> operations in question were to be regarded as a trade and, as such, a source of taxable profit.[64]

The House was there concerned with Case I of the Act, "tax in respect of any trade . . ."[65] and for this reason, apparently, commentators consider the decision not applicable in Australia and New Zealand.[66]

In the result, therefore, if the indications in *B.B.C.* v. *Johns* that the basis of the mutuality principle is absence of trading are later authoritatively established, the availability of this principle in Australia may have to be reconsidered. If, however, the second basis discussed above is reaffirmed, then as it depends on facts, not concepts, the mutuality principle, uncertain and uneven in operation as it is, will remain available.

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OPPRESSIVE CONDUCT IN THE AFFAIRS OF COMPANIES

RE BROADCASTING STATION 2GB PTY. LTD.[1]
RE ASSOCIATED TOOL INDUSTRIES LTD.[2]

INTRODUCTION

The early English Acts[3] providing for separate legal identity and limited liability introduced new legal concepts which set the company on its feet as an instrument for commercial expansion. Over the years, however, the basic role of the average shareholder in a limited liability company has changed from that of co-adventurer and active participant in the company's fortunes, to that of passive supplier of capital with a relatively small shareholding. This has aggravated the perennial problem, still a long way from being solved, of preventing or containing oppressive conduct by controlling factions of shareholders or directors.

It is probably no exaggeration to say that until recent years both legislative and judicial policy was largely that of non-intervention in the affairs of companies. Such intervention as did occur was rather hesitant and reluctant and the principles which have emerged from the application and adaptation of traditional legal rules can fairly be described as hazy, ill-defined and unsatisfactory. Continuing abuses have compelled the recent introduction of novel statutory remedies which have proved to be most beneficial. They do not, however, extend to all situations where the remedies which they provide might be thought to be appropriate and in some circumstances it may still be necessary to seek relief, if it be available, under the general law. It is not proposed to deal in detail here with the principles developed by the general law to regulate oppressive conduct. It will be observed, however, that those principles are also relevant to the application of the statutory remedies.[4]

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[64] 36 T.C. 275 at 303.
[65] *Supra* n. 2.
[66] J. A. L. Gunn, *Commonwealth Income Tax Law and Practice* (7 ed. 1963) para. 1061; N. E. Challoner and J. M. Greenwood, *Income Tax Law and Practice* (2 ed. 1962) para. 367; and H. A. Cunningham, *Taxation Laws of New Zealand* (5 ed. 1963) para. 563.
[1] (1964-5) N.S.W.R. 1648.
[2] (1964) A.L.R. 73.
[3] Trading Companies Act, 1834, 4 & 5 Wm. 4 c. 94; Chartered Companies Act, 1837, 7 Wm. 4 & 1 Vict. c. 73; Joint Stock Companies Act, 1844, 7 & 8 Vict. c. 110; Companies Clauses Consolidation Act, 1845, 8 & 9 Vict. c. 16; Limited Liability Act, 1855, 18 & 19 Vict. c. 133.
[4] See, e.g., the *2GB Case supra* n. 1 and *infra.*

STATUTORY REMEDIES IN CASES OF OPPRESSION

Of the possible statutory remedies, s. 65[5] (protection of class rights) and the provisions relating to investigations[6] will not be dealt with here other than to suggest that the latter should be expanded so that shareholders and other aggrieved persons may obtain information relating to oppressive conduct or conduct which might lead to oppression.

Section 222[7] gives the court power to wind up the company but this can often have disastrous effects on the petitioners because a sale of their assets or undertaking is usually on the basis of a forced sale at a depreciated value.

The Cohen Committee in 1945 recommended the provision of a remedy "intended to strengthen the minority shareholders of a private company in resisting oppression by the majority".[8] It recommended an enlargement of the power to wind up on the just and equitable ground and also an alternative power to make such order as might seem just where an order for winding up "would not do justice to the minority".[9] The recommendations were substantially adopted and extended to all companies by s. 210 of the Companies Act of 1948.[10] This has been enacted in Australia, with some differences, in s. 186 of the Uniform Companies Acts.[11]

Section 186 of the New South Wales Act[12] provides:

> (1) Any member of a company who complains that the affairs of the company are being conducted in a manner oppressive to one or more of the members (including himself) may, or, following on a report by an inspector under this Act, the Minister may apply to the Court for an order under this section.
>
> (2) If the Court is of opinion that the company's affairs are being so conducted the Court may, with a view to bringing to an end the matters complained of—
>
> (a) except where paragraph (b) of this subsection applies, make an order that the company be wound up; or
>
> (b) where the Court is of opinion that to wind up the company would unfairly prejudice the member or members referred to in subsection (1) of this section, but otherwise the facts would justify the making of a winding up order on the grounds that it is just and equitable that the company be wound up, or that, for any other reason it is just and equitable to make an order (other than a winding up order) under this section, make such order as it thinks fit whether for regulating the conduct of the company's affairs in future or for the purchase of the shares of any members by other members or by the company and, in the case of a purchase by the company, for the reduction accordingly of the company's capital, or otherwise. . . .

