CORPORATIONS LEGISLATION 2013:

KEY SECTION ANNOTATION EXAMPLE – s 233 ORDERS THE COURT CAN MAKE

233 Orders the Court can make

(1) The Court can make any order under this section that it considers appropriate in relation to the company, including an order:

(a) that the company be wound up;

(b) that the company's existing constitution be modified or repealed;

(c) regulating the conduct of the company's affairs in the future;

(d) for the purchase of any shares by any member or person to whom a share in the company has been transmitted by will or by operation of law;

(e) for the purchase of shares with an appropriate reduction of the company's share capital;

(f) for the company to institute, prosecute, defend or discontinue specified proceedings;

(g) authorising a member, or a person to whom a share in the company has been transmitted by will or by operation of law, to institute, prosecute, defend or discontinue specified proceedings in the name and on behalf of the company;

(h) appointing a receiver or a receiver and manager of any or all of the company's property;

(i) restraining a person from engaging in specified conduct or from doing a specified act;

(j) requiring a person to do a specified act.

Order that the company be wound up

(2) If an order that a company be wound up is made under this section, the provisions of this Act relating to the winding up of companies apply:

(a) as if the order were made under section 461; and

(b) with such changes as are necessary.

Order altering constitution

(3) If an order made under this section repeals or modifies a company's constitution, or requires the company to adopt a constitution, the company does not have the power under section 136 to change or repeal the constitution if that change or repeal would be inconsistent with the provisions of the order, unless:

(a) the order states that the company does have the power to make such a change or repeal; or

(b) the company first obtains the leave of the Court.

[233.10] Scope

This section sets out examples of remedies that the court may order in reponse to a contravention of s 232. Disputes involving this section often relate to how the court values the shares involved in the transaction, which is specifically dealt with below.

[233.20] Key cases

There is no automatic right to obtain a remedy where a breach of s 232 has been proved: *Shelton v NRMA Ltd* (2004) 51 ACSR 278; [2004] FCA 1393 at [15] per Tamberlin J. In that case, Tamberlin J (at [17]) expressed a general reluctance to interfere with the members' meeting on the basis, inter alia, that the company had close to 2 million members and the election campaign had been widely publicised.

The court has a wide discretion as to the appropriate remedy: *Smith Martis Cork & Rajan Pty Ltd v Benjamin Corp Pty Ltd* (2004) 207 ALR 136; [2004] FCAFC 153 at [70] per the Court. However, this wide discretion should be exercised in view of the remedies provided in previous cases involving similar facts (*United Rural Enterprises Pty Ltd v Lopmand Pty Ltd* (2003) 47 ACSR 514; 21 ACLC 1,965; [2003] NSWSC 910 at [34]–[38] per Campbell J (cited in *Smith Martis Cork & Rajan Pty Ltd v Benjamin Corp Pty Ltd* at [70] per the Court)), and the scope and purpose of s 232 : *Turnbull v NRMA Ltd* (2004) 186 FLR 360; 50 ACSR 44; 22 ACLC 1,094; [2004] NSWSC 577. See also *Szencorp Pty Ltd v Clean Energy Council Ltd* (2009) 69 ACSR 365; [2009] FCA 40.

Denied access to a register of members per se is not enough to justify an order under this provision: *Australian Securities Commission v Multiple Sclerosis Society (Tas)* (1993) 10 ACSR 489; 11 ACLC 461.

In *Re Enterprise Gold Mines NL* (1991) 9 ACLC 168 at 174, Murray J said:

> Where grounds for intervention exist, the nature of the remedy chosen by the court will be dependent upon the conclusion drawn as to the type of oppression with which the court is dealing and the court will choose the remedy which is least intrusive.

The court should choose the least intrusive remedy: *Re Enterprise Gold Mines NL* (1991) 3 ACSR 531; 9 ACLC 168 at 539 (ACSR); *Ehsman v Nutectime International Pty Ltd (No 2)* [2009] NSWSC 1096.

In relation to the availability of remedies where the company is a trustee company, see above at [232.50].

Section 233 does not contemplate an order for payment of damages or compensation by a director for breach of statutory and/or fiduciary duties: *Vinciguerra v MG Corrosion Consultants Pty Ltd* (2010) 79 ACSR 293; [2010] FCA 763 at [123].

[233.30] Court may make orders: s 233(1)

Section 233(1)(a)

An order for the winding up of the company should be avoided if at all possible: *John J Starr (Real Estate) Pty Ltd v Robert R Andrew (A'asia) Pty Ltd* (1991) 6 ACSR 63; 9 ACLC 1,372. See also *Re Dalkeith Investments Pty Ltd* (1984) 9 ACLR 247; 3 ACLC 74. In *John J Starr (Real Estate) Pty Ltd v Robert R Andrew (A'asia) Pty Ltd* (1991) 6 ACSR 63; 9 ACLC 1,372 at 1375 (ACLC), Young J said:

> If a fair offer is made by the defendants to purchase the plaintiff's shares, prima facie no order for winding-up ought to be made.

