority of individual citizens and are in this sense 'public interests'. The Government, and not the private citizen is seen as the guardian of public interests. The private citizen may act to protect interests which are peculiarly his or perhaps, those which he shares with a minority group of citizens, but not those public interests whose protection has been committed to the Government.[90]

The parallels between this and the philosophy which underpins the rule in *Foss v Harbottle* are striking. The attempt is to maintain a distinction between the realm of private individual interests, and those of the group. In place of directors who act in the interests of the company, we have Government which is considered as the guardian of the public interest. In Australian administrative law doctrine, this argument has been translated into rules of standing set out by the High Court in *Australian Conservation Foundation Inc v The Commonwealth of Australia*.[91] That decision denied the Australian

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84 Note 54 *supra* at 32.

85 See DL Ratner "The Government of Business Corporations: Critical Reflections on the Rule on 'One Share, One Vote'" (1970) 56 *Cornell L Rev* 1.

86 See R Tomasic and S Bottomley *Directing the Top 500: Corporate Governance and Accountability in Australian Public Companies*, (forthcoming).

87 See P Redmond *Companies and Securities Law: Commentary and Materials* (1st ed, 1988) at 183-6 and (2nd ed, 1992) at 335-45.

88 E Spitz *Majority Rule* (1984) p 185 ff.

89 The Australian Law Reform Commission has proposed a broad and flexible definition of 'public interest litigation' as "proceedings which are or may be recognised as having a public element", note 43 *supra* at [48].

90 P Cane "The Function of Standing Rules in Administrative Law" (1980) *Public Law* 303 at 304. Despite the use of the male pronoun, this argument, as far as I am aware, is not restricted to male citizens.

91 (1980) 146 CLR 493.

Conservation Foundation ("ACF") standing to bring an action to enforce administrative procedures under the *Environmental Protection (Impact of Proposals) Act* 1974 (Cth). In the majority, Gibbs J held that:

> an ordinary member of the public, who has no interest other than that which any member of the public has in upholding the law, has no standing to sue to prevent the violation of a public right or to enforce the performance of a public duty ... The assertion of public rights and the prevention of public wrongs ... is the responsibility of the Attorney-General, who may proceed either ex officio or on the relation of a private individual. A private citizen who has no special interest is incapable of bringing proceedings for that purpose...[92]

Later, His Honour explained what he meant by a "special interest":

> an interest, for present purposes, does not mean a mere intellectual or emotional concern. A person is not interested within the meaning of the rule unless he is likely to gain some advantage, other than the satisfaction of righting a wrong, upholding a principle or winning a contest, if his action succeeds or to suffer some disadvantage, other than a sense of grievance or a debt for costs, if his action fails. A belief, however strongly felt, that the law generally, or a particular law, should be observed, or that conduct of a particular kind should be prevented, does not suffice to give its possessor locus standi.[93]

In short, unless the individual citizen can translate the interests of the group into a legitimate personal concern, standing should be denied.

The 'special interests' exception to the basic rule seems to invite a very similar type of approach to that which was used in the *Residues Treatment* case.[94] That is, whether the reference is to 'special interests' or 'personal rights', the courts can manipulate the malleable idea of private individual interests to avoid any adverse consequences resulting from the division that liberal thought tries to maintain between the individual and the group. Other commentators have also noted the plasticity of this distinction; for example, it has been argued that the idea of representing special interest simply means "representing enough of the public interest to be accorded standing."[95]

Subsequent judicial decisions in the administrative law area have demonstrated a willingness to adopt this approach. For example, the ACF was subsequently given standing to bring an action against a ministerial decision to grant a woodchip export licence, on the basis that the ACF had a special interest arising out of its role in formulating a forest strategy for the South-East region of NSW.[96] In another case in which the ACF was a plaintiff, King CJ, the author of the *Residues Treatment* decision, held that the ACF had special interest to enforce compliance with the procedures of the *Planning Act* 1982

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92 *Ibid* at 526. Justice Gibbs based his judgment on a reformulation of the rule in *Boyce v Paddington Borough Council* [1903] 1 Ch 109.

93 *Ibid* at 530.

94 Note 65 *supra*.

95 G Airo-Farulla "Public and Private in Australian Administrative Law", paper presented at the Australasian Law Teachers' Association conference ANU (1990) p 7.

96 *Australian Conservation Foundation Inc v Minister for Resources* (1989) 19 ALD 70 discussed in E Arnson "Standing Up for the Environment" (1991) 16 *Legal Service Bulletin* 174. See also *Onus v Alcoa of Australia Ltd* (1982) 149 CLR 27.