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[5] Companies Act, 1961 (N.S.W.).

[6] Part VI Divisions 3 and 4 Companies Act, 1961 (N.S.W.).

[7] Section 222:

> The Court may order the winding up of a company if
>
> (f) directors have acted in the affairs of the company in their own interests rather than in the interests of the members as a whole, or in any other manner whatsoever which appears to be unfair or unjust to other members.
>
> . . .
>
> (h) The Court is of the opinion that it is just and equitable that the company be wound up.

[8] The Committee on Company Law Amendment (Cmnd. 6659/1945) par. 60.

[9] *Id.* recommendation 11.

[10] 11 and 12 Geo. 6 c. 38.

[11] Companies Act, 1961 (N.S.W.); Companies Act, 1961 (Vict.) s. 94; Companies Act of 1961 (Qld.); Companies Act, 1961 (W.A.); Companies Act, 1962 (S.A.); Companies Act, 1962 (Tas.); Companies Ordinance, 1962 (A.C.T.).

[12] *Supra* n. 11.

Section 186 therefore provides the court with an alternative to winding up. It is an adventurous section, an admirable feature of which is the giving of a wide but defined discretion to the court. On the other hand, the section is largely experimental and the decided cases have brought out a number of shortcomings which the courts, despite their wide discretionary powers, have not yet overcome.

Before considering the *2GB Case*[13] and the *Associated Tool Case*,[14] it is proposed to state briefly what are thought to be the principles developed by decisions in earlier cases.

1. What Constitutes Oppression?

Viscount Simonds in *Scottish Co-Operative Wholesale Society Ltd.* v. *Meyer and Anor.*[15] said that oppression meant "burdensome, harsh and wrongful". In that case the petitioners were directors and minority shareholders of a subsidiary company formed by a co-operative society to enable it to enter the rayon industry. The need to operate through a subsidiary ceased, and it was alleged that the society, through its nominee directors and otherwise, had pursued a deliberate policy of ruining the subsidiary's business and depressing the value of its shares. It was held that such action was "burdensome, harsh and wrongful" and oppressive within the meaning of the section and the Court ordered the society to purchase the minority's shares at a fair value fixed by the Court. In *Re Harmer*[16] the controlling shareholders' tyrannical desire to run the whole business was held to be oppressive. Lord Cooper in *Elder* v. *Elder and Watson*[17] stated: "The conduct complained of should at the lowest involve a visible departure from the standards of fair dealing and a violation of the conditions of fair play on which every shareholder who entrusts his money to a company is entitled to rely."[18] Although such a test may be vague, courts with such wide discretion as is provided should be able to apply it. The conduct need not involve a breach of the law nor must absence of *bona fides* be proved. Motive is irrelevant[19] except for the purpose of fixing the appropriate remedy. The courts have stressed that the section does not cover domestic disputes or inter-faction wrangling or the mere outvoting of the minority by the majority.[20]

2. Who May Bring an Action?

The applicant must be a member of the company.[21] A director, officer of the company, debenture holder and, it seems, the legal personal representative of a deceased person has no rights. Possibly a legal personal representative could seek the remedy once the shares are registered in his name, but if he cannot arrange this or the dispute arises prior thereto he is barred from the remedy.[22]

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[13] *Supra* n. 1.
[14] *Supra* n. 2.
[15] (1959) A.C. 324 at 342.
[16] (1958) 3 All E.R. 689.
[17] (1952) S.C. 49 at 58. See also *Taylor* v. *Welkon Theatres Ltd.* (1954) (3) S.A. 339 (Orange F.S.P.D.).
[18] *Supra* at 55.
[19] *Re Harmer supra* n. 16.
[20] *Per* Lord Keith in *Elder* v. *Elder and Watson supra* n. 17 at 59.
[21] *Id.* at 58.
[22] Cohen Committee Report. Cmd. 6659 pars. 58, 60. Compare the recommendations on this point of the Committee for Company Law Reform in N. Ireland noted in (1959) 22 *Modern L.R.* 308. The Jenkins Committee has proposed that the section be extended to include legal personal representatives and that directors who refuse to register the legal personal representative should be bound to furnish their reasons for doing so: Cmnd. 1749/1962 par. 212(g).

