Constraining Fat Cats in Corporate Cathedrals: Neo-Liberalism, Corporate Law and Unreasonable Remuneration of Directors

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Introduction [1]

A 'passionate neurosis'[2] has manifested itself in the high degree of public concern regarding overgenerous remuneration paid to some corporate executives.[3] This is not surprising considering that over one third of the Australian adult population own shares in companies listed on the Australian Stock Exchange (ASX)[4] and that commentators readily claim that the excessive remuneration of directors is unacceptable[5] and the abuse of the remuneration process is rampant.[6]

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1 The term 'Corporate Cathedral' was also used by Whincop MJ, "Painting the Corporate Cathedral: the Protection of Entitlements in Corporate Law" (1999) 19 *Oxford Journal Legal Studies* 19. Whincop notes the term originally derived from Calabresie and Melamed, "Property Rules, Liability Rules, and Inalienability: One View of the Cathedral" (1972) 85 *Harvard Law Review* 1089.

2 See Senator Evans, Senate Debate, "Companies Regulations (Amendment) 1986", 14 November 1986 p 2215 cited in Hill J, "What Reward Have Ye? Disclosure of Director and Executive Remuneration in Australia."(1996) 14 *Company And Securities Law Journal*, 232 at fn 98 p 241.

3 Brooks A, Chalmers K, Oliver J and Veljanovski A, "Issues Associated with Chief Executive Officer Remuneration: Shareholders' Perspectives." (1999) 17 *Company And Securities Law Journal*, 360 at 362; See also Hill, note 2, p 233.

4 See Australian Stock Exchange (ASX), 1997 *Australian Shareownership Survey* cited in Brooks, note 3, p 361.

5 See Walker B, "The Duel Executives' pay An executive's worth is the multimillion-dollar question", *The Weekend Australian Financial Review*, October 5-6, 2002, p 50; Harris T "Executive pay out of step", *The Australian Financial Review*, October 1 2002, p 70; McLachlan M and Chandler M, "Fat cats are getting fatter" *The Australian Financial Review*, October 1 2002, p 5; Shand A, "Payoffs on greed street" *The Weekend Australian Financial Review*, September 28-29 2002, p 22 and Riley M, "Boardroom blitz", *The Sydney Morning Herald, Weekend Edition*, 28-29 September 2002, p 30. Re: criticism of exceedingly generous stock options in US and Australia see Henry D et al, "Too much of a good incentive?" Business Week, 4 March 2002, pp38-39 cited in Tomasic R, "Corporate collapse, crime and

Justice Dawson, extra-judicially, has raised concern about why some "executives of large public companies become enriched to quite an extraordinary extent at what can ultimately only be the expense of the shareholders… [These] executives are doing no more than performing their proper function and do not …deserve huge rewards in recognition of their achievements".[7] The focus of this paper is directed at public listed companies and argues that directors' remuneration should be constrained to a level that is reasonable given all the circumstances.

Justice Kirby, extra-judicially, conceptualises corporate law's fundamental challenge to be how to "retain…the entrepreneurial spark which is essential to the success of the corporation… but under conditions of corporate honesty to the general community and fidelity to shareholders".[8] A warning has been made that "those who forget the past are doomed to repeat its mistakes".[9] However corporate law's challenge is certainly a strained undertaking. While the dark side of the 1980's corporate scandals[10]are still being unravelled a new

governance – Enron, Andersen and beyond" (2002) 14 *Australian Journal of Corporate Law* 183 at 185.

6 Yablon CM, "Overcompensating: The corporate Lawyer and executive pay" (1992) 92 *Columbia Law Review*, 1867 at 1906. Note also discussion re decline in business ethics Halstead B, "Entrepreneurial Crime: Impact, Detection and Regulation" (1992) 34 *Trends & Issues In Crime And Criminal Justice 1*. <http://www.aic.gov.au/publications/tandi/ti34.pdf> and Chambers FJ, "Accounting and Corporate Morality-The Ethical Cringe" (1991) 1(1) *Australian Journal of Corporate Law* 9 at 9-12.

7 Mr Justice Dawson, of the High Court of Australia, in an address delivered to the Second Business Lawyers Conference on 10 April 1989 (at 4-5 of the speech); cited in Adenwala Z, "Directors' generous remuneration: To be or not to be paid?" (1991) 3 *Bond Law Review*, 25 at 27. For a similar more recent judicial comment see Owen J in *Shamsallah Holdings v CBD Refrigeration* (2001) 19 ACLC 517 at para 35; [2001] WASC 8 Supreme Court of Western Australia, 18 January 2001.

8 Although this quote is from a speech deliver by Justice Kirby in 1996 it is acutely relevant today. See Kirby, Hon Justice Michael, "Australian Corporations Law in Context" *Seminar on the Courts and Corporate Law, The University of Melbourne Centre for Corporate Law and Securities Regulation*, Melbourne 31 October 1996 at dot point 6.

9 Kirby, Hon Justice Michael, "The Company Director: Past, Present and Future", The Australian Institute of Company Directors, Tasmanian Division, Luncheon Address, Hobart, Tasmania, 31 March 1998.

10 Note in particular Miller S, "Corporate Crime, the Excesses of the 80s and Collective Responsibility: an Ethical Perspective" (1995) 5 *Australian Journal of Corporate Law* 139. See also Acquaah-Gaisie GA, "Enhancing Corporate accountability in Australia" (2000) 11 *Australian Journal of Corporate Law* 139 at 143-145. See generally Carroll J, "Corporate Carnivores" (2000) 72(4) *Australian*

wave of corporate scandals involving a number of high profile corporations One.tel, HIH, Enron, and most recently WorldCom have hit and caused severe damage[11] to the financial markets world wide. A legitimate fear that these corporate scandals are merely the tip of the iceberg has undermined investor and social confidence in financial markets. A number of high profile and politically salient corporate scandals have exacerbated the corporate crisis in Australia. The most politically salient of these corporate scandals to the Australian corporate landscape were the collapses of the corporations HIH and One.tel.

The corporate scandal aspect of HIH and One.tel involved allegations of self-dealing[12] by directors prior to the corporate collapse and have resulted in legal action. In regard to HIH, Santow J in *ASIC v Adler*[13], found that the conduct of former HIH directors[14] involving a $10 million payment had contravened a host of provisions in the *Corporations Act.* In regard to One.Tel, the Australian Securities and Investments Commission (ASIC) has commenced civil proceedings in the NSW Supreme Court against former directors.[15] Self-dealing[16]

Quarterly 18; and Best P, "a word" (2000) 72(4) *Australian Quarterly* 1. See also Sykes T, *The Bold Riders*, Allen and Unwin, Sydney, 1994.

11 June 2002 figures indicate that global sharemarkets have fallen over 25% (in Australian Dollar terms) over the past year; *Colonial First State, Investment Markets update*, June 2002 URL: <http:www.colonialfirststate.com.au>. Postscript: The falls in the global sharemarkets would be considerably higher after a United States financial market crash on 25 July 2002. The Australian market followed with media reports (SBS television late news 25 July 2002) suggesting that 50 billion dollars where wiped off the share values on the ASX (Australian Stock Exchange).

12 It should be noted that the questionable self-dealing by directors was not the sole purpose of the corporate collapse but served to focus the spotlight of interrogation on corporate governance.

13 *ASIC v Adler* (2002) 20 ACLC 576 per Santow J

14 Mr Adler a non-executive director of HIH and also Mr Raymond Williams and Mr Dominic Fodera.

15 Messrs Jodee Rich and Bradley Keeling, the former Managing Directors, Mr Mark Silbermann, the former Finance Director, and Mr John Greaves, the former Chairman; see *ASIC Media Release* 01/441 dated 12/12/01; CCH *Australian Corporate News* Issue No. 1, 16 January 2002. Note that intervention by the ASIC re the concerns about secrecy of the former One.Tel directors' remuneration arrangements resulted in the disclosure of their remuneration to the market; CCH *Australian Corporate News* (2002) Issue No 26, 21 December 2001.

16 For a background to self-dealing see generally the metaphorical 'bad man' in the influential paper Holmes OW, "The Path of the Law" (1897) 10 *Harvard Law Review*

and the taking of unreasonable remuneration by some corporate directors have been difficult problems to eradicate. Commentators readily claim that the excessive remuneration of some directors is simply unacceptable[17] and that the writing is on the wall such that we can no longer "repeat the mistakes of the past".[18] Perhaps it is time we take a good look at the normative framework of corporate law that facilitates the abuse of the remuneration process by some directors.

The remuneration process is a reflection of the broader norms of corporate law that provide the environment that enables some directors to take excessive remuneration to the detriment of the company. This paper is premised on the claim that neo-liberalism is the normative focus of corporate law but the ideology of neo-liberalism fails to address the abuse of the remuneration process. The analysis provided by this paper involves a two-step process. First an "internal critique"[19] will examine how the norms of corporate law are predominantly informed and constructed in accordance with neo-liberal ideology. This internal critique will involve an examination of the connection between the values of neo-liberalism[20] and corporate law's construction of the contemporary normative focus upon investor protection and wealth maximisation. Neo-liberal ideology is an important silent mechanism that can be used to better understand why law in its judicial mode presently avoids the question of whether remuneration is reasonable.[21] The second part of this paper suggests that a normative reconstruction[22] of corporate law might better resolve the excessive remuneration issue. A shift in corporate law's normative focus upon the fiduciary requirement of good faith and equitable

459 at 461; and Andrews N, "Bad Company? The Corporate Form in an Uncertain Law" (1998) 9 *Australian Journal of Corporate Law* 39 at 40.

17 See note 5. See also Yablon, note 6, p 1906.

18 See Kirby, note 9.

19 See generally Lacey N, "Normative Reconstruction in Socio-Legal Theory" (1996) 5(2) *Social & Legal Studies* 131.

20 Note that 'neo-liberalism' first found expression as 'monetarism', then as 'Thatcherism' or 'Reagansim' in the 1980s; see: Harman C, *The theory and practice of anti-capitalism* at 4, 52. <http://www.otherdavos.net/PDF/Harman.pdf> (18 August 2000)

21 On this issue see *Re Halt Garage (1964) Ltd* [1982] 3 All ER 1016

22 See generally Lacey, note 19.

doctrines[23] is suggested as a means of restraining unreasonable remuneration of some company directors.

The Remuneration Issue

The issue of "unreasonably generous executive pay" [24] has become very topical especially in the wake of the collapse of HIH and One.Tel.[25] In response to the resulting public concern to the HIH and One.Tel collapses the Prime Minister [John Howard] has said that some executives had been "getting away with murder"[26] and "a new law [is required that enables] a CEO's bonus to be clawed back in the event of corporate failure".[27] The *Corporations Act*[28] contains a range of potential remedies for unreasonable remuneration[29], however the legal norms inherent within the legislation and judicial

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23 To note in particular a willingness to impose a constructive trust.

24 Stapledon G, "Comment; No need for new law on bonuses" *The Age*, <http://www.theage.com.au/> Monday 11 June 2001.

25 Note that although the collapse of HIH and One.Tel was not the result of directors abusing remuneration the corporate collapses have contributed to making the excessive remuneration issue a topical issue. Re October/September 2002 newspapers see Wisenthal S, "Golden handshakes come with a silver lining" *The Weekend Australian Financial Review*, October 5-6, 2002, p 10; Cox M and Walker B, "The Duel Executives' pay An executive's worth is the multimillion-dollar question" *The Weekend Australian Financial Review*, October 5-6, 2002, p 50; Chenoweth N, "Millions of dollars can be oh so embarrassing" *The Weekend Australian Financial Review*, October 5-6, 2002, p 50; Kohler A, "Why the great salary debate has been missing the point" *The Weekend Australian Financial Review*, October 5-6, 2002, p 72; Reid N, "Gift or bribe? It's just a matter of give and take" *The Australian Financial Review*, Special Report, Incentives and Rewards, 3, October, 2002, p 22.; Batterley R, "The wise way to hand out the golden eggs" *The Australian Financial Review*, Special Report, Incentives and Rewards, 3, October, 2002, p 26; McLachlan M and Chandler M, note 5;
Harris T, note 5; Shand A, note 5; Riley M, note 5; Chenoweth N, "Choice aplenty as companies review exec rewards" *The Australian Financial Review*, Profits 2002, 25 September, 2002, p S6.

26 Chenoweth N, note 25.

27 Stapledon, note 24.

28 *Corporations Act 2001* (Cth). All references to legislative provisions refer to the *Corporations Act 2001* (Cth) unless otherwise stated.

29 See ss 236 & 237 (Statutory derivative action); ss 232 & 233 (oppression provisions) ss 181-184 (fiduciary duty) s 1317E (civil penalty provision); s 1317G (pecuniary penalty order via ASIC); s 1317H (court compensation order). However note ss 195 & 191 (disclosure regime.) and Chapter 2E (related parties), especially s 211. Note Replaceable Rule s 202A-remuneration of directors.

narrative usually consider that the amount of remuneration paid to directors is a matter of internal management and is not an area for law's enquiry.[30] The cases that have come before the courts are usually[31] not concerned with whether the amount of remuneration is excessive or unreasonable but with whether there is entitlement to remuneration.[32] There are "serious limitations to the extent to which [the norms of contemporary] corporations law are able…to control corporate conduct".[33] There is a pressing need to take seriously[34]the major concerns regarding irresponsible company management, excessive remuneration and to formulate high standards in corporate governance.