However, winding up, rather than a compulsory purchase of shares, was the appropriate remedy in *Supercar International Holdings Ltd v Sommers* [2011] NSWSC 336, where it was concluded (at [275]) that the parties had oppressed each other. It was also appropriate in *Re Bonython Metals Group Pty Ltd (No 6)* [2011] FCA 1484 where the majority shareholders did not have the funds to buy out the minority. The Court considered that it would be a disproportionate remedy to order the majority to sell their shares to the minority, and found no remedies other than winding up to be suitable.

Whilst winding up a solvent company is an extreme step, there is no “principle” or assumption that a winding up order of a solvent company is inappropriate: *Hillam v Ample Source International Ltd (No 2)* (2012) 202 FCR 336; [2012] FCAFC 73 at [68] – [70].

Section 233(1)(c)

The court may make an order preventing a company from holding a meeting that is contrary to the interests of the members as a whole under s 232(d): *Turnbull v NRMA Ltd* (2004) 186 FLR 360; 50 ACSR 44; 22 ACLC 1,094; [2004] NSWSC 577. In that case, although Campbell J granted the order preventing the meeting from being held, his Honour noted at [51]:

> [I]t is likely to be only in a very rare case that a Court will decide to order that a company meeting validly requisitioned need not be held, or that a

resolution validly proposed need not be put to a meeting.

For the appointment of a provisional liquidator, see *Re Back 2 Bay 6 Pty Ltd* (1994) 12 ACSR 614; 12 ACLC 253.

Section 233(1)(d)

The court's discretion under this provision is absolute: *Fedorovitch v St Aubins Pty Ltd* (1999) 17 ACLC 1,558; [1999] NSWSC 776. This subsection “says nothing about the price for which purchase of shares can be ordered, or the basis for calculation of such a price. The only legal restriction on the way in which the price may be calculated is that it be a proper exercise of a judicial discretion”: *United Rural Enterprises Pty Ltd v Lopmand Pty Ltd* (2003) 47 ACSR 514; 21 ACLC 1,965; [2003] NSWSC 910 at [36] per Campbell J (cited with approval in *Smith Martis Cork & Rajan Pty Ltd v Benjamin Corp Pty Ltd* (2004) 207 ALR 136; [2004] FCAFC 153 at [75] per the Court; *Crawley v Short (No 2)* [2010] NSWCA 97 at [9]).

As per Giles JA in *Campbell v BackOffice Investments Pty Ltd* (2008) 66 ACSR 359; 26 ACLC 537; [2008] NSWCA 95 at [122]: “A buy-out order is not to compensate for the shareholder’s loss (although it may have that effect), but to separate the oppressor and the oppressed”. Giles JA went on to say that it would be unusual for a buy-out order to be made if the oppression has otherwise been brought to an end, except where the oppression caused the destruction of the business (at [123]). This view was confirmed on appeal to the High Court. By the time the matter had come to trial, a liquidator who had been appointed provisionally had sold the whole of the undertaking of the company and had applied the proceeds to the costs and expenses of the provisional liquidation and some external creditors, with the result that the company had no business or assets. The primary judge had made an order for the compulsory purchases of shares. The majority in the High Court (Gummow, Hayne, Heydon and Kiefel JJ) held that in those circumstances no order should have been made by the primary judge other than an order for winding up: *Campbell v Backoffice Investments Pty Ltd* (2009) 238 CLR 304; 83 ALJR 903; 257 ALR 610; [2009] HCA 25 at 361–362 (CLR), 938 (ALJR), [179]–[182]. French CJ agreed with the result, but on the slightly different basis that the primary judge erred by failing to take the above facts into account in the exercise of her discretion. See also *Nassar v Innovative Precasters Group Pty Ltd* (2009) 71 ACSR 343; [2009] NSWSC 342 at [120]–[129].

Paragraph 233(1)(d) is not limited to purchase orders involving the minority’s sale of its shares. In *Re Bonython Metals Group Pty Ltd (No 6)* [2011] FCA 1484, the primary remedy sought by the oppressed minority was an order that the majority sell its shares to the minority. Robertson J characterised this as an unusual order, but did not exclude the possibility of making such an order in an appropriate case. However, it was not appropriate to the immediate case because (at [330])

> [t]here must be proportionality between the conduct and the remedy with the aim of putting an end to the oppression.

The company was instead wound up.

Section 233(1)(e)

See *John J Starr (Real Estate) Pty Ltd v Robert R Andrew (Australasia) Pty Ltd* (1991) 6 ACSR 63; 9 ACLC 1,372.

[233.40] Valuation of shares

The decision *Smith Martis Cork & Rajan Pty Ltd v Benjamin Corp Pty Ltd* (2004) 207 ALR 136; [2004] FCAFC 153 contains a detailed discussion of the state of the authorities relating to compulsory purchase of shares as a remedy under s 233. At [71] the Court stated:

> If the Court considers it is appropriate to make an order that the other members purchase the shares of the oppressed shareholder, its task is to fix a price that represents a fair value in all the circumstances.

Later in the same case, the Court stated (at [74]–[77]):

> [I]t is not just a question of value; it is a matter of fixing a price that should be paid … Even if there is an agreement between the parties, as for example in the statutory contract contained in the constitution or articles of association, as to the way in which the shares are to be valued, the Court is free to override the agreement if it makes a finding of oppression.