3. The Affairs of "the Company"

The affairs of the actual company concerned must be conducted oppressively and not, for example, those of a related holding or subsidiary company.

4. Against Whom is the Remedy Available?

Early cases were concerned with oppression by the majorities. Jenkins, L.J. in *Re Harmer*[23] thought that the section covered anyone taking part in the affairs of the company.

5. Nature of Relief

Although the courts have a wide discretion they have imposed a duty on the applicant to state in clear terms the nature of the relief sought, which must be calculated to bring to an end the matters complained of. There are examples of relief in the section but the court does not read the words "such order as it thinks fit" as *ejusdem generis* with them — it still has power to make any appropriate order; for example, in *Re Harmer*[24] the Court appointed the party guilty of oppression as consultant to the company and president for life but without any duties, rights or powers.

THE 2GB CASE[25]

> Mr. Justice Jacobs in his judgment stated:
> I think the bare truth of the situation can be summed up by saying that the Fairfax companies were determined, by any legal means available, to obtain control of the direction of the company, or rather to retain such control despite the contemplated changes in the board. I think that the various moves were made for that purpose and that the various actors . . . played their parts accordingly.[26]

For an understanding of the scheme and its execution the facts of the case will be set out in some detail.

The main business of Broadcasting Station 2GB Pty. Ltd. was conducting a broadcasting station, the licence of which was issued under the Broadcasting and Television Act, 1942-1963 (Commonwealth), which required the company to have the consent of the Australian Broadcasting Control Board to certain activities and the permission of the Minister to any variation in its control.

Prior to October, 1951, the major shareholder in the company was Broadcasting Associates Pty. Ltd., the shares in which were owned by Denison Estates Pty. Ltd. In October, 1951, a company controlled by English newspapers purchased the shares in Broadcasting Associates Pty. Ltd. from Denison Estates Pty. Ltd. The petitioner Ogilvy, McIntyre and Mackisack were appointed directors of Broadcasting Associates Pty. Ltd. and of 2GB, and of other associated companies. Their directors' qualification shares in 2GB were provided by Broadcasting Associates Pty. Ltd., for whom they were held in trust. Patience was appointed a director and became chairman of directors of both Broadcasting Associates Pty. Ltd. and 2GB. Shortly afterwards the articles of 2GB were amended to provide for not less than five nor more than nine directors.

The purchase by the English company of the shares in Broadcasting Associates Pty. Ltd. was disapproved of by the Federal authorities and in 1953 the shareholding of Broadcasting Associates Pty. Ltd. in 2GB was reduced by sale of a number of its shares to John Fairfax and Sons Pty. Ltd. Fairfax

[23] *Supra* n. 16.
[24] *Supra* n. 16.
[25] *Supra* n. 1.
[26] *Id.* at 1663.

obtained 14% of 2GB shares. The agreement for sale provided that Fairfax would have a nominee director on the board of 2GB, as well as certain rights of pre-emption. At this stage representation on the board of 2GB was as follows: Broadcasting Associates had four nominees, Patience, Ogilvy, McIntyre and Mackisack; Fairfax had one nominee, Palmer; minority shareholders were represented by one director, Denison, whilst the seventh director, Clark, had no particular representative capacity.

In 1958 the English newspaper interests sold their shares in Broadcasting Associates Pty. Ltd. to A.T.V. (Australia) Pty. Ltd., a wholly owned subsidiary of an English company, Associated Television Ltd. Ogilvy, McIntyre, Patience and Mackisack considered themselves as nominees of A.T.V. Ogilvy also became, shortly afterwards, managing director of Macquarie Broadcasting Service, of which 2GB was the key station.

In June, 1964, shares in 2GB were held approximately as follows: ATV 45%; Fairfax 14%; minority interests 41%. Fairfax then agreed to purchase from Associated Television Ltd. the whole of the issued share capital in ATV. The agreement provided that ATV would procure the resignation of such directors as Fairfax should require and that the service agreements of Patience and Ogilvy should be terminated. Settlement of the sale was set for 30th July and Fairfax gave notice requiring the resignations of Patience, McIntyre, Mackisack and Ogilvy. McIntyre refused on the grounds that he represented shareholders and not particular interests, that no notification as to Fairfax's intentions had been given to 2GB or the minority shareholders, and that assurances had not been given to protect minority shareholders from pressure to sell at low value. He also pointed out that the sale was subject to the Government's consent. Ogilvy refused to resign until given assurances as to the interests of minority shareholders and clarification regarding the Government approval. He said the sale had been made without reference to the Australian boards and only the briefest details had been given.