The remuneration of directors is important as a reflective measure of the overall health of a company's corporate governance and the

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30 *Re Halt Garage (1964) Ltd* [1982] 3 All ER 1016; see discussion in Yablon, note 6, p 1869. Re *Corporations Act* 2001 (where applicable; s 135(2)) see Replaceable Rule – s 198A.

31 Note that a corporations conduct is oppressive when the company's acts or omissions or the company's affairs are 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; s 232. Where excessive remuneration is unfair to shareholders the s 232 oppressive remedy may attract the court's intervention; s 233: see *Sanford v Sanford Courier Services Pty Ltd* (1986) 10 ACLR 549*;* re excessive rates of remuneration and depriving members of dividends as oppressive *see Roberts v Walters Developments Pty Ltd* (1992) 10 ACLC 804*: See also Shamsallah Holdings*, note 7.

32 See in particular *Guinness plc v Saunders* [1990] 2 AC 663.

33 Tomasic R, Jackson J and Woellner R, *Corporations Law Principles, Policy and Process*, 3rd edition, Butterworths, Sydney, 1996 at 8. Note the extensive academic literature cited therein.

34 See for example the *Senate Standing Committee on Legal and Constitutional Affairs (the Cooney Committee) Report on the Social and Fiduciary Duties and Obligations of Company Directors* discussed in Baxt R, "Proposals for Reforming Company Law - The Duties of Directors" (1992) 10 *Company and Securities Law Journal* 139. See the influential UK reports - Cadbury Committee, Greenbury Report and more recently the Hampel Report. Note Hampel reviewed the Cadbury and Greenbury Reports and produced a report which the London Stock Exchange incorporated into the Stock Exchange Listing Rules in 1998 as a new Combined Code of best practice. See *West Midlands Pension Fund, Corporate Governance*, <http://www.westmids-pensions.org.uk/corp_gov.htm> update 25.09.01, Copyright © Wolverhampton CC 2001. Re Hampel Committee (November 1995) see: Souster P, *DIRECTORS: Your Responsibilities and Liabilities*, 4th edition, Accountancy Books cited in *Club Organisation, Directors' responsibilities - a guide*, <http://www.thompson231.freeserve.co.uk/DirResp.htm#Corporategovernance> 31 December 1999.

excessive remuneration of directors is indicative of inadequate transparency and accountability of management.

In 1999 a survey[35] indicated that there is a general perception that the level of executive director remuneration is excessive. One would expect that this concern regarding excessive remuneration is now a major concern for investors and the general public considering the new wave of corporate scandals and ascending amounts of directors' remuneration.[36] Riley[37] captures the concerns regarding excessive remuneration well in observing that "[t]here are golden hellos on arrival, golden handcuffs as inducement to stick around…and…a golden parachute to steady their fall from grace." While many directors might voluntarily be answerable to the "vaguer sanctions of conscience"[38] to act with reasonable conduct in good faith without the need for legal regulation there remains a number of directors who succumb to lower standards. Lord Herschell in *Bray v Ford* observed that "human nature being what it is, there is a danger of [a director] being swayed by [self] interest, rather than by duty".[39] The truth in this statement has been confirmed in a perpetual cycle of corporate scandals and the neo-liberal norms of corporate law have proved to be inappropriate to curb the self-interests of some directors. A shift in the corporate norms based on the fiduciary responsibility of good faith[40]is required as a means of restraining unreasonable remuneration[41]of company directors. Commentators have noted that

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35 Brooks, note 3. referring to 86.5% of respondent shareholders.

36 See Chenoweth N, note 25; and see generally articles in the special attachment "Profits 2002" *The Australian Financial Review*, 25 September, 2002.

37 Riley M, note 5.

38 Holmes, note 16, p 461.

39 *Bray v Ford* [1896] AC 44 per Lord Herschell at 52.

40 The 'good faith' norm represents the equitable fiduciary duties the director including a duty of loyalty and honesty to act in good faith for the benefit of the company: see *Re Smith & Fawcett Ltd* [1942] Ch 304; a duty to deep discretions unfettered: see *Russell v Northern Bank Development Corporation Ltd* [1992] BCLC 1016; a duty to exercise powers only for proper purpose; *Permanent Building Society (in liq) v Wheeler* (1994) 14 ACSR 109*; Howard Smith Ltd v Ampol Petroleum Ltd* [1974] AC 821: and a duty to avoid conflicts of interest: *Aberdeen Railway Co v Blaikie Bros* (1854) 1 Macq 461. In addition to the equitable fiduciary duties the director has a further common law duty to exercise, care and diligence: see *AWA Ltd v Daniels T/as Deloitte, Haskens & Sells (1992)* ACSR 759. See also ss 181-183.

41 Note that although the focus of the House of Lords in *Guinness plc v Saunders* [1990] 2 AC 663 was on whether there was a right to remuneration there was a heavy emphasis placed on the fiduciary obligations [see note 41] of the members of

the current system of corporate law embodies legal norms that display a conservative bias[42] and is "designed to prevent outside interference in most forms of substantive decision making by corporate boards of directors".[43] Corporate law theory is housed in a conservative world[44]and nearly[45] all of the literature on Australian corporate law theory is generally anchored in the liberal world view.[46] Hall has observed that there has been "little attempt to explain or acknowledge…the impact of the values of liberalism".[47]

Briefly Australian corporate law theory can be categorised into three main strands or paradigms namely the concession theory, corporate realism and aggregate/contractarian theories.[48] "Stripped of their

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the board of directors; see esp. per Lord *Templeman* at ACLC pp 3,066-3,072; A.C. p 689-696, noted by Ormiston J in *Sali v SPC Ltd & Anor* (1991) 9 ACLC 1,511 at 1521.

42 Note that the central contracting norm of corporate law is supported by the "immanent" conservative bias in the judicial passivity, private ordering, disclosure and equality. See the discussion in Whincop M, "The Immanent Conservatism of Corporate Adjudication: Thoughts on Kingsford Smith's 'Interpreting the Corporations Law'" (2000) 22 *Sydney Law Review* 273.

43 Yablon, note 6, p 1882.

44 See Generally Hall KH, "The Interior Design of Corporate Law: Why Theory is Vital to the Development of Corporate Law in Australia" (1996) 6 *Australian Journal of Corporate Law* 1. at 4.

45 Note that Andrews provides an interesting observation into corporate law theory in that critical theories "rarely 'intrudes' into legal writing about company law…The effect is that modernism lingers on and the ideas of normative legal thought still prevail." See Andrews, N, "What would Sir Samuel Griffith have said? Postmodernism in the 1990s company law classroom" (1998) 5(2) *E Law - Murdoch University Electronic Journal of Law*, at para 35 <http://www.murdoch.edu.au/elaw/issues/v5n2/andrews522.html>;
See also Andrews N, "Wormes in the entrayles: the corporate citizen in law?" (1998) 5(2) *E Law - Murdoch University Electronic Journal of Law*, at para 29. <http://www.murdoch.edu.au/elaw/issues/v5n2/andrews522.html>; and Andrews, note 16.

46 Bottomley S, "Taking Corporations Seriously: Some Considerations for Corporate Regulation" (1990) 19 *Federal Law Review* 203 at 204

47 Hall, note 44, p 6; Cf Bottomley, note 46, p 206; Wishart David, "The Absent Discussion in Australian Corporations Law" (1997) 15(1) *Law in context*, 142 at 142.

48 Hall, note 44, p 5; Bottomley S, "From Contractualism to Constitutionalism: A Framework for Corporate Governance" (1997) 19 *Sydney Law Review* 277 at 279-290; Bottomley, note 46, p 206; Bonollo F, "the nexus of contracts and close corporation appraisal" (2001) 12 *Australian Journal of Corporate Law* 165 at 167-174. For a discussion on debate between contractarianism and communitarianism see generally Bradley M, Schipani C, Sundaram AK And Walsh JP , "The Purposes

complexities"[49], the debate between the theories is concerned with whether the corporation should be viewed as a "nexus of contracts"[50]negotiated among self-interested autonomous individuals or as a "separate legal entity"[51]with the privilege of having the rights and responsibilities of a natural person. Contractarian theory is the dominant theory in corporate law scholarship[52] in Australia and purports that the corporation is a nexus of contracts[53] and corporate norms serve to fill the inevitable gaps that arise in complex contractual relations.[54] However contractarian theory[55] fails to adequately address the taking of excessive remuneration by corporate directors. Corporate contractarianism is premised on efficiency, autonomous individual rights, de-regulation and wealth creation.[56] The underlying premise of contractarian theory is the existence of the autonomous contracting individual. However the shareholders and the company are not free autonomous contracting individuals but are inherently

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And Accountability Of The Corporation In Contemporary Society: Corporate Governance At A Crossroads" (1999) 62 *Law & Contemp. Probs.* 9 at 33-45.

49 Bradley, note 48, p 34. See also Hall, note 44, p 9.

50 see generally Hall, note 44, pp 9-15; Bottomley, note 46, pp 208-211; Bradley, note 48, pp 35-38.

51 Note that Concession theory posits that the corporation has an artificial separate legal status created by a privileged concession by the state; see Bottomley, note 46, pp 206-208; Hall, note 44, pp 6-7. In contrast to the concession theory view of an artificial entity, corporate realism considers that the corporation exists naturally through business activities and is recognised by the state; see Hall, note 29, p 7-9; Bottomley, note 46, pp 211-213.

52 Simmonds R, "Shareholder Democracy or a Banana Republic: The CASAC Proposals for Reform" (2000) 7(4)) *E Law - Murdoch University Electronic Journal of Law*, <http://www.murdoch.edu.au/elaw/issues/v7n4/simmonds74nf.html>. Note also the extensive literature re contractarian theory and Australian corporate law cited in Whincop, note 55, p 189 at footnote 11.

53 Whincop MJ, note 1, p 28. Cf communitarian theory discussed in Whincop, note 1, p 29.

54 Whincop, note 1, p 29.

55 Re ex ante contracts around fiduciary duties modification see Coffee J "No Exit?: Opting Out, the Contractual Theory of the Corporation, and the Special Case of Remedies" (1988) 53 Brooklyn Law Review 919 cited in Whincop MJ, "Of Fault and Default: Contractarianism as a Theory of Anglo-Australian Corporate Law" (1997) 21 *Melbourne University Law Review* 187 at 193 and 195; Re ex post contracts around fiduciary duties see generally Whincop, note 1.

56 See generally Whincop, note 1, p 29.

vulnerable due to the corporate structure[57] that requires them to rely upon the directors to represent their interests. Therefore contractarian theory is strained because the presumption of an autonomous individual cannot be sustained in the face of this fundamental vulnerability and the disadvantaged shareholder and company may require "the protection of equity acting upon the conscience of [the director]".[58] The prevalence of self-dealing type behaviours such as unreasonable remuneration by corporate directors highlights the very need to refocus law upon the normative principle of good faith[59] in an effort to restrain the abuse of the remuneration process by some directors.

Internal Critique: Neo-liberalism and Corporate Law

The terms 'internal critique' and 'normative reconstruction' are conceptual tools that have been used by Lacey[60]and which draw life from Hegel's immanent critique.[61]

In this paper an internal critique[62] is a theoretical construct employed predominantly through an ideological analyses[63]within the normative framework of corporate law. The ideological analysis[64] will focus on

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57 See discussion on contract and fiduciary in Maxton JK, "Contract and Fiduciary Obligation" (1997) 11(3) *Journal of Contract Law* 222.

58 *United States Surgical Corp. v Hospital Products International Pty Ltd* (1984) 58 ALJR 587 per Dawson J at 628. Note that the emphasis on the undesirability of imposing fiduciary obligation in commercial transactions where directed at where the parties deal at arms length; Gibbs CJ, Dawson and Wilson JJ.

59 Note the discussion in Whincop, note 55, pp 204, 205, 222 & 233. See also Paterson JM, "Good Faith in Commercial Contracts? A Franchising Case Study" (2001) 29 *Australian Business Law Review* 270; see Stapleton J, "Good Faith in Private Law" (1999) *Current Legal Problems* 1; and Mason A, "Good Faith and Equitable Standards" (2000) 116 *Law Quarterly Review* 66.

60 Note Lacey, note 19.

61 Salter M and Shaw J, "Towards a Critical Theory of Constitutional Law: Hegel's Contribution" (1994) 21 *Journal of Law and Society* 464 at 465.

62 Lacey, note 19.

63 See in particular the reconceptualized approach to ideology in Fegan E, "'Ideology' After 'Discourse': A Reconceptualization for Feminist Analyses of Law." (1996) 23(2) *Journal of Law and Society* 173.

