The Multifaceted Nature of the Best Interests Duty

Dr Rosemary Teele Langford
Senior Lecturer, Melbourne Law School
Best Interests Duty

• Duty to Act in Good Faith in the Interests of the Company
  – Fiduciary duty
  – s 181 Corporations Act 2001 (Cth)
  – Multifaceted Nature - incorporates requirements of a number of duties
    • Focus on conflicts/profits and consideration (particularly as concerns stakeholders)
• Incorporation of Conflicts and Profits Duties
  – Striking feature of s 181 Corporations Act
  – May be due to more specific nature of ss 182, 183, 191, 195, ch 2E
  – More clearly incorporates benefits to third parties
  – Authorisation of breach problematic (cf breach of duties to avoid conflicts and profits)
  – May require extended disclosure/positive action in situations of conflict
Best Interests Duty

• Incorporation of consideration
  – Key role in focusing directors on company’s interests
  – Played a big part in first instance Bell group decision but contested on appeal
  – Imposed by long line of cases
  – Key contexts: group companies and companies approaching insolvency
• Creditors’ Interests
  – Courts in Australia and UK have required directors of financially unstable companies to have regard to creditors’ interests (dating back to *Walker v Wimborne* (1976) 137 CLR 1)
  – Uncertainty re point of activation and extent of requirement
  – Actual protection of creditors’ interests required by UK cases and possibly by Bell group appeal judgment
  – Appropriateness of this requirement recently queried by Hayne J
• Incorporation of Corporate Social Responsibility
  – Likewise it is arguably inappropriate to require directors to protect stakeholders as part of the best interests duty
  – Contentious issue – three key inquiries:
    • CAMAC (2006)
    • PJC (2006)
    • Governance Institute (2014)
• Corporate Social Responsibility: Contours
  – No doubt directors have freedom to consider stakeholder interests and may be in breach of duty (or cause reputational damage) if they do not
  – However, requirement to balance a number of interests is problematic in theoretical and practical terms
• Corporate Social Responsibility: Bottom Line
  – UK equivalent (in s 172 *Companies Act 2006* (UK)) imposes bottom line requirement of interests of members
  – Query whether bottom line is more appropriately the company as a corporate entity (see Andrew Keay, *The Corporate Objective* (2013), who outlines an ‘entity maximisation and sustainability model’)
  – Further issues re s181: authorisation, s 1324 and public interest aspect of the Corporations Act
• Corporate Social Responsibility: Role of Directors’ Duties
  – Rejection of stakeholder approach does not mean that directors’ duties have no role to play
  • Stepping stone approach – directors may breach s 180 or 181 by allowing the company to breach laws protecting stakeholders
• Corporate Social Responsibility:
  Summary
  – State of law still unsettled
  – Shareholder and stakeholder interests intersect
  – Best to show consideration of relevant interests but also corporate benefit
  – Note also ASX Corporate Governance Principles
• Conclusion

– The best interests duty incorporates a number of requirements and encapsulates loyalty

– There is good reason to question the appropriateness of the duty as a creditor protection mechanism

– For the same reason the suitability of the duty as a means of protecting stakeholders is also open to doubt

– Unsettled state of the law results in need for caution in terms of appropriate consideration