Fairfax decided that two steps should be taken to secure its control of the board: First, that the power to increase the number of directors to nine should be exercised by the appointment of two additional Fairfax nominees, Jennings and Foster. Secondly, that Mackisack and Patience should resign and that the vacancies thus created should be filled by the appointment of two more Fairfax nominees, Woodrow (who would replace Patience as chairman) and Shakespeare. The first step was implemented at a meeting on 4th August, and the second at a meeting on 7th August. Ogilvy and McIntyre opposed all four appointments and were supported at the first meeting by Denison. As a result of these steps Fairfax now had five nominees in a board of nine directors. At these meetings Ogilvy and McIntyre complained of the lack of information available to the board particularly in relation to the position of minority shareholders, the renewal of the 2GB licence and the future conduct of the company. At the second meeting Woodrow, as chairman, read a statement prepared in consultation with the legal advisers of Fairfax to the effect that neither he nor Fairfax could give any indication of future plans or intentions until the Government had approved the change in control.

McIntyre then wrote to Fairfax stating that the action taken had placed the licence in jeopardy, being in breach of the condition relating to variations in control. He expressed concern for the rights of minority shareholders and questioned the validity of the recent appointments. He sought assurances (i) that the new directors would resign pending Government approval of the change in control, (ii) that the Government had been fully informed on matters relating to the change, (iii) that Fairfax would state its intentions in relation to purchasing minority shareholdings and future policy affecting the company. Upon Fairfax declining to give these assurances the proceedings

were commenced.

The petitioner alleged oppression in that (1) the steps taken at the meetings of 4th and 7th August were taken by the majorities of directors acting in concert to achieve a purpose without regard to the interests of the company but solely in the interests of Fairfax, (2) those majorities had acted in concert to deprive the others of information concerning the affairs and future of the company so as to exclude them from having any effective voice in the affairs of the company, and (3) the licence had been placed in jeopardy.

The Fairfax companies and the majority of the directors denied that they had acted contrary to the interests of the company. They said there was at that time no information to give other than that the matter had been taken up with the Postmaster-General. They also said that the actions at the board meetings were justified by a *bona fide* and reasonable fear that the petitioner and McIntyre intended to take control of the company.

Jacobs, J. dismissed the petition. In his judgment he said that to succeed in an application under s. 186 the petitioner must first prove that the affairs of the company are being conducted in a manner oppressive to a member or members.[27] He further stated that to decide whether conduct is "oppressive" the whole course of events in the company in the period complained of must be considered to see whether, as a result of a visible departure from the standards of fair dealing or of conduct which is "burdensome, harsh and wrongful"[28] or which suggests a lack of probity, some member or members have suffered in a pecuniary sense in their capacity as members. His Honour indicated that not all conduct which could be categorized as "wrongful" or which fell short of some standard of fair dealing must necessarily be "oppressive" within the meaning of s. 186. In order to determine whether "oppression" existed on the facts he thought it was necessary to have regard to the principles developed by the general law to deal with the duties of directors and the duties of majority shareholders. He pointed out that directors must act in the interests of the company as a whole as must also the majority of shareholders who appoint them. The difficulty, of course, lies in reconciling this duty to all shareholders with their right to vote in their own interests.

> The reconciliation is to be found in the necessity that the shareholder should have a genuine belief that the proposed action, however much it may benefit him, is in the interests of the company as a whole, including the minority shareholders. If he does not or reasonably could not hold such a belief, and if the proposed act is to the pecuniary disadvantage of the minority shareholders then they can complain that the conduct is oppressive.[29]

His Honour mentioned that Fairfax held at least 60% of the voting power at the time of purchase of ATV shares and that it thought it could reconstitute the board in a manner which would ensure the carrying out of its wishes. When this could not be done, because of the objections of Ogilvy and McIntyre, the procedure of appointing extra directors at the meetings of 4th and 7th August was adopted to achieve the same result. His Honour said that although taking control of the Board in such a manner could lead to oppression, such acts were not in themselves "oppressive" provided the legal requirements of the articles of association were observed. He went on to say:

> It is my view that . . . such conduct . . . is not reprehensible unless it can also be inferred that the directors so nominated would so act even if they were of the view that their acts were not in the best interests of the company. The view which I take of the conduct of the directors does

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[27] *Elder* v. *Elder & Watson supra* n. 17.
[28] *Scottish Co-Operative Wholesale Society Ltd.* v. *Meyer supra* n. 15.
[29] *Per* Jacobs, J. in the *2GB Case supra* n. 1 at 1662.