64 To overcome the epistemological difficulties inherent in the Marxian use of ideology we draw upon Fegan's reconceptualised notion of ideology; Fegan, note 63. Note the epistemological difficulties refers to the "assertion that masses of people can be taken in by false ideas while [the theorists] have somehow managed

neo-liberalism and its impact on both the legislative and judicial discourses. The term 'ideology' is used to describe the process whereby certain "unchallenged facts are idealised in a system of contingent ideas, beliefs, and practices, which are in turn taken for granted as natural and necessary to the proper functioning of society".[65] In relation to the remuneration of corporate directors ideology serves as a "legitimating mechanism"[66]for particular political ends.[67] In this sense the organised rhetoric[68] of neo-liberalism is internalised by corporate law and elevates the ideas, beliefs and values of the neo-liberal world-view to the corporate law norms.[69] Put in a nutshell this paper is premised upon the proposition that the values of neo-liberalism,[70] including individualism; freedom of choice; profit making; deregulation and privatisation[71]are the normative focus for corporate law. It will be argued that the normative focus upon neo-liberal ideology is inappropriate as a legitimating mechanism for the remuneration of corporate directors.

Australian politics has experienced an overt neo-liberal turn, whereby the Liberal/National Coaltion[72]and Labor Governments[73] have

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to escape their influence" raises doubts about the efficacy of ideology as an analytical tool; see Fegan, note 63, p 177.

65 Fegan, note 63, pp 180-181

66 Fegan, note 63, p 179.

67 see Thompson JB, *Studies in the Theory of Ideology* (1984) at p 4 cited in Fegan, note 63, p 177. See also Hunt A, "Marxism, Law, Legal Theory and Jurisprudence" in Fitzpatrick P (ed), *Dangerous Supplements: Resistance and Renewal In Jurisprudence*, (1991) 102 at 115 cited in Fegan, note 63, p 182.

68 Eagleton T, Ideology: An Introduction (1991) cited in Fegan, note 63, p 177.

69 organised as "persuasive political rhetoric and used by empowered social organizations serving particular political ends", Eagleton T, *Ideology: An Introduction* (1991) cited in Fegan, note 63, p 177.

70 see note 20. Cf neo-liberalism with social democracy characterised by equality and the collective good re distributive justice, government regulation and public accountability; See for example the 1970's Whitlam Labor Government social justice policies. See generally Bottomley S, Gunningham N and Parker S, *Law in Context*, The Federation Press, Leichardt, NSW, 1994, especially at 1-87

71 See generally Bottomley, note 70, pp 1-87; and Thornton M, "Neo-liberalism, Discrimination and the Politics of Ressentiment" (1999) *Law in Context* 8 at 9-11.

72 Since 1996 at virtually totally at the expense of a social justice agenda; see further commentary in Carroll, note 10.

73 Note the 1983 Hawke Labor Government; see Eisenstein H, Inside Agitators: Australian Femocrats and the State, Philadelphia, Temple University Press, 1996 at 185 cited in Thornton, note 71, p 15. Note also the Keating Labor Government also

embraced neo-liberalism at the expense of social- welfare policies. The seductive attraction in neo-liberal ideology is the persuasive rhetoric that government policies support economic efficiency,[74] profit-making, privatisation, and globalisation[75] and economic rationalism and will secure corporate/business approval by facilitating a perception that the particular Government is "a good manager of capitalism".[76]

The internalisation of neo-liberalism within corporate law is a subtle process of rhetorical persuasion by dominant business groups.[77] However in the case of the Corporate Law Economic Reform Program (CLERP) the government policy was one of neo-liberalism and economic analysis of law and economics theory and there was no necessity for rhetorical persuasion.[78] Corporate law reform policy has been closely informed by economic policy. CLERP[79] enshrined neo-liberal values and proactively took the law and economics alignment to a new level in moving corporate law from law to law with an overt central economic focus.[80] The Federal Treasurer's support for neo-

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embraced economic rationalism but both Hawke and Keating governments simultaneously articulated a commitment to a social justice agenda.

74 Re economic analysis and normative claims that law ought to be efficient; see Farrar JH, "In pursuit of an appropriate theoretical perspective and methodology for comparative corporate governance" (2001) 13 *Australian Journal of Corporate Law* 1 at 8-10.

75 See also the impact of neo-liberalism on anti-discrimination legislation in Thornton, note 71, pp 14-16.

76 see Eisenstein H, Inside Agitators: Australian Femocrats and the State, Philadelphia, Temple University Press, 1996 at 185, referring to the 1983 Hawke Labor Government; cited in Thornton, note 71, p 15.

77 see Thornton, note 71; Wishart, note 47.

78 See Business Law Division of Treasury, Cth, 1997: 1; and CLERP Policy Goals; Business Law Division, 1997: 2. See generally Chan SH and Law L, "Interests of the Company as a Whole: An Economic Appraisal of Fiduciary Controls" (1999) 20(2) *The University of Qld Law Journal* 186.

79 See for example the policy goals aimed to secure "a strong and vibrant economy" by delivering a corporate regulatory regime which adopted the Government's economic objectives; facilitate investment; wealth creation; and investor protection and maintain business confidence: See *Corporate Law Economic Reform Program, Proposals for Reform, No 3, Directors' Duties and Corporate Governance - Facilitating Innovation and Protecting Investors* (1997). At 3.1 pp 7-8. <http://www.treasury.gov.au> under the Corporate Law Reform hypertext link.

80 See and CLERP Policy Goals; note 78. Note also "Principles of Reform" of cost/benefits analysis; and the "transaction costs" analysis and concerns for "world competitiveness" as indicators of neo-liberal discourse; See critique of the "façade"

liberalism and economic analysis[81] is obvious in his quest to "modernise…Corporations Law and give it an economic focus" and "harmonise Corporations Law with pro-enterprise, pro-jobs and pro-investment objectives". [82] Neo-liberalism permeates the normative framework for corporate law[83] and is focused on two normative objectives namely investor protection and wealth creation. Corporate law has become the embodiment of a profit driven neo-liberal form of capitalism. The desirability of this form of capitalism depends upon one's world-view but the issue here is whether neo-liberal norms are appropriate to guide corporate law's approach to the issue of excessive remuneration.

Neo-liberal values are well represented within some important definitive provisions of the *Corporations Act.* The following are but a few examples:

1. Individualism is embodied within the separate legal entity doctrine.[84] The creation of an artificial person with special powers and privileges including the legal capacity of a natural person and all the powers of a body corporate is an important reference in corporate legislation[85];
2. Free trade is facilitated by limited liability[86]; the floating charge[87]; perpetual succession[88]; the indoor management

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re CLERP as law reform and discussion re ideological neo-liberal right in Wishart, note 47, pp 142-149.

81 See Business Law Division of Treasury, note 78; and CLERP Policy Goals, note 78.

82 Quoted in Brown and da Silva Rosa, "Australia's Corporate Law Reform and Market for Corporate Control" (1998) 5(2) *Agenda* at 179.

83 Note the strong worded approach by Carroll, note 10, p 20.

84 *Salomon v Salomon & Co Ltd* [1895] 2 Ch 323 (CA); [1897] AC 22. Re: judicial acceptance in Australia see *Hobart Bridge Co Ltd v FCT* (1951) 82 CLR 372; and *Walker v Wimborne* (1976) 137 CLR 1. See commentary re normative values, separate legal person, contracts and investors in Dawson F, "Acting in the Best Interests of the Company — For Whom are Directors "Trustees"?" (1984) 11 *New Zealand Universities Law Review* 68 at 77-78.

85 s 124(1)

86 See s 9 definition of limited company; s 112; s 148(2), s 149, s 516. limited liability means that members are not liable for all the companies debts upon its winding up and therefore acts to reduce risk and facilitates investment and protect investors.

87 See definition of floating charge in s 9

88 See Part 1.5 – Small business guide 1.5 – continuous existence.

rule[89]; corporate agency principles[90] and pre incorporation contracts[91];

3. Deregulation[92] is embodied in corporate law deeming the corporate constitution[93] and/or replaceable rules a statutory contract.[94] The statutory contract[95]serves to define and privilege a company's internal management.[96] The replaceable rules and company constitution are private law designed to minimise state regulation;

4. Wealth maximisation[97] and investor protection are the central normative focus of corporate law. The privileging of the corporation as a separate legal entity and applying the free market mechanisms in a deregulated environment are all premised on the assumption that they are the best means of achieving wealth and that the wealth maximisation of corporations is good for the general economy.

The neo-liberal language within the *Corporations Act* serves to privilege the status of the internal management decision concerning the remuneration process. The *Corporations Act* does not require

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89 see ss 128-130; see also *Royal British Bank v Turquand* [1919] ER 886; *Northside Developments Pty Ltd v Registrar-General* (1990) 170 CLR 146.

90 ss 126-127

91 ss 131-133

92 See discussion on deregulation in Halstead, note 6.

93 see s 136; also the saving provision re memorandum and articles; s 1415.

94 s 140

95 see generally Riley CA, "Contracting Out of Company Law: Section 459 of the Companies Act 1985 and the Role of the Courts" (1992) 55 *Modern Law Review* 782 at 783, cited in Bonollo, note 48, p 168.

96 s 134; see also s 198A (replaceable rule). Re articles similar to s 198A (replaceable rule) the case law recognises the power of the board to manage the company free from interference by the general meeting. See *Automatic Self-Cleansing Filter Syndicate Co Ltd v Cunningham* [1906] 2 Ch 34; *Howard Smith Ltd v Ampol Petroleum Ltd* [1974] AC 821; and *NRMA v Parker* (1986) 4 ACLC 609

97 Note that company income tax provisions and the system of dividend imputation tax credits are designed to facilitate wealth maximisation. Companies are taxed at a lower marginal rate than most (except the lower tax brackets) individuals and dividend imputation tax credits for tax paid by the company on distributed dividends enables the individual shareholder to minimise tax liabilities.

disclosure of director's remuneration[98] under the notice of material personal interest provisions; s.191. Likewise directors are not precluded from being present or voting on a matter that does not need disclosure under s.191.[99] The central provision dealing with directors' remuneration is a replaceable rule[100] and the company's constitution can displace or modify the rule.[101] Reasonable remuneration does not require general meeting approval[102] and is exempt from the comparatively onerous procedural requirements[103] that serve to prevent self-dealing. There is a specific acknowledgment that the board of directors is an appropriate body to approve reasonable amounts of remuneration to themselves and other directors. However "[d]irectors have no right to be paid for their services, and cannot pay themselves or each other, or make presents to themselves out of the company's assets, unless authorised so to do by the instrument which regulates the company or by the shareholders at properly convened meetings".[104] The language of the *Corporations Act* suggests that directors, including non-executive directors, are authorised by s.211 to reasonable remuneration without shareholder approval. However public corporations listed on the Australian Stock

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98 s 191(2)(a)(ii).

99 s 195(1)(d). Cf that "a company director cannot, on behalf of the company, effectually deal with himself" *Aberdeen Ry. v Blaikie* (1854) 1 Macq. 461: and "a resolution of a company which is controlled by the company directors' votes is nugatory if it purports to sanction their making a profit"; Megarry R and Baker PV, *Snell's Principles of Equity Twenty Seventh Edition*, Sweet & Maxwell Limited, London, 1973, p242 citing *Cook v Deeks* [1916] 1 AC 554; *Re the French Protestant Hospital* [1951] Ch. 567; and *Transvaal Lands Co v New Belgium (Transvaal) Land and Development Co.* [1914] 2 Ch. 488.

100 See s 202A (a replaceable rule; see s 135) "The directors of a company are to be paid the remuneration that the company determines by resolution" Note the title of Part 2D.3 Division 2 is "the remuneration of director".

101 See s 135(2) and note that a failure to comply with a replaceable rule is not a contravention of the Act and therefore civil liability or injunction relief do not apply; s 135(3).

102 s 211

103 see ss 217-227.

104 *Re George Newman and Co.* [1895] 1 Ch. 674 (Court of Appeal) per Lindley LJ at 686, with Halsbury, LC and Smith, LJ; note also *Guinness plc v. Saunders & Anor* (1990) 8 ACLC 3,061 at pp 3,067-3,068; [1990] 2 A.C. 663 at p 690; Re a non-executive director (remuneration) see *Sali v SPC Ltd & Anor* (1991) 9 ACLC 1,511 Supreme Court of Victoria. Ormiston J: Re an executive director (re boards authority to provide a pension) see *Woolworths Ltd v Kelly (1991)* 9 ACLC 539 (N.S.W.C.A.)

Exchange (ASX) must[105] comply with listing rules. ASX Listing Rule 10.17 declares that an entity must not increase the total amount of directors' fees without the shareholder approval and "[i]f a non-executive director is paid, he or she must be paid a fixed sum"; 10.17.2. There is an interesting dilemma posed by s.211 and s.230. Section 211 provides statutory authority for directors reasonable remuneration without shareholder approval but those same directors remain fully liable for any breach of fiduciary duty; s.230.