The Court relied on statements made in *Dynasty Pty Ltd v Coombs* (1995) 59 FCR 122; 13 ACLC 1,290 at 146 (FCR).

The value of shares is assessed by establishing what their value would have been but for the oppressive conduct: *Rankine v Rankine* (1995) 124 FLR 340; 18 ACSR 725; 14 ACLC 116; *Smith Martis Cork & Rajan Pty Ltd v Benjamin Corp Pty Ltd* (2004) 207 ALR 136; [2004] FCAFC 153 at [72] per the Court. In *Smith Martis Cork & Rajan Pty Ltd v Benjamin Corp Pty Ltd* this included benefits that accrued to the member who brought the oppression action in his capacity as a director.

In *Dynasty Pty Ltd v Coombs* (1995) 59 FCR 122; 13 ACLC 1,290 the Court held that the net tangible assets method of valuing the minority shares was appropriate in this case. That was because the book values reflected actual values at the time and the company's balance sheet was dominated by two assets. In general, however, dividend history or past and future earnings potential were better methods. As to the relevant date, the Court considered that either the date immediately before the oppressive conduct took place or the trial date could be used to value the shares. However, if the earlier date were used, compensation should be given.

If the market is depressed, then a long-term view of the value of the shares should be adopted: *Re Bodaibo Pty Ltd* (1992) 6 ACSR 509; 10 ACLC 351. In *Mopeke Pty Ltd v Airport Fine Foods Pty Ltd* (2007) 61 ACSR 395; 25 ACLC 254; [2007] NSWSC 153, a three-year average of the company's earnings was used to calculate the share value.

There is no definite rule regarding the appropriate date for determining the value of shares: *Re Quest Exploration Pty Ltd* (1992) 6 ACSR 659. See also *Joint v Stephens* (2007) 62 ACSR 309; [2007] VSC 145; *Mopeke Pty Ltd v Airport Fine Foods Pty Ltd* (2007) 61 ACSR 395; 25 ACLC 254; [2007] NSWSC 153. The principles relating to the date for valuation were discussed in *Harding Investments Pty Ltd v PMP Shareholding Pty Ltd (No 3)* [2011] FCA 1370 at [12].

The majority may be forced to sell their shares: *Fedorovitch v St Aubins Pty Ltd* (1999) 17 ACLC 1,558; [1999] NSWSC 776 at [22] per Young J; *Re A Company; Ex parte Shooter* [1990] BCLC 384; *Re Brenfield Squash Racquets Club Ltd* [1996] 2 BCLC 184.

The Act does not identify the basis upon which the price for the shares is to be fixed if an order for compulsory purchase is made. Under earlier forms of the oppression remedy, various approaches have been taken and there is no reason to give the present oppression provisions a narrower construction: *Campbell v Backoffice Investments Pty Ltd* (2009) 238 CLR 304; 83 ALJR 903; 257 ALR 610; [2009] HCA 25. See also *Garraway v Territory Realty Pty Ltd* [2010] FCAFC 9 at [75]–[76].

The question is what is a fair value to be attributed in all the circumstances, and there is room for a different approach to be taken in relation to the valuation of shares, than the textbook approach, where the different approach would produce a fairer outcome: *Re Cheal Industries Pty Ltd; Fitzpatrick v Cheal* [2012] NSWSC 595 at [36].

[233.50] Practice points

In *Re Dernacourt Investments Pty Ltd; Baker Davis Supply Co Pty Ltd v Dernacourt Investments Pty Ltd* (1990) 20 NSWLR 588; 2 ACSR 553; 8 ACLC 900 at 620 (NSWLR) Powell J said that the powers conferred on the court are intended to bring the relevant oppression to an end. Accordingly, the power to make an order requiring a person to do a specified act or thing may properly be exercised only when directed towards that end; it may not be properly exercised when directed towards another end (such as enabling a potential litigant to have pre-trial discovery with a view to determining whether he or she would be justified in commencing proceedings under s 232). See also *Campbell v BackOffice Investments Pty Ltd* (2008) 66 ACSR 359; 26 ACLC 537; [2008] NSWCA 95 at [121] (citing *Dernacourt*).

An order under s 233 cannot be made to disqualify directors as only ASIC has standing to apply for a disqualification order: *Lee v AMP Ltd* [2006] ACTSC 38.

As to whether the orders should be made against the company, or against the majority shareholders, see *Mopeke Pty Ltd v Airport Fine Foods Pty Ltd* [2007] NSWSC 243.

The parties cannot, by a shareholders' agreement, regulate the exercise of the court's powers under s 233: *Page v Good Impressions Offset Printing Pty Ltd* [2011] NSWSC 1398 at [17].

[233.60] Further reading

The following journal articles may be of assistance on this topic:

- R Baxt, *Company Law – Oppression, Winding Up and the Continued Retention of Parallel Shareholders' Remedies* (2008) 26 C&SLJ 259.
- M Legg and L Travers, *Oppression & Winding Up Remedies After the GFC* (2011) 29 C&SLJ 101.