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Directors' Duties: Principles and Application
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"J.B.L. 587 Professor John Lowry, in his review of this book, observes that "[t]he subject of directors’ duties has taken on its own mantle". Indeed, judging by the wealth of literature the subject has generated in recent years—attributable in part, in the UK, to the codification of directors’ duties in the Companies Act 2006 and to the effects of the global financial crisis—it does seem to have taken on a life of its own.

As Dr Langford notes, the pitfall of increasing regulation of directors is its potential to divert attention from the fiduciary element which is at the core of directors’ duties, when in fact clearer articulation and enforcement of fiduciary duties would lessen the need for frequent revision of corporate governance standards. While it may be somewhat taken for granted that the development of fiduciary theory has an impact on directors’ duties, she discerns that there is a dearth of literature that examines the divergences between the fiduciary concept in equity and in corporate jurisprudence. One of the key aims of the book is accordingly to provide a coherent view of the fiduciary duties of directors—an important task in the Australian context (as in the UK), where their statutory duties may be viewed against the backdrop of fiduciary duties. This examination is conducted in light of the position in English law, given the historical roots of Australian directors’ duties and the parallel development of the law in this regard in both jurisdictions over a considerable period of time, as well as the potential lessons to be drawn from the review of company law preceding the introduction of the UK Companies Act 2006. The value of these comparative insights is enhanced by the Australian judiciary’s continued reliance on English precedent, as well as continued domestic (UK) academic and judicial interest in developments in Australian jurisprudence.

Following an introductory chapter, Ch.2 traces the dimensions of directors’ fiduciary role, pairing a general outline of what it means to be a fiduciary with a consideration of the implications of this term as applied to directors, the importance of which has been amplified by the modern shareholder/stakeholder debate. Chapter 3 sketches the shift in fiduciary theory in Australia, through a series of judicial decisions finding fiduciary obligations to be proscriptive rather than prescriptive in nature, and that the "no conflict" and "no profit" rules constitute the essence of fiduciary duties—the effect (and soundness) of which is analysed in this chapter. Of particular concern is the inconsistency between this restrictive approach to the fiduciary concept and the broader scope of fiduciary obligations in corporate law jurisprudence, especially in relation to directors. Chapters 4 and 5 examine the obligation to act bona fide in the interests of the company as a whole, demonstrating its significance to directors’ duty of loyalty and assessing its categorisation as fiduciary in light of the evident shift in fiduciary theory—the importance of which "J.B.L. 588 is borne out by the Bell litigation. This is of interest from a UK perspective in light of the discussion surrounding the extent to which s.172 of the Companies Act 2006 encapsulates the traditional common law duty to act bona fide in the interests of the company. Insofar as the jurisprudence relating to s.181 of the Corporations Act 2001 (Australia) reflects the absorption of the "no conflict" and "no profit" rules within the bona fide rule, the analysis is also pertinent to ss.175, 177 and 182 of the UK Companies Act 2006 and the principles governing disclosure. Chapters 6, 7 and 8 pursue this connection between the bona fide rule and other fiduciary duties, including the "no conflict" and "no profit" rules, the proper purpose rule, the duty to retain discretions and the duty of disclosure. The overlaps between the bona fide rule and the "no conflict", "no profit" and proper purposes rule are found to be insufficient in breadth to diminish the centrality of the bona fide rule. If anything, the practical operation of the rules supports the separate and predominant nature of the bona fide rule. The duty to retain discretion ("to exercise independent judgment") and the duty of disclosure may be seen as part of the bona fide rule, rather than independent from it. The duty of disclosure considered here differs, interestingly, from disclosure in relation to authorisation or ratification of breaches of duty. It is largely rooted in common law and is
accordingly distinguishable from the statutory duty to disclose material personal interests. Against the backdrop of the narrowing of the fiduciary concept in modern Australian law to hold that the "no conflict" and "no profit" rules are the only remaining fiduciary duties, it is argued that the duties canvassed in Chs 5–8 should continue to be categorised as fiduciary, and in light of some of the complexities surrounding them, should not be neglected in the evolution of fiduciary theory.

Chapters 9 and 10 respectively complete the picture by addressing the non-fiduciary categorisation of the duty of care (resonant with English law, and similarly codified) and remedies. These are more closely related than may appear at first glance, as the remedy for breach of the duty of care can be differentiated from the sanctions available for breach of the bona fide and proper purposes rules. Moreover, Ch.10 explores the implications for the remedies for breach of the relevant fiduciary duties if they were to be characterised as non-fiduciary. In particular, the extent to which some of the advantages associated with proving breaches of a fiduciary nature would be affected. The author concludes that even if the practical effects of re-categorising the fiduciary duties were found to be limited from a remedial standpoint, the considerable impact on loyalty and the high standards imposed on directors justify upholding the critical role of the fiduciary duties, including the "foundational" bona fide duty.

Chapter 11, the penultimate chapter, provides a comparative evaluation with English law in light of the origins of Australian directors' fiduciary duties, the cross-fertilisation of principles between English and Australian jurisprudence, and the insights drawn from the examination of directors' duties in the context of the review preceding the introduction of the UK Companies Act 2006. It focuses primarily on the treatment of the bona fide rule in English law, expanding the discussion in the latter part of the chapter to consider the wider implications of the codification of directors' duties, and the more expansive nature of the fiduciary “J.B.L. 589” concept in English law. While much of the substance will be familiar to many readers, the chapter usefully highlights the contrast between the more prescriptive operation of the bona fide rule in English law and its proscriptive complexion in modern Australian law, and between the broad and restrictive approaches to fiduciary theory evinced by the treatment of the bona fide rule in both jurisdictions. This comparison reinforces the argument in favour of a categorisation of fiduciary duties which recognises the fundamental nature of the bona fide rule.

In concluding, Ch.12 notes that the divergence between the characterisation of fiduciary duties in corporate law and the restrictive view of fiduciary theory in Australian equity jurisprudence seems more apparent than real. It can be resolved by the fiduciary classification of the bona fide, proper purposes, "no conflict" and "no profit" rules, and the imposition of obligations to retain discretion and to disclose information as part of the bona fide rule. No significant effort is required to achieve this, beyond re-focusing attention on the fiduciary loyalty underlying the role of company directors, of which the bona fide rule forms an essential part.

Overall, this is a thoughtfully constructed monograph, which addresses with great precision, detail and clarity a dimension of directors' duties that is often acknowledged and yet increasingly under-explored as (in the UK for example) attention shifts towards the operation of the codified duties and the shareholder/stakeholder debate. It bears testament to Dr Langford's extensive practical and research experience in this field. Although it is difficult to imagine a title that more accurately captures the purpose of the text, the neutrality of the current one might lead prospective readers to approach it with the mistaken impression that it provides an exposition of directors' duties. It is certainly a rewarding read for researchers and practitioners interested in the development of Australian corporate law or its degree of similarity with English law in this area.

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