How does a director who self approves reasonable remuneration without full disclosure or informed consent as per s.211 avoid their general law fiduciary duty not to be remunerated unless authorised by the constitution or by informed consent at a general meeting?[106] Section 211 is subject to s.230 and could not be relied upon as a statutory authority to justify the remuneration. Unless there is provision in the company constitution how is s.211 to be reconciled with s.230? In practice remuneration is generally approved by resolution at a general meeting and the s.211/s.230 dilemma would not arise, but nonetheless it does highlight a need for caution. There is a need for caution on two fronts. The first being a need for caution regarding the prudent practice of a company to ensure that their constitution is an adequate source to authorise the taking of reasonable remuneration. The second being a need for caution in interpreting the *Corporations Act* when there is a clash between neo-liberal norms, such as a right to remuneration, and good faith norm, as expressed in fiduciary obligations of directors.

Authorisation of remuneration and Informed Consent

A central question that underlies the judicial approach to the remuneration issue is whether the court should have "a constituent role in shaping corporate governance practices, or whether…governance practices, are best viewed as the inevitable

[105] See s 777(1). Re definition see s 761 re court order enforcement of ASX listing rules see s 777.

[106] *Hutton v West Cork Ry Co* (1883) 23 Ch D 654 at 672; *Re George Newman & Co* [1985] 1 Ch D 674 per Lindley LJ at 686. Cf re: conflict of interest see: *Woolworths Ltd v Kelly* (1991) 9 ACLC 539, CA (NSW).

results of market forces, centered [sic] upon capital markets".[107] However market forces are only efficient in optimal market conditions that rarely exist. The prevalence of corporate scandals highlights the requirement for proactive[108] judicial supervision regarding all forms of self-dealing, including the taking of unreasonable amounts of remuneration. Therefore it is submitted that when directors abuse their position of power and manipulate the decision-making processes to give themselves unconscionable amounts of remuneration this is an issue that the judicial narrative needs to address.

Positivist liberalism informs traditional judicial narrative as to what defines corporate law and is inscribed with "illusions of a rational route to an absolute form of knowledge by a faith"[109] in efficient (neo-classical) economics[110] and managerial science. In the case of remunerating directors the judicial narrative embraces managerial science, economic management, economic progress and the efficiency of the market as neo-liberal legitimating devices to privilege internal management decisions. The academic literature[111] "in law, economics, finance, strategy, and management presumes that governance problems are largely a result of the 'agency' problems that arise from the separation of ownership and control in the large-scale, public corporation."[112] The agency theory[113] narrowly focuses on the relation between the corporate management and investor shareholders and "has become so dominant in the literature that it is

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107 Demott D, "The Figure In The Landscape: A Comparative Sketch Of Directors' Self-Interested Transactions" (1999) 62 *Law & Contemp. Probs.* 243 <http://www.law.duke.edu>

108 see Acquaah-Gaisie, note 10, p 145.

109 See generally Hunt A, "The Big Fear: Law Confronts Postmodernism" (1990) 35(3) *McGill Law Journal* 508 at 515.

110 See commentary on Posner and post-Posner economics in Kirby, Hon Justice Michael, "*Law and Economics-Is there Hope?*" The University of Melbourne, Monash University Law School 4 July 1997.

111 See Jensen MC & Meckling WH, "Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure" (1976) 3 *J. Fin. Econ.* 305, 305-11, 343-51; and Coase R, "The Nature of the Firm" (1937) 4 *Economica* 386 cited in Bradley, note 48, p 11. See also text and literature cited in Bolodeoku IO, "Economic Theories of the Corporation and Corporate Governance: A Critique" (2002) July *The Journal of Business Law* 411 at 411, 413, 436.

112 Bradley, note 48, p 11.

113 See Clyne S, "Modern corporate governance." (2000) 11 *Australian Journal of Corporate Law*, 276 at 277-278; Brooks, note 3, p 363. Re Fiduciary principles as a response to agency costs see Chan and Law, note 78, p 190.

almost automatically accepted".[114] A dominant mechanism used to reduce agency problems and align the interests of directors with shareholders[115] is the linking of remuneration to performance criteria.

The pay for performance issue has been an important consideration in the UK, US and in Australia. Both corporations and shareholders[116] generally accept that the incentive rewards offered by generous executive remuneration are linked to facilitating company performance.[117] The pay for performance argument is intimately connected with the neo-liberal normative focus on wealth creation and investor protection and has served to encourage big salaries, generous profit related bonuses and share options[118] that are all geared toward profitable performance. The justification of the large sums involved in executive remuneration packages rests on the claim that large rewards of pay are necessary to attract highly skilled executives to the task and provide the incentive to generate achievement orientated behaviour. However, a 1994 empirical study that investigated the largest Australian companies found no evidence of a significant positive relationship between director remuneration and company performance.[119] Brooks et al[120] notes that there is a major problem in

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114 Shleifer A & Vishny RW , *A Survey of Corporate Governance*, (1997) 52 J. FIN. 737 at 738. cited in Bradley, note 48, p 11.

115 see Greenbury Committee cited in Quinn M, "The Unchangeables-Director and Executive Remuneration Disclosure in Australia." (1999) 10 *Australian Journal of Corporate Law*, 89 at 91. See also Clyne, note 113, p 278.

116 See empirical study by Brooks, note 3.

117 See Quinn, note 115, p 91. Re UK position see Greenbury Committee cited in Quinn, note 115; Young S, "Corporate Governance: Responsibilities, Risks and Remuneration" (1997) 27(4) *Accounting and Business Research* 357 cited in Quinn, note 115, p 91; Brooks, note 3, p 362

118 Re discussion on options see Lawson M, "Local option schemes try to raise the bar" *The Australian Financial Review*, Special Report, Incentives and Rewards, 3, October, 2002, p18. Note that companies are now required to put valuation figures on options and some companies "apparently do not even know how valuable the options they have been distributing are"; Chenoweth N, note 25.

119 Defina A, Harris TC and Ramsay IM, "What is Reasonable Remuneration for Corporate Officers? An Empirical Investigation Into the Relationship Between Pay and Performance in the Largest Australian Companies." (1994) 12 *Company And Securities Law Journal*, 341-353. Cf a weak link between CEO and company performance in a US study by Jensen and Murphy, "Performance Pay and Top Management Incentives" (1990) *Harvard Business Review* 138 cited in Brooks, note 3, p 363.

120 See generally Brooks, note 3, pp 369-372. Note that "inadequate compensation would have a chilling effect on the entrepreneurial enthusiasm of a director";

being able to identify variables that are an actual valid measure of performance. Empirical research by Ramsay and Hoad[121] indicate that a staggering "65% of companies do not discuss procedures for reviewing the performance of management and directors and only 42% of large companies regularly review the performance of management…" These findings raise questions as to whether high levels of remuneration can be justified on the pay for performance argument.

Recent studies have questioned the adequacy of the remuneration process. Research[122] indicates, "the vast majority of companies don't distinguish between executive and non-executive directors". The distinction should be made clear because a different process of remuneration applies.[123] Both non-executive and executive directors owe statutory and general fiduciary duties to the company. Non-executive directors are appointed pursuant to a resolution of the company[124] and usually the remuneration is fixed by resolution of the company.[125] In contrast, the managing director (CEO)[126] and other executive directors, are "ordinarily appointed by the board of directors and whose terms and conditions of appointment, including those of remuneration, are [usually] fixed by the board."[127] Hill[128] has argued that the remuneration process is flawed and the requirement for remuneration disclosure has been criticised as being uninformative

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Bishop W and Prentice DD, "Some Legal and Economic Aspects of Fiduciary Remuneration." (1983) 46 *The Modern Law Review*, 289 at 305.

121 See Ramsay I and Hoad G, "Disclosures! Corporate Governance in Practice" (1998) 14(2) *Company Director* 11 cited in Kirby, note 9.

122 See Ramsay and Hoad, note 121.

123 See *Sali v SPC Ltd & Anor* (1991) 9 ACLC 1,511 per Ormiston J at 1521.

124 Re public companies see ss 201G & 201H (replaceable rules). see also 201C. Note special rules for appointment of directors for single director/single shareholder proprietary company; s 201F.

125 See s 202A Corp. Act (replaceable rule); Chapter 2E esp. s 211 (reasonable remuneration). Note that in a public company remuneration includes superannuation benefits; s 211(3)(a) and termination benefits to a person ceasing to hold an office; s 211(3)(b). Re public companies listed on the ASX and ASX Listing Rules, see note 105 and accompanying text.

126 See s 201J (replaceable rule). (Note also there is usually a contract of employment and the provisions of the contract are important to the appointment.)

127 See *Sali v SPC Ltd & Anor* (1991) 9 ACLC 1,511 per Ormiston J at 1519; cf. *Lincoln Mills (Aust.) Ltd. v. Gough* [1964] V.R. 193 and *Taupo Totara Timber Co. Ltd. v. Rowe* *(1977-1978) CLC 40-352*; [1978] A.C. 537 (P.C.).

128 Hill, note 2.

and inadequate.[129] The Australian Council of Super Investors claims that half of the top 100 Australian listed companies failed to disclose values of the share option deals.[130] Although disclosure and fully informed consent generally[131] exonerates a fiduciary's conduct, it is submitted that implied within that informed consent is the notion of reasonableness.[132] The purpose of requiring full disclosure of all the known facts is so that an informed consent can be based on a rational and reasonable assessment of that disclosed information. By implication the informed consent refers to the taking of reasonable remuneration and the unreasonable and excessive amount of remuneration is in breach of fiduciary duty.

A director's right to remuneration is usually authorised by either the corporate constitution[133]/replaceable rules[134], the members in a general meeting[135], or by statute.[136] Therefore directors have to establish a right to be paid.[137] The provisions of a company's constitution/replaceable rules[138] have the effect of a statutory contract

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129 See Hill, note 2, pp 240-244 and 247. These criticisms are still relevant to the current s 300A disclosure regime; re s 300A and problems with inadequate disclosure see Clyne, note 113, pp 287-88. See generally discussion re continuous disclosure in Koeck WJ, "Continuous Disclosure" (1995) 13 *Company and Securities Law Journal* 485.

130 See Chenoweth N, note 25.

131 Note that a controlling director may be required to take action beyond disclosure depending on the degree of director involvement and the gravity of possible outcomes for the company: *Fitzsimmons v R (1997) 15 ACLC 666; (1997) 23 ACSR 355* per Owen J (at ACLC 669; ACSR 358). See *ASIC v Adler* (2002) 20 ACLC 576 per Santow J at para 735.

132 Note Oliver J in *Re Halt Garage (1964) Ltd* [1982] 3 All ER 1017 at 1043a.

133 *Re George Newman & Co* [1985] 1 Ch D 674 at 686.

134 S 202A (Replaceable Rule)

135 S 202A; article 63 Table A (by virtue of transitional provision s 1415). Note - subject to the express provisions of the company constitution.

136 Re: public company see generally Chapter 2E and specifically reasonable remuneration without consent; s 211; note "related person" includes director; s228.

137 *Dunstan v Imperial Gas Light and Coke Co* (1832) 110 ER 47 per Tauntan J.

138 Note either the constitution or replaceable rules will apply; see s141 or both; s 134. A replaceable rule will apply unless displaced or modified; s 135(2): either constitution/replaceable rules will apply.

between the company and each director[139] "but the obligation to act in good faith in the best interest of the company remains paramount".[140] Unauthorised remuneration must be repaid to the company[141] and subsequently it would be extremely unusual that a company's constitution did not provide for the payment of remuneration to directors. As "a matter of prudence, if not necessity"[142] the approval of a non-executive director's remuneration package is most commonly by ordinary resolution before a general meeting of shareholders. However the requirement of general meeting approval for remuneration has been criticised as cumbersome, expensive and impractical process.[143] Such criticism does raise an interesting point as to whether the approval by the shareholders at a general meeting is a valid process.

The criticism directed at the general meeting approval of remuneration is supported by empirical research. A 1999 survey[144] indicates that 62.7% of shareholders never attend the annual general meeting, perceive their involvement as futile and that a majority of shareholders elect not to have an active involvement in the company. But even if shareholders could organise themselves into an effective voice they would have difficulty in becoming the necessary majority.[145] When a general meeting is held typically the shareholders vote on the recommendation of the board of directors and determine only the gross amount available for remuneration not individual director

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139 see s140(1)(b). Note that a failure to comply with the a replaceable rule does not contravene the Corporations Law; s 135(3) and affords no injunction remedy; s 1324.

140 See *Centofanti v Eekimitor Pty Ltd* (1995) 15 ACSR 629 at 631, SC(SA).

141 See *Boschoek Proprieatary Co Ltd v Fuke* [1906] 1Ch 146.

142 Dawson J, cited in Adenwala, note 7 at 27. Note also that under the ASX Listing rules.

143 Griffiths, "Directors Remuneration: Constraining the Power of the Board" (1995) *Lloyd's Maritime and Commercial Law Quarterly* 372 cited in Hill, note 2, p 234.