(SA).[97] Chief Justice King's reasoning followed a similar track to that which he used in his *Residues Treatment* judgement. He began by pointing out that the statute in question granted "important rights" to any person who makes representations in relation to a planning proposal. From this he concluded:

> The special interest in such a case arises not from the impact which the proposed development will have on the plaintiff but from the threatened deprivation of the right to oppose by representations and appeal which right is conferred upon him by statute irrespective of the impact, if any, of the proposed development upon him.[98]

In both this and the *Residues Treatment* decision, Chief Justice King's view of the interests of the individual centres on the importance of individuals being free to exercise those opportunities which are provided by the group (whether voting rights granted by the articles of association, or rights granted by statute) to allow those individuals to express themselves in the group context.

It is an interesting coincidence that in the administrative law field there is also a current and detailed proposal to legislatively reform the rules of standing in public interest litigation.[99] The Australian Law Reform Commission ("ALRC") has proposed that standing to initiate public interest litigation[100] should be granted to any person, except where she or he was found to be "merely meddling" in the matter.[101] Under this test standing would continue to be granted to plaintiffs who have either a private right or a 'special interest', as currently defined. Standing would be extended to include those who, whilst not having a personal stake in the outcome of the litigation, have a "sense of grievance" or, even without this, are concerned with the issue in dispute and have the ability to represent the public interest.[102] The criterion of "mere meddling" is intended to exclude persons who have:

> no personal stake in the subject-matter of the litigation and whose manner of presenting the issues betrays a clear incapacity or unwillingness to represent the public interest adequately.[103]

In general terms, then, the ALRC's approach to standing in public interest litigation seems to be similar to that adopted by the CSLRC in relation to shareholder derivative actions. Both advocate a greater role for the courts, shifting from a firm requirement that the plaintiff should have some personal stake in the matter, to one in which the courts exercise their discretion purposively, to ensure that the 'public interest' is protected.

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97 *Australian Conservation Foundation Inc and Conservation Council of South Australia Inc v The State of South Australia and Ophix Finance Corporation Pty Ltd* (1990) 53 SASR 349.

98 *Ibid* at 354.

99 Note 43 *supra*.

100 See note 89 *supra* for the ALRC's definition of this term.

101 *Ibid* at [252] and [259].

102 *Ibid* at [254].

103 *Ibid* at [253].

V. CONCLUSION

Judges and law reformers in both these areas of law now seem to be more sceptical about the formalist view (to use Frug's terminology) which regards company directors or managers and governmental agencies as mere conduits for the democratically expressed will of their constituents. In both areas of law, it seems, the inevitability and the significance of the discretion which is exercised by decision-makers is being recognised. The response has been a greater emphasis on the capacity of the courts to provide the constraints on bureaucratic power which the formalist model is not able to provide. A fair summation of this judicial task is that:

> its dominant purpose is no longer the prevention of unauthorised intrusions on private autonomy, but the assurance of fair representation for all affected interests in the exercise of the legislative power delegated to agencies [or, we could add, the power given to corporate managers][104]

Despite these changes, however, neither recent judicial initiatives nor the proposed reforms introduce any greater degree of certainty or predictability into the way in which our legal system responds to the phenomenon of bureaucracy. Of course, lack of certainty may have its uses; the plasticity of concepts such as individual/group, and private/public may be interpreted in functional terms. That is, indeterminacy in applying these concepts may actually be a means whereby courts and legislators can respond to shifts in community attitudes about the legitimacy of bureaucratic power.[105]

The general concern of this article has been to test the viability of the distinction which our legal system draws between laws which respond to the problem of bureaucratic power. I have tried to show that corporate law and administrative law both attempt to deal with the concept of standing in 'group-interest' suits in similar ways, by manipulating the concepts of individual and group, and private and public. The next question is 'so what'?

One pragmatic response might be to urge scholars and practitioners in these not-so-disparate areas of legal discourse to look to each other for inspiration tackling the problems and issues encountered in dealing with bureaucracies. This response may not get us very far, however. Indeed, it may perpetuate the very problem which Frug sets out to expose. We may merely end up constructing more elaborate, but no less problematic, models to defend bureaucracy. If we accept, along with Frug and others, that an important (if not *the* important) purpose of these two areas of law is to defend and justify bureaucracy then, I suggest, we not only have to examine the nature and pattern of those defences, but (secondly) we must also ask some critical questions, such as: are these large bureaucratic forms of organisation worth defending? why? and who benefits and who loses as a result?

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104 R Stewart "The Reformation of American Administrative Law" (1975) 88 *Harv L Rev* 1667 at 1712.

105 I am indebted to Stephen Parker, Reader, ANU for originally suggesting this point, although I am responsible for the way it is expressed here.

As another response, the similarities discussed in this article may seem unexceptional to some readers. If that is the case, then the question is why we maintain the distinction between these areas of law as rigidly as we do. I am not suggesting that we should simply merge the doctrines of corporate and administrative law into a single doctrinal edifice. I do suggest, though, that as a necessary part of looking behind these justifications and defences in order to understand the doctrines we study and teach, we should be prepared to look beyond the doctrinal Chinese Walls that have been erected over the years.