144 Brooks, note 3, p 365.

145 Dawson, cited in Adenwala, note 7. Cf the role of institutional investors see generally Stapledon G, "Disincentives to Activism by Institutional Investors in Listed Australian Companies" (1996) 18 *Sydney Law Review* 152; Ramsay I and Blair M, "Ownership Concentration, Institutional Investment and Corporate Governance: An Empirical Investigation of 100 Australian Companies" (1993) 19 *Melbourne University Law Review* 153; Walker G and Fox M, "Institutional Investors and the Brierley Investments Ltd Executive Share Options Scheme" (1995) 13 *Company and Securities Law Journal* 344.

remuneration.[146] The authority for the board to divide between the directors a total sum determined at general meeting is usually provided in the company's constitution.[147] Strictly speaking it is questionable whether the individual director could possibly satisfy the requisite "full and complete disclosure" of all material facts to enable a fully informed consent by the general meeting when the actual amount of remuneration to the individual director is unknown until after the portion of the total sum has been allocated.[148] It appears that the mechanics of the actual remuneration process and general meeting procedure seriously undermines the validity in authorising remuneration by resolution of the general meeting.

Normative Reconstruction.

The normative reconstruction is an attempt to refocus legal norms within the remuneration process so as to avoid the inappropriate neo-liberal norms. The internal critique has revealed that the contemporary corporate law norms of wealth creation and investor protection are manifestations of neo-liberal ideology and have been internalised within the reform process, statutory provisions and judicial narrative. However it is important to note that the focus on corporate wealth creation and investor protection is in clear contradiction where there is an abuse of the remuneration process by either self-dealing by a director or by company approved unreasonable remuneration to directors. The taking of unreasonable remuneration by a director threatens the investor and ultimately harms the company's potential to maximise on wealth creation and consequently reveals the need to find a more appropriate normative basis for adjudication in relation to issues of remuneration.

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146 Hill , note 2, p 234.

147 Provisions of this kind were discussed in detail in *Guinness,* note 32, per Lord *Templeman* at ACLC pp 3,066-3,072; A.C. pp 689-696; cited in *Sali v SPC Ltd & Anor* (1991) 9 ACLC 1,511 per Ormiston J at 1521.

148 Cf *ASIC Policy Statement 76* at 76.33 & 76.34 suggests that a director is not in breach of a conflict of interest where provisions in a company's constitution provides for shareholders approval of a maximum or total amount for directors' remuneration and left for directors to decide upon the allocation of that amount between directors.

Whincop[149] has argued that the courts display an immanent conservative bias and adopt a passive approach to corporation adjudication with a preference for private ordering "by favouring ongoing contractual solutions to the relational problems that the parties experience".[150] Judicial passivity and conservative bias and private ordering favour internal management and manifest the neo-liberal normative principles of wealth maximisation and investor protection. There is a presumption that management is efficient and knows best how to exercise their powers. The immanent judicial conservatism has generally meant that courts[151] have demonstrated an unwillingness to interfere with the operation of the internal management decisions regarding executive director remuneration. One argument for the courts reluctance to interfere in the remuneration process is that the corporation and shareholders know the intricate details of their situation and are better suited than the court to decide how much to remunerate their directors. This proposition is exemplified by the words of Lord Hailsham[152] that "[b]usinessmen know their own business best even when they appear to grant an indulgence." However courts are often required to deal with complex relationships[153] and decide what is reasonable given all the circumstances. The use of expert evidence[153(a)] is most often required but the courts are able and capable to deal with the complex nature of deciding whether remuneration is both authorised and justified as reasonable given the factual circumstances.

Unreasonable remuneration

The judicial focusing upon merely whether a director's remuneration is authorised sterilises law's process and inhibits law's ability to attain its own promises of justice and fairness. The authority for a director to receive remuneration is important but should serve as the first tread

149 Whincop, note 42.

150 Whincop, note 1; see also Whincop, note 42.

151 See for example *Guinness plc v Saunders* [1990] 2 AC 663.

152 *Woodhouse AC Israel Cocoa Ltd SA & Anor v Nigerian Produce Marketing Co Ltd* [1972] AC 741 at 757, cited by Samuels JA in *Woolworths Ltd v Kelly* (1991) 9 ACLC 539 (NSWCA) at 553.

153 Yablon, note 6, p 1896.

153(a) see s 241(d) *Corporations Act 2001* (Cth)

in a two-step process. Once the court is satisfied that a director is authorised by either the company's constitution, the legislation or by consent of the general meeting there should be an inquiry into whether the remuneration is reasonable given all the circumstances. It is submitted that remuneration that is unreasonable is beyond authorisation by the company's constitution and beyond general meeting sanction this is because such payment would harm the company.

The courts do not define reasonable remuneration or provide criteria to determine whether remuneration is reasonable or unreasonable.[154] The reasonable/unreasonable remuneration dichotomy is central to the judicial narrative found in *Re Halt Garage (1964) Ltd*[155]. *Re Halt* is often cited[156] as the authority to legitimate the judicial narrative that the amount of remuneration paid to directors is a matter of internal management[157]and that focus should be on the entitlement to remuneration[158] as opposed to whether the remuneration is excessive or unreasonable. In fact the head note in *Re Halt* states that "[t]he amount of remuneration awarded…was a matter of company management and, provided there had been a genuine exercise of the company's power to award remuneration, it was not for the court to determine if, or to what extent, the remuneration awarded was reasonable".[159] However it is submitted that the foregoing sentence from the head note does not fully reflect the content of Oliver J's judgment.

On re-visiting *Re Halt*[160] it is clear that Oliver J differentiates between that part of remuneration "which genuinely represented a reasonable reward for services' and 'that part…which is so manifestly beyond

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154 Defina, note 119, p 345.

155 *Re Halt Garage (1964) Ltd* [1982] 3 All ER 1016

156 Tomasic, Jackson & Woellner, note 33, p 338; Quinn, 115, p 90; Adenwala, note 7, p 30; Hill, note 2, p 233; Defina, note 119, p 342;

157 *Re Halt Garage (1964) Ltd* [1982] 3 All ER 1016; see discussion in Yablon, note 6, p 1869. Re *Corporations Act* (where applicable; s 135(2)) see Replaceable Rule – s 198A. Note unless otherwise stated reference to statute sections/regs refer to the *Corporations Act.*

158 See for example *Guinness plc v Saunders* [1990] 2 AC 663.

159 *Re Halt Garage (1964) Ltd* [1982] 3 All ER 1017

160 Note that *Re Halt* concerned a closed private company where the constitution gave an express power to award remuneration to a director as determined by the company in general meeting.

any possible justifiable reward".[161] Oliver J "focused on whether the remuneration was over-generous or unreasonable with reference to the benefit to the company derived from the payments to a director"[162] and was of the opinion that:

> *in the absence of evidence that the payments made were patently excessive or unreasonable,* the court…should [not] engage on a minute examination of whether it would have been…beneficial to the company...so long as it is satisfied that it was indeed drawn as remuneration.[163]

Although *Re Halt* is often cited[164] as authority to support the court's privileging internal management decisions regarding the amount of director's remuneration there is a failure to acknowledge the important proviso that there be an "absence of evidence that payments made were patently excessive or unreasonable." In *Guinness*[165]; *Sali v SPC* [166]; and *Woolworths v Kelly*[167] the courts' approach has been to focus on the entitlement to remuneration and not whether the remuneration/benefit was excessive or unreasonable. However Oliver J has clearly recognized that the "court is not a slave to any express power or to any resolution passed by a general meeting"[168] and the important point was well made that "payments of remuneration that are so 'out of proportion' to be 'over-generous and unreasonable'…*could not be sanctioned by a general meeting* because it was not for the benefit for the company as an entity to resolve on payments on this scale".[169] This is important because it provides the

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161 *Re Halt Garage (1964) Ltd* [1982] 3 All ER 1016 at 1044

162 *Re Halt Garage (1964) Ltd* [1982] 3 All ER 1016 at 1041 h & 1040j.

163 *Re Halt Garage (1964) Ltd* [1982] 3 All ER 1016 at 1041c-d, (emphasis added).

164 See note 156.

165 *Guinness plc v Saunders* [1990] 2 AC 663.

166 *Sali v SPC Ltd & Anor* (1991) 9 ACLC 1,511 Supreme Court of Victoria. Ormiston J

167 *Woolworths Ltd v Kelly* (1991) 9 ACLC 539 (NSWCA) per Mahoney JJA at 567.

168 *Re Halt Garage (1964) Ltd* [1982] 3 All ER 1016 at 1043e.

169 *Re Halt Garage (1964) Ltd* [1982] 3 All ER 1017 at 1043a; 1044 (emphasis added). Note the three tests in *Re Lee, Behrens & Co Ltd* [1932] All ER Rep 889 at 890-91 per Eve J cited in *Re Halt* at 1028h applied to both express or implied powers and stated that "all…grants [of remuneration] involve an expenditures of the company's money, and that money can only be spent for purposes reasonably

judiciary with good authority to focus upon the principle of good faith in relation to the remuneration issue and to address whether the remuneration is excessive or unreasonable. There is a difficulty in knowing "'where to draw the line' between what could be described as reasonable and what could not"[170]and Oliver J has laid down a navigational path that courts should follow by concluding that "[i]n the absence of any evidence of actual [fraud] motive, the court must…look at the matter objectively and apply the standard of reasonableness".[171]

Chapter 2E of the *Corporations Act* makes special provision for the payment of remuneration to the directors of public companies.[172] The purpose of Chapter 2E is "to protect the interests of a public company's members as a whole, by requiring member approval for giving financial benefits to related parties that could endanger those interests"; s.207. In determining remuneration the term "giving of a benefit" is to be given a "broad interpretation" and "the economic and commercial substance of conduct is to prevail over its legal form".[173] Section 211 exempts the general requirement for approval by a resolution of members for the remuneration to directors if and only if the remuneration is reasonable. Section 211 provides that remuneration would be reasonable given the circumstances of the public company or entity giving the remuneration; and the related party's circumstances includes the responsibilities involved in the office of employment. Although there is no case authority[174] that

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incidental to the carrying on of the company's business and the validity of such grants is to be tested…by the answer to three pertinent questions: (i.) Is the transaction reasonably incidental to the carrying on of the company's business? (ii.) Is it a bona fide transaction? And (iii.) Is it done for the benefit and to promote the prosperity of the company?". Note that Eve J in *Re Lee, Behrens & Co Ltd* [1932] All ER Rep 889 at 890-91 cites the following supporting authority: *Hampson v Price's Candle Co.* (1876) 45 LJ Ch 437; *Hutton v. West Cork Ry.Co.* (1883) 23 Ch D 654; and *Henderson v Bank of Australasia* (1888) 40 Ch D 170.

170 *Re Halt Garage (1964) Ltd* [1982] 3 All ER 1016 at 1044f.

171 *Re Halt Garage (1964) Ltd* [1982] 3 All ER 1016 at 1044f.

172 see the notation attached to s 202A.

173 s 229(1) see also s 229(2)

174 CCH Australian Company Law Cases search revealed no cases specifically on s 211. Note that *ASIC v Adler* (2002) 20 ACLC 576; [2002] NSWSC 171 NSWSC per Santow J dealt with related party transactions re Chapter 2E and the arm's length exception to the requirement for member approval for a related party transaction; s 210.

specifically deals with s.211 the important point is that s.211 provides some basic guidance as to what would constitute reasonable remuneration.[175] The guidance here is in two parts. The first concerns the given circumstances of the company and the second concerns the director's circumstances.

Guidance as to what constitutes reasonable remuneration is crucial to resolving the excessive remuneration issue and further discussion on this point will be made. But for now it is important to note that s.211 leaves us with the fairly absurd position that when the remuneration is unreasonable there is a requirement to gain member approval of unreasonable remuneration. The logic here is that unreasonable remuneration would endanger the interests of a company's members as a whole; s.207 but the absurdity is that unreasonable remuneration should not be able to gain member approval. The approval of unreasonable remuneration must be approved in accordance with ss.217 to 227. Section 219(1) requires that an explanatory statement to members must include all information that is reasonably required by members in order to decide whether or not it is in the company's interests to pass the proposed resolution. This information includes whether the director has an interest in the outcome and from an economic and commercial point of view, what the true potential costs and detriments would be from giving the remuneration. It would appear that the explanatory statement to members would need to inform the members that the remuneration was unreasonable given the circumstances of the company and the position of the director. One would expect that it would be unlikely that unreasonable remuneration would receive bona fide approval by resolution of members. However even if the unreasonable remuneration was approved the provisions of s.230 make it clear that a director is not relieved from either their statutory or fiduciary duties in connection with a transaction merely because the transaction was approved by a resolution of members. This would mean that the directors are not relieved from their statutory or fiduciary duty not to endanger the interests of the company as a whole. It would appear that both the statutory and fiduciary duties preclude the directors from receiving unreasonable remuneration and s.230 precludes relief from the statutory and fiduciary duties even if

175 Note reasonable remuneration; s 211(1) or reasonable expenses incurred in performing duties or that will be incurred; s 211(2) to a related party. A "related party" is defined in s 228 and includes a director, officer or employee. Note that the definition of "officer" in s 9 also includes a director.

approved by resolution of members. Therefore it is arguable that a director who takes unreasonable remuneration, even if approved by members, is in breach of fiduciary duties and liable to account for the unreasonable amount of the remuneration.

It is submitted the unreasonable remuneration is a breach of both the statutory and general law fiduciary duties and therefore s.230 should be read to prohibit the authorisation or sanctioning of unreasonable remuneration to directors. This would be consistent with Oliver J's judgment in *Re Halt* and would require the court to "look at the matter objectively and apply the standard of reasonableness".[176] However the difficulty in knowing "where to draw the line" demarcating the reasonable from unreasonable remuneration still remains. Judicial and/or legislative guidance is needed to assist in determining whether the remuneration is unreasonable and therefore beyond authorisation by law or sanction by the company.[177]

In Australia neither the courts[178] nor Parliament through legislation have defined the term reasonable remuneration or provided guidance[179] as to factual criteria or a standard test that could be employed for determining whether remuneration is reasonable or unreasonable.[180] However the United States taxation cases have developed a body of factual criterion that could be used to assist the Australian courts in determining issues of reasonable remuneration. Defina et al[181] outlines a number of US case authorities and research studies that indicate a series of factors to be considered in determining whether remuneration is reasonable.

Generally the rule of reasonable remuneration encompasses the following factors[182]:

1. a proportionality between the director's ability;
2. services and time devoted to the company;
3. responsibilities assumed and the difficulties involved;

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176 *Re Halt Garage (1964) Ltd* [1982] 3 All ER 1016 at 1044f

177 *Re Halt Garage (1964) Ltd* [1982] 3 All ER 1017 at 1043a; 1044

178 Cf *Re Halt Garage (1964) Ltd* [1982] 3 All ER 1016.

179 Cf s 211.

180 Defina, note 119, p 345.

181 Defina, note 119, pp 345-348.

182 See Defina, note 119, pp 345-348.

4. the success achieved demonstrated by profit performance; and
5. all other relevant factors at the discretion of the court.

Other factors that courts have used as indicators of reasonable remuneration include the payment to other executives in the company and a comparison of remuneration with the distributions to shareholders.

Research[183] has identified seven salient indicators of whether remuneration paid was reasonable. These are:

1. officer's qualifications;
2. general economic conditions;
3. comparison of officer's remuneration paid to industry average;
4. remuneration structure of the company;
5. formality and timing of the decision of the board of directors concerning remuneration;
6. officer's responsibility for the company's inception or performance; and
7. the level of remuneration previously received.

To these seven points we might add the liquidity and profitability of the company. The company's liquidity and profitability as an indicator would be especially relevant in regards to remuneration paid to a director by a company that is marginally solvent. The unreasonable remuneration of directors by an insolvent company would be an uncommercial transaction[184] and would invoke the insolvent trading provision in s.588G.[185]

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183 Carpenter FW, Wallace WD and Flesher TK "Reasonable Compensation: What factors actually matter" (1988) 37 *Oil & Gas Tax Quarterly* 319 cited in Defina, note 119, p 347.

184 see point 7 in Table set out in s 588G1A. Note that an uncommercial transaction is defined in s 588FB and uses an objective test.

185 See: s 588G *Corporations Act*. Note s 588H(2) as a defence to s 588G. re person reasonably expected the company was solvent due to reasonable grounds for suspecting the company could trade out of the situation see: *Starguard Security Systems Pty Ltd v Goldie* (1994) 13 ACSR 805; re: an expectation of solvency

One reason for the lack of court intervention is the limited availability of sound benchmarks and the difficulty in assessing what is reasonable remuneration in a highly specialized commercial environment. Remuneration issues are complex[185a] and perhaps the Australian courts could utilise the above relevant factors to determine the difficult line that demarcates reasonable from unreasonable remuneration.

Good faith; fiduciary duties and constructive trusts.

The standard of conduct required by the principle of good faith rests upon the notion of reasonableness.[186] The proposed normative reconstruction requires the court to extend beyond the mere enforcement of a formal compliance with an express power and employ a legal requirement that director's remuneration be reasonable in relation to the expected benefits to the company.[187]

Mahoney JJA makes this point in *Woolworths v Kelly*[188] in the following way:

> [A company] may be generous to its directors, in providing large fees… but essentially only if it be the means adopted by it of attracting good directors to its service or securing the best performance…To adapt what was said long ago, the directors may have cakes and ale and, now, jet planes, but they may have them only if it is for the benefit of the company

This statement of Mahoney JJA supports the view that the normative framework that provides guidance to law's approach to the remuneration of directors, including generous and large fees, should

see: *Re RHD Power Services Pty Ltd (in liq)* 1990 3 ACSR 261; *Re Kerisbeck Pty Ltd* (1992) 10 ACLC 610.

185a See discussion in Quinn, note 115, p 91; Clyne, note 113, p 284.

186 Paterson JM, note 59, p 274. Note Paterson, note 59, p 274 cites *Renard Constructions (ME) Pty Ltd v Minister for Public Works* (1992) 26 NSWLR 234 per Priestley JS, at 263 as judicial authority that has considered that the common connection between the notion reasonableness and the principle of good faith.

187 Yablon, note 6, p 1897

188 *Woolworths Ltd v Kelly* (1991) 9 ACLC 539 (NSWCA) per Mahoney JJA at 567.

accord with the principle of good faith in the best interest of the corporation.

The focus of the proposed normative reconstruction[189] of corporate law regarding director remuneration is on the role of good faith as a central normative principle within corporate law. Finn[190] has described the concept of good faith as a standard that aligns somewhere between the general notion of unconscionability and the fiduciary principle. Stapleton[191] has noted that "the principle of good faith restrains the deliberate pursuit of self-interest". The concept of good faith as a normative principle is well suited to the regulation of the remuneration issue because it aligns closely with the fiduciary principle and the standard of reasonableness. A director is a fiduciary and owes fiduciary duties to the company. Excessive remuneration is remuneration that is unreasonable given all the circumstances of a particular factual scenario and the standard of reasonableness is a fundamental guide to appropriate remuneration of directors.

A normative reconstruction based on the good faith principle is justifiable under both the general law and the statutory provisions. The *Corporations Act* expressly preserves the general law duties and liabilities of directors[192] and demands the continued application of general law fiduciary obligations under equity. But in addition to the general law ss.181-183 suggest a mandatory obligation[193] that directors must exercise their powers and discharge their duties in good faith in the best interests of the corporation: and for a proper purpose; s.181; must not improperly use their position; s.182 and must not use information obtained because of their position; s.183 to gain and advantage for themselves or cause detriment to the corporation. The

189 Lacey, note 19.

190 See Finn PD, "The Fiduciary Principle" in Youdan TG (ed), *Equity, Fiduciaries and Trusts*, Law Book Company, Toronto, 1989 1 at 3-4, cited in Paterson JM, note 59, p 272.

191 see Stapleton J, note 59, p 7.

192 see s 185

193 Re fiduciary duties as mandatory base rules see Riley CA, "Contracting Out of Company Law: Section 459 of the Companies Act 1985 and the Role of the Courts" (1992) 55 *Modern Law Review* 782 at 790 cited in Bonollo, note 48, pp 172 and 173-4. See also Coffee JC, "The Mandatory/Enabling Balance in Corporate Law: An Essay on the Judicial Role" (1989) 89 *Colum L Rev*. 1618 at 1623 cited in Bonollo F, note 48, p 173. See also Whincop, note 55, pp 195 and 202.

statutory[194] directors' duties are expressly declared to be "the most significant duties of directors"[195] and read in conjunction with the obligatory term 'must' used in the statutory duties is indicative of a basic mandatory obligation to refrain from conduct that would breach the statutory duties. It is submitted that the combined effect of the significant director's duties outlined in ss.180 to 185 is to impose a basic mandatory obligation on directors that cannot be contracted out through the statutory contract within a corporations constitution nor excused by resolution at a general meeting.[196]

In *ASIC v Adler*[197] Santow J recently applied general law principles in the statutory interpretation of ss.181-183.[198] The statutory provision for good faith[199] and proper purpose[200] is s.181. Section 181 requires an objective[201] standard of behaviour so that a directors' decision making is measured by the fact that no reasonable director[202]could have reached that conclusion.[203] However there is

194 Chapter 2D, which include ss 180-185

195 s 179(1)

196 Note that ss 193, 185, 230, & 260E (where applicable) indicate a legislative intent to impose mandatory fiduciary obligations.

197 *ASIC v Adler* (2002) 20 ACLC 576; [2002] NSWSC 171 NSWSC per Santow J. (Judgment handed down 14 March 2002)

198 *ASIC v Adler* (2002) 20 ACLC 576 per Santow J at paras 458 and 735 and see also 736. Note commentary that judicial interpretation of the statutory Corporate Law should be public regarding rather than using private law base lines such as contractual relations; Kingsford Smith DA, "Interpreting the Corporations Law –Purpose, Practical Reasoning and the Public Interest" (1999) 21 *Sydney Law Review* 161. Note also the reply to Kingsford Smith article by Whincop, note 42.

199 See Bowen LJ in *Hutton v West Cork Railway Co (1883) 23 ChD 654 at 671*:); see *ASIC v Adler* (2002) 20 ACLC 576 per Santow J at para 738.

200 Note in *ASIC v Adler* (2002) 20 ACLC 576 at para 738 Santow J cites *Permanent Building Society (in liq) v Wheeler* per Ipp J at ACLC 676; ACSR 137; & Ford, 6th Ed at para 8.200);

201 Note the original CLERP Bill proposed a subjective test but the test of good faith was amended to apply an objective test; see Cth Parliamentary Debates, Senate, 13 October 1999, p 9624 (Senator Conroy) cited in Kluver J, "*Sections 181 and 189 of the Corporations Law and Directors of Corporate Group Companies' Paper presented at the seminar "Directors' Duties: Recent Developments"* 8 November 2000, Centre for Corporate Law and Securities Regulation, University of Melbourne, <http://cclsrlaw.unimelb.au/researchpapers/>

202 Note that where "no reasonable board could consider a decision to be within the interests of the company" will also be caught by the objective test and the decision-making will be a breach of duty. See *ASIC v Adler* (2002) 20 ACLC 576 per Santow J at para 739 citing Ford 6th Ed, para 8.060 at p 313.

an important difference in the onus of proof between the general law and the statutory provisions. Sections 181-183 are civil penalty provisions[204] and the onus of proof is a civil standard[205] on the balance of probabilities. Evidence of unreasonableness is crucial for any challenge to remuneration. Directors have control of the company and control of company information and the task of accessing evidence as to the information and advice relied upon may be a difficult one.[206] However the evidential onus of challenging the reasonableness of the remuneration under the general law of equity[207] is different: a reverse onus rule applies.[208] Once certain basic facts give rise to a prima facie case of fiduciary obligation the evidential burden shifts so that the director must justify the conduct. The director would have to show that in taking the alleged unreasonable and excessive remuneration there was no breach of the fiduciary duty owed to the company.[209] There is generally an information asymmetry where directors control information regarding the remuneration process and the general law may provide a better option where evidential hurdles are substantial.

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203 Bowen LJ in *Hutton v West Cork Railway Co* (1883) 23 ChD 654 at 671 cited by Santow J in *ASIC v Adler* (2002) 20 ACLC 576 at para 738.

204 Note breach of a civil penalty provision (see: s 1317E) may attract a number of potential consequences. The ASIC may seek a pecuniary penalty order; s 1317G; or a disqualification order; s 206C and/or the court may order a compensation order; s 1317H; or re contravening the *Corporations Act* court may grant an injunction; s 1324.

205 Note s 140 *Evidence Act 1995* (NSW) & the uniform *Evidence Act 1995* (Cth). Note that the *Bringshaw* test for the standard of proof in civil cases has been enacted in s 140 in that in civil proceedings a court must find a fact proved on the balance of probabilities and must take into account the nature of the cause or action or defence; and the subject matter of the proceedings and the gravity of the matters alleged. For further on this point see Waight PK & Williams CR, *Evidence Commentary and Materials*, 5th ed, LBC Information Services, Sydney 1998 at p 102.

206 In practice directors usually employ remuneration consultants and form compensation committees. See discussion in Yablon, note 6, pp 1878, 1883-1884. Note also the rebuttable presumption in s 189 the director's reliance on the information or advice is taken to be reasonable unless the contrary is proved. see generally Kluver, note 201.

207 The general law includes common law and equity; s 9.

208 Duggan AJ, "Is Equity Efficient?" (1997) 113 *The Law Quarterly Review*, 601 at 623.

209 See generally Bishop and Prentice, note 120.

There is a strict rule of equity that a fiduciary cannot profit[210] from their fiduciary position and the absence of an absolute right to remuneration[211] that can be traced back to the law of trusts. A director of a company is in a relationship of trust and confidence with that company. The duties owed by the director to the company are based upon that position of trust and confidence. Sealy[212] notes that the "[b]reach of …confidence, is one of the traditional heads of jurisdiction in Chancery" and "if confidence is reposed, and that confidence is abused, a court of equity shall give relief".[213] From this branch of equity we derive the law of trusts[214] and from the law of trusts we derive the law of fiduciary.

Principles similar to the law of trust have been applied to non-trustee persons who occupy a fiduciary position in circumstances, which fell short of a strictly defined trust.[215] The general principles regarding fiduciary relations have a long heritage[216] and the court noted in 1866 that "a fiduciary position is not confined to dealings between trustee and cestui que trust".[217] The early courts treated the rules and principles governing fiduciary relationships as "in essence and in origin-the same as those of the law of trusts". [218] However to say that all trust principles and remedies apply to all trustee-like fiduciary relationships is misleading. Fletcher Moulton LJ succinctly puts this proposition into perspective in saying that:

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210 *Regal (Hastings) Ltd v Gulliver* [1924] 1 All ER 378.

211 *Hutton v West Cork Ry Co* (1883) 23 Ch D 654 at 672; *Re George Newman & Co* [1985] 1 Ch D 674 per Lindley LJ at 686. Cf re: conflict of interest see: *Woolworths Ltd v Kelly* (1991) 9 ACLC 539, CA (NSW). See note 104 and accompanying text.

212 Sealy L, "Fiduciary relationships" (1962) *Cambridge Law Journal* 69 citing Maitland, *Equity* 2nd ed, Brunyate, 1932.

213 *Cartside v Isherwood* (1788) 1 Bro.C,C, 558, per Lord Thurlow at 560.

214 Sealy, note 212, p 69. Re discussion on the development of the trust, as a formal technal legal concept see Sealy, note 212, pp 69-72.

215 See Sealy, note 212. Note *Re West of England and South Wales District Bank, ex Dale & Co* (1879) 11 Ch.D. 772 per Fry J at 778.

216 Early instances of the use of the word 'fiduciary' are cited in Sealy, note 212, p 72 (fn.11) such as *Bishop of Winchester v Knight* (17170 1 P.Wms. 406 per Cowper LC at 407; *Oliver v Court* (1820) 8 Price 127, 143 (counsel); *Docker v Somes* (1834) 2 My. & K. 655 per Lord Brougham at 655. see also Ta*te v Williamson* (1866) 2 Ch. App 55 at 60.

217 *Tate v Williamson* (1866) 2 Ch. App 55 at 56 (counsel).

218 *Re West of England and South Wales District Bank, ex Dale & Co* (1879) 11 Ch.D. 772 per Fry J at 778.

> some minds…conclude that every kind of fiduciary relation justifies every kind of interference. Of course that is ***absurd.*** The nature of fiduciary relation must be such that it justifies the interference.[219]

Courts "have always been careful not to fetter this useful jurisdiction by defining the exact limits"[220] to "verbal formulae".[221] Hence the Court does not specifically define what constitutes a fiduciary relationship. Instead the authorities have defined fiduciary relationships "class by class and rules have developed to govern each class".[222]

Sealy notes that company directors fall within two of four general and overlapping categories of fiduciary relationships.[223] A company director is in a fiduciary relationship with the company firstly by the "inherent power of control[224] (in the eyes of equity) over company property"[225] and secondly by the director being entrusted with company powers on behalf of the company to perform the particular undertaking of a director for the company.[226] The law of equity ensures that the company director, as a fiduciary, acts consistently with his/her undertaking and the court insists that a fiduciary director acts in good faith for the benefit of the company and not in his/her own interest.[227]

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219 *Re Coomber, Coomber v Coomber* [1911] 1 Ch 723 per Fletcher Moulton LJ at 729 (empahsis added).

220 *Tate v Williamson* (1866) 2 Ch. App 55 per Lord Chelmsford LC at 61

221 *Re Coomber, Coomber v Coomber* [1911] 1 Ch 723 per Fletcher Moulton LJ at 728.

222 Sealy, note 212, p 73.

223 Sealy, note 212, pp 74-77 and Sealy L, "Some Principles of Fiduciary Obligation" (1963) *Cambridge Law Journal* 119 at 119-124.

224 Cope notes the a "director may also be liable to account for property as a trustee of the property when the director has control of the property of the company"; *Penisnsulare and Oriental Steam Navigation Co v Johnson* (1937) 60 CLR 189 per Latham CJ at 218 cite in Cope M, *Constructive Trusts*, The Law Book Company Limited, Sydney, 1992, p 107.

225 Sealy, note 212, pp 74-75

226 Sealy, note 212, p 76.

227 *Whichcote v Lawrence* (1798) 3 Ves. 740 per Lord Loughborough at 750 cited Sealy, note 212, p 76.

The traditional rule is that a trustee cannot make a profit from his trust and therefore a trustee is generally not entitled to remuneration.[228] However a director is generally[229] not a trustee[230] in the traditional sense because the director generally does not hold the property of the company but is in a trustee-like relationship with the company and owes fiduciary duties to the company. The obligations and restrictions imposed on the fiduciary will depend upon the scope of the undertaking and the specific factual circumstances.[231] The scope of a fiduciary's undertaking is important in generally determining whether a director has breached their fiduciary duty. A "fiduciary must refund all profits, including remuneration, which are made by means of their fiduciary position unless they made the profits with the full knowledge and approval of the persons to whom they owed the fiduciary duty".[232] However a fiduciary is not accountable for profits derived from outside the scope of the fiduciary relationship.[233] Therefore it depends on whether the gain comes from an act, which would constitute a breach of fiduciary duty.[234] A director does not have an absolute right to remuneration and the taking of unauthorised remuneration is clearly a breach or a director's fiduciary duty to the

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228 *Robinson v Pett* (1734) 3 P.Wms. 132; *Re Thorpe* [1891] 2 Ch. 360; *Re White, Pennell v Franklin* [1898] 2 Ch. 217 cited in Megarry, note 92, p 243. Cf Sealy comments re the remuneration rule is now an anachronism; Sealy L, "The Director Trustee" (1967) *Cambridge Law Journal* 83 at 97.

229 Re unauthorised remuneration obtained by trustees, including trustee companies see Cope, note 224, pp 249-258.

230 See Sealy L, "Directors' Wider Responsibilities — Problems Conceptual, Practical and Procedural" (1987) 13 *Monash Law Review* 164 at166-169.

231 Note fiduciary obligations in commercial contexts in *Hospital Products Ltd v United States Surgical Corporation* (1984) 156 CLR 41; 55 ALR 417; and business dealings; *United Dominions Corporation Ltd v Brian Properties Ltd* (1985) 157 CLR 1; 60 ALR 741; but a close scrutiny of the specific factual matrix is required; see *News Ltd v Australian Rugby Football League Ltd* (1996) 64 FCR 410 at 538-9; 139 ALR 193 at 310-11. See generally Lynch A, "Equitable compensation for breach of fiduciary duty: Causation and contribution-The High Court dodges a fusion fallacy in Pilmer" (2001) 21 *Australian Bar Review* 173.

232 *Costa Rica Ry.v Forwood* [1901] 1 Ch. 746; see also *Stubbs v Slater* [1910] 1 Ch. 632. cited in Megarry, note 99, p 241. See also Ford HAJ, Austin RP and Ramsay IM, *Ford's Principles of Corporations Law, 10th ed.* Buttterworths, Sydney, Australia, 2001 at 381.

233 *Hospital Products Ltd v United States Surgical Corporation* (1984) 156 CLR 41 per Mason J at 113; *Birtchnell v Equity Trustees, Executors and Agency Co Ltd* (1925) 24 CLR 384 per Dixon J at 408.

234 Lehane JRF, "Fiduciaries in a Commercial Context" in Finn PD (ed), *Essays in Equity*. The Law Book Company Limited, Sydney, Australia, 1985 at 194.

company. Likewise unreasonable remuneration is not beneficial to the company and is contrary to the director's duty in good faith in the best interests of the corporation.

The fundamental advantages of refocusing corporate law upon the normative principle of good faith in relation to the remuneration process are two fold. The first is that neo-liberal ideology is exposed as an inappropriate normative basis for dealing with self-dealing problems involving the fiduciary director. The restraint of self-interest is the hall-mark of the good faith standard[235] and refocusing corporate law norms on good faith as a "single normative centre of gravity"[236]sharpens law's ability to restrain the taking of unreasonable remuneration of corporate directors. A director is first and foremost a fiduciary and owes fiduciary duties to the company. Coffee[237] has made a compelling argument that good faith should be an irreducible minimum standard in corporate law[238]and should be a mandatory obligation immune to contracting out through the company's constitution. Therefore, according to Coffee's argument, unreasonable remuneration is contrary to the base mandatory good faith principle and subject to the full force of equity. A role of good faith as a central normative principle is to ensure that unreasonable remuneration is identified as a breach of a director's fiduciary duty according to the equitable principles in the conflict rule and profit rule.

The fiduciary relationship between a director and the company attracts the equitable rule to avoid conflict of interest.[239] The conflicts rule[240]

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235 Whincop, note 55, p 222. See also Stapleton, note 59, p 7.

236 see Bratton W, "Self-Regulation, Normative Choice and the Structure of Corporate Fiduciary Law" (1993) 61 *George Washington Law Review* 1084 at 1127-8 cited in Whincop, note 55, p 202.

237 See Coffee J "No Exit?: Opting Out, the Contractual Theory of the Corporation, and the Special Case of Remedies" (1988) 53 *Brooklyn Law Review* 919 cited in Whincop, note 55, pp 193 and 195.

238 Note Coffee's theory is that good faith is a base mandatory principle which Bratton argues that company law contains various normative centres of gravity which includes good faith see: Whincop, note 55, p 233.

239 See: *Hospital Products Ltd v United States Surgical Corporation* (1984) 156 CLR 41 per Deane and Mason JJ; see also Austin RP, "Fiduciary Accountability for Business Opportunities" in Finn PD (ed), *Equity and Commercial Relationships*, The Law Book Company Limited, Sydney, 1987 p 146. See also *Regal (Hastings) Ltd v Gulliver* [1924] 1 All ER 378.

240 See generally *Aberdeen Railway Co v Blaikie Bros.* (1843-60) All ER 249; *Bray v Ford* (1896) AC 44 at 51-52; *Transvaal Lands Co* (1914) 2 Ch 488. But note

prohibits directors placing themselves in a position where a personal interest or duty conflicts with their duty to the company. However, not every conflict will result in the general law applying. The conflict must be a real and substantial one in order for the conflict rules to apply.[241] A conflict of interest can arise when directors are involved in the determination of their own remuneration.[242]

A conflict of interest occurs in situations where the fiduciary director has self-interest in a transaction with the company. The payment and receipt of remuneration is a transaction with the company. The actual transaction of remuneration from the company to the director may be sanctified by the company's authorising instrument.[243] It is submitted that the taking of unreasonable remuneration is beyond the sanctity of general meeting approval and according to Oliver J in *Re Halt* is beyond the authority of the company's authorising instrument. In any event to empower the taking of unreasonable remuneration would be contrary to the spirit of having an authorising instrument to protect the company.

The conflict rule should apply to directors placing their personal interests in taking excessive remuneration ahead of their duty of loyalty and good faith to the company.[244] The normative concept of good faith is elastic[245] and should be vigorously applied to fiduciary directors taking unreasonable remuneration.[246] It is submitted that the focus on the normative principles of good faith assists the law to identify the definitive problem in that the corporate director who takes an unreasonable amount of remuneration is in breach of the fiduciary duty to act in good faith in the interests of the company.[247] A director owes a duty to protect the company's interests and should not take

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commentary that suggest a move away from strict prohibition of the conflict rule for fiduciaries to a position more in line with good faith; see: Teele R, "The Necessary Reformulation of the Classic Fiduciary Duty to Avoid a Conflict of Interest or Duties" (1994) 22 *Australian Business Law Review* 99.

241 See: *Boulting v ACTAT* (1963) 1 All ER 716 at 729-730, CA; *Hospital Products Ltd v United States Surgical Corporation* (1984) 156 CLR 41 at 103.

242 See: *Camelot Resources Ltd v MacDonald* (1994) 14 ACSR 437

243 Company's constitution/replaceable rules; s 202A or by statute; Chapter 2E-re public company; see *Woolworths Ltd v Kelly* (1991) 9 ACLC 539, CA (NSW).

244 *Centofanti v Eekimitor Pty Ltd* (1995) 15 ACSR 629 at 631-632, SC(SA).

245 See Whincop, note 55, p 205.

246 Re: conflict rule and good faith norm see: Whincop, note 55, p 205.

247 Re: interest of the company see: Chan and Law, note 78.

unreasonable remuneration that would cause harm to the company by diminishing the company's resources. Taking unreasonable remuneration is conduct that has a negative impact on the company. Company resources are diverted which could be better used to benefit the company. The taking of unreasonable remuneration is a drain on the company resources, prejudicial to the interests of shareholders, may be harmful to employees and "harmful to creditors where the company is marginally solvent or is likely to become insolvent".[248] Put simply unreasonable remuneration is a detriment to company resources and contrary to the best interests of the company to whom the duty is owed.

Equitable Remedy - Constructive Trust.

"A fiduciary liable to account for unauthorised remuneration is liable to account as a constructive trustee for the remuneration that he or she has received".[249] The usual remedy for breach of fiduciary duty is disgorgement of profits/benefits regardless of harm caused to the company. A fiduciary cannot retain a profit or benefit that has been obtained following a conflict of interest and/or a breach of fiduciary duty.[250] In the case of a director in receipt of unreasonably excessive remuneration the relief sought would be the disgorgement of the excessive portion of the remuneration.[251] The account of profits or disgorgement of the excessive portion of the remuneration could be achieved by the use of a constructive trust.[252]

A constructive trust is a form of equitable remedy and is discretionary. An important aspect of a constructive trust is that it can be imposed

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248 Adenwala, note 7, p 27.

249 Cope, note 224, p 249.

250 *Hospital Products Ltd v United States Surgical Corporation* (1984) 156 CLR 41 at 107 per Mason J(dissenting) ; *Re Jarvis* [1958] 2 All ER 336 per Upjohn J.

251 See counter argument in Cowan D, Griggs L and Lowry J, "To say that a man is a fiduciary only begins analysis" – The shifting boundaries of fiduciary liability" (1995) 1(1) *The Newcastle Law Review*, 73 at 82. Note re *Guinness plc v Saunders* [1990] 2 AC 663 a constructive trust was imposed but the issue concerned authority not reasonableness of the 5.2 million pounds remuneration.

252 *Boardman v Phipps* [1967] 2 AC 46; The Australian authority is *Muschinski v Dodds* (1986) 60 ALJR 52 per Deane J at 65-66. See generally Austin RP, "Commerce and Equity-Fiduciary Duty and Constructive Trust." (1986) 6(3) *Oxford Journal of Legal Studies*, 444-455.

"*regardless of actual or presumed agreement* or intention to preclude the retention or assertion of beneficial ownership of property to the extent that such...would be contrary to equitable principle".[253] This is important because it enables the court to impose a construct trust over remuneration in the circumstance of a director taking unreasonable remuneration even in the face of an agreement and/or by informed consent or an authorising instrument. There are two crucial points that should be made here to justify the imposition of a constructive trust over the unreasonable remuneration. The first is that the court should adopt the position that a director is in breach of a fiduciary duty in taking unreasonable remuneration. The second point is that the unreasonable remuneration cannot be justified as legitimate remuneration[254]and is beyond the authorisation or sanction by the company or the company's constitution. The basis of this submission is that it is unconscionable for a director to take unreasonable remuneration. The central attraction to the use of constructive trusts in the normative reconstruction is its discretionary nature that extends the court's "remedial flexibility"[255] "with an eye to the substantial justice of the case".[256] Unreasonable remuneration is not proper remuneration[257] having regard to the full consideration of all the facts and a court must "fix its eyes on the goal of doing 'what is practically just'". [258]

"A court of equity in decreeing a constructive trust is bound by no unyielding formula. The equity of transaction must shape the measure of relief".[259] The fiduciary director's 'ill gotten' gain is the focus of a constructive trust.[260] First the fiduciary's gain must be identified so

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253 *Muschinski v Dodds* (1986) 60 ALJR 52 per Deane J at 65-66. (emphasis added)

254 See *Re Halt Garage (1964) Ltd* [1982] 3 All ER 1016 per Oliver J at 1044.

255 See Wright, *The Remedial Constructive Trust*, Butterworths, Sydney 1998 cited in Waye V and Wright D "Trial Strategy when selecting a Remedy form the Remedial Smorgasbord" (1998) 17(3) *Australian Bar Review* 263 at fn 48.

256 *Gall v Mitchell* (1924) 35 CLR 222 at 228 per Isaacs J; See generally Dal Pont GE and Chalmers DRC, *Equity and Trusts in Australian and New Zealand*, LBC Information Services, Sydney, 1996, p 612.

257 *Re Halt Garage (1964) Ltd* [1982] 3 All ER 1016 per Oliver J at 1044.

258 *Maguire v Makarononis* (1997) 71 ALJR 781, per Kirby at 804-805.

259 Reynolds JA in *Daly v Sydney Stock Exchange Ltd* [1982] 2 NSWLR 421 at 426 quoting Cardozo J in *Beatty v Guggenheim Exploration* Co. 225 NY 380 at 389 (1919).

260 For procedural discussion of imposing a constructive trust see *Leplastrier and Co Ltd v Armstrong Holland Ltd* (1926) 26 SR (NSW) 585; *Colbeam Palmer Ltd v*

that the court can determine whether it is appropriate to impose a constructive trust. In the case of director remuneration all the components of remuneration must be identified.[261] Once identified the fiduciary director's 'ill-gotten' gain must be measured. Where the fiduciary is not fraudulent[262] and has made an honest mistake the court may make a just allowance[263] for the skill and industry which produced the benefit.[264] But allowances "should not extend further than the justice of the case demands".[265] The Court may equate a just allowance with the reasonable remuneration and the excess or unreasonable remuneration could be treated as the 'ill-gotten gains'.[266]

The proposed normative reconstruction hinges on the court's willingness to change the substantive corporate law so as to provide a greater incentive to restrain unreasonable remuneration. The court would need to be prepared to embrace a subtle normative shift away from merely seeking authority for remuneration to actively requiring that the "onus of upholding the validity of [the reasonableness of the directors' remuneration] lies on those who assert it"[267] – the directors. Yablon[268] has proposed a form of judicial control, which he calls the objective proportionality standard as a means of

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Stock Affiliates Pty Ltd (1968) 122 CLR 25. See generally Glover J, *Commercial Equity: Fiduciary Relationships*. Buttterworths, Sydney, Australia, 1995 at 248-263.

261 see Quinn, note 115, p 91; Clyne, note 113, p 284.

262 *Hospital Products Ltd v United States Surgical Corporation* (1984) 156 CLR 41 per Mason J at 109-110.; *Timber Engineering Co. Pty Ltd v Anderson* [1980] 2 NSWLR 488. See discussion in Kearney JB, "Accounting for a Fiduciary's Gains in Commercial Contexts" in Finn PD (ed), note 239, p 195.

263 See criticism of generous equitable allowances in Aitken L, "Reconciling 'irreconcilable principles' – A Revisionist View of the Defaulting Fiduciary's 'Generous Equitable Allowance'" (1993) 5 *Bond Law Review* 49.

264 *Phipps v Borardman* [1964] 1 WLR 993 per Fox LJ at 1018; *O'Sullivan v Management Agency and Music Ltd* [1985] 1 QB 428 (CA). Re no allowance see Hopkins J, "Fiduciary duty – Receipt of company's property by director-equitable allowance to fiduciary" (1990) *The Cambridge Law Journal*, 220-223. See also discussion re director Quantum meriut in Adenwala, note 7, pp 34-36.

265 *Phipps v Boardman* [1964] 1 WLR 993 per Fox LJ at 1018.

266 *O'Sullivan v Management Agency Ltd* [1985] 1 QB 428 per Waller LJ. See discussion in Kearney JB, "Accounting for a Fiduciary's Gains in Commercial Contexts" in Finn PD (ed), note 239, p 197.

267 see *Parke v Daily News Ltd* [1962] 2 All ER 929 at 942 per Plowman J

268 Yablon, note 6, pp 1896-1906.

restraining director's remuneration. Yablon argues that there must be a reasonable relationship between the value of the benefits passing to the corporation and the value of the remuneration. Beyond Yablon's "objective proportionality standard" is what this paper has referred to as unreasonable remuneration. The main benefits of the normative refocusing upon good faith to the remuneration issue may not be found in the courtroom but in the boardroom and in corporate lawyer's advice as to how corporate clients can "avoid legal 'problems' in connections with the actions they want to take".[269] Hence the shift in the focus of the central normative principles from the neo-liberal norms of wealth creation and investor protection to a single normative centre of gravity[270] of good faith may "have an immediate impact on ex ante discussions between directors and legal counsel".[271]

Conclusion

Justice Kirby has extra-judicially warned that "those who forget the past are doomed to repeat its mistakes".[272] The trail of corporate scandals and excess scatter the corporate landscape from the 1980's to the present. Corporate scandals enhance the political salience of the excessive remuneration issue.

The remuneration process takes place within the broader norms that provide the structural framework for corporate law. Corporate law has internalised neo-liberal ideology and this ideology is, in a real sense, reflected in both the *Corporations Act* and the judicial review of directors' remuneration. CLERP demonstrates the privileging of economics in corporate profit making and the protection of investors in the corporate reform terrain. Neo-liberal values are well represented within some important definitive provisions of the *Corporations Act*. The *Corporations Act* regulates the structure and governance procedures of corporations and has been developed to facilitate the

269 Yablon, note 6, p 1897.

270 see Bratton W, "Self-Regulation, Normative Choice and the Structure of Corporate Fiduciary Law" (1993) 61 *George Washington Law Review* 1084 at 1127-8, cited in Whincop, note 55, p 202.

271 Yablon, note 6, p 1897.

272 Kirby, Hon Justice Michael, note 9.

neo-liberal normative principles of wealth creation and investor protection.

The internal critique revealed that the current normative focus in corporate law is investor protection and the maximisation of shareholder wealth, which are fundamental to the neo-liberal conservative revisioning of economic rationalism. A positivist neo-liberal ideology has acted silently to enhance the climate and facilitate the abuse of the remuneration process by some directors. However the taking of unreasonable remuneration by a director threatens the investor and ultimately harms the company's potential to maximise wealth creation. Hence the neo-liberal normative focus on corporate wealth creation and investor protection fails to adequately address the abuse of the remuneration process by some directors.

The current system of corporate law embraces neo-liberal norms that display a conservative bias.[273] In particular the conservative bias is inherent in the judicial passive approach and a preference for private ordering "by favouring ongoing contractual solutions".[274] Judicial conservatism serves to privilege internal management decisions. Internal management appears to be focused on incentive rewards represented by the pay for performance argument. However research indicates that the monitoring and the disclosure/approval process of remuneration is not adequate in linking remuneration to performance or linking shareholder concerns with management concerns.[275]

A director is first and foremost a fiduciary and owes both general law and statutory duties of good faith to the corporation. The fiduciary relationship between a corporate director and the corporation has a long legal pedigree and is a sound basis upon which to reconstruct a central normative framework based on the good faith principle. Directors as fiduciaries are generally precluded a right to

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273 Note that the central contracting norm of corporate law is supported by the "immanent" conservative bias in the judicial passivity, private ordering, disclosure and equality. See the discussion in Whincop, M, note 42.

274 Whincop, note 1.

275 Defina A, Harris TC and Ramsay IM, note 119, 341-353. Cf a weak link between CEO and company performance in a US study by Jensen and Murphy, "Performance Pay and Top Management Incentives" (1990) *Harvard Business Review* 138 cited in Brooks, note 3, p 363. see also See I Ramsay and G Hoad, "Disclosures! Corporate Governance in Practice" (1998) 14(2) *Company Director* 11, cited in Kirby, note 9.

remuneration[276] unless authorised and if unauthorised the remuneration must be repaid to the company.[277] The judicial focus upon authorisation of remuneration is important but a second step is warranted that ensures authorised remuneration is reasonable. The difficulty in identifying the demarcation line between reasonable and unreasonable remuneration has been noted and there is a need for judicial or legislative guidance as what constitutes unreasonable remuneration.

The purpose of consciously positioning our inquiry within the current liberal normative framework was to enable a normative reconstruction of the remuneration process so as to contribute to a new vision of justice by incorporating a central normative focus on the good faith principle in response to the unreasonable remuneration problem. The foregoing discussion was premised on a normative focus upon the fiduciary requirement of good faith and the continued application of general law principles as a means of restraining unreasonable remuneration of company directors. The proposed normative reconstruction was based on objective measures as to what would constitute unreasonable remuneration and would therefore attract equitable doctrine and remedy.[278] The proposed normative refocusing upon the good faith principle was applied to the remuneration of a fiduciary director according to the conflict rule and the equitable constructive trust remedy was shown to be a promising restraint on the taking of unreasonable remuneration by fiduciary corporate directors.

A normative reconstruction, as the name suggests, is within the normative liberal framework and might be criticised as merely another form of "totalising essentialism aimed at fixing a positivist vision of legal meaning as an attempt to control" [279] the corporate world. However the use of the equitable fiduciary as a base doctrine, although within the normative liberal framework, is not fixed but is discretionary by nature. The purpose in employing a normative reconstruction is a constructive process aimed at providing a corporate

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276 See discussion in Quinn, note 115, p90.

277 See *Boschoek Proprieatary Co Ltd v Fuke* [1906] 1Ch 146.

278 Note equitable doctrine and remedy refers to both the general law and the statutory provisions ss 181-183 and ss 1317H. Re 1317H see *ASIC v Adler* (2002) 20 ACLC 576 per Santow J.

279 See generally Lacey, note 19, p225

law that is better equipped to address the ethically problematic issues involved in the unreasonable remuneration of directors. The ultimate aim of employing the internal critique and normative reconstruction was to inform a new understanding and offer a new way of thinking about law's approach to the excessive and unreasonable remuneration of corporate directors.