> not in my approach to this matter amount to oppression of any shareholder nor to improper conduct so long as they bona fide believed that the Fairfax companies would act in the interests of the company as a whole. They were prepared to leave it to the Fairfax companies to conduct the negotiations with the Postmaster-General. There is, in my view, no evidence which would support a conclusion that this course was not one which was in the best interests of the company to adopt. However, this attitude which was adopted by the majority of the directors has a very important result, namely, that if it could be shown that the Fairfax companies were acting in their own interests, either contrary to the interests of the company, or without any regard to the interests of the company, then no one, director or shareholder, could rely on the acts of the directors, or the failure of the directors to act, upon the ground that they acted or failed to act in a bona fide belief that the Fairfax companies would act in the interests of the company.[30]

In the circumstances his Honour thought it could be said that the acts of Fairfax were the acts of the directors. Therefore if it were to appear that the latter were acting contrary or without regard to the interests of the company, to the detriment of any minority shareholder, then the case of oppression could be made out. A situation of oppression could only arise where in the event of a conflict between the interests of the company and the interests of Fairfax, Fairfax preferred its own interests.

> It is not sufficient to show that the affairs of the company are, in effect, being controlled by the major shareholder. It is not sufficient that, when the licence is in jeopardy, the majority of the board has been prepared to abide the result of negotiations on that subject carried on, not by it but by the major shareholder alone. There is in my view no oppression until, in these circumstances, the major shareholder prefers its own interests to the interests of the company. Of this I can see no evidence.[31]

His Honour also pointed out that ". . . the Court is unable to anticipate the damage which a member may suffer from oppression. . . . The section gives no power to anticipate. It can only deal with a situation of oppression which is already existing".[32] He stated that during the hearing he had suggested an adjournment while the parties sought information from the Postmaster-General as to whether he would approve of the purchase. Neither party supported his suggestion.

RE ASSOCIATED TOOL INDUSTRIES LIMITED[33]

Associated Tool Industries (A.T.I.) was a holding company with a paid-up capital of £35,000. It had a number of subsidiaries and Australian Hardware Services Pty. Ltd. acted as sales agent for some of them. The respondents were A.T.I., James Tulloch, Alan Best and Douglas Rose, all directors of A.T.I. and Australian Hardware. Each held a £1 fully paid up share in Australian Hardware, the capital of which, paid up or credited as paid up, was £4. Its business operations were financed by loans obtained from the A.T.I. group to which it owed £29,000 at the time of the petition. On 16th June, 1961, 400 ordinary shares in A.T.I. of five shillings each were allotted to the petitioner, James McFadden, and on 15th July, 1961, a further 600 ordinary shares were allotted to him and he was appointed a director. On the same day, 200,000 ordinary shares of five shillings and 5,000 eight per cent cumulative preference shares of £1 each were allotted to the petitioner, Macamco Pty. Ltd. The shares were all fully paid up in cash.

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[30] *Id.* at 1663-4.
[31] *Id.* at 1664.
[32] *Id.* at 1664.
[33] *Supra* n. 2.

On 28th October, 1961, at a meeting of directors of A.T.I. the possibility of a take-over of Australian Hardware was discussed but deferred. The trial judge, Joske, J., was satisfied that a take-over would have been the proper course as a matter of business and he was also satisfied that the individual respondents were determined to oppose it. At the same meeting Tulloch proposed he should go on a visit to Japan. McFadden opposed this on the ground that the company could not afford to have the chairman away. It was resolved "that the proposed trip be deferred". On 11th April, 1962, Tulloch left for overseas without taking leave of absence from the company, although he had leave from the subsidiaries. Joske, J. was satisfied that Tulloch believed McFadden would oppose his leave if he knew of it and would oppose his expenses which had been allowed at a considerable amount (£1,950).

McFadden gave notice of a directors' meeting on 26th April to discuss the propriety of Tulloch's absence and expenses and to consider a proposal that Australian Hardware be requested to allot shares to A.T.I. to the extent of the outstanding loans. On 21st April, Rose, Best and Hyams (the last-mentioned acting as alternate for Tulloch from whom he held a power of attorney) met as directors of Australian Hardware and resolved: (a) that if the directors of Australian Hardware should agree to allot further shares to the A.T.I. group then steps should be taken to alter the structure of the company to provide for a new "A" share to be allotted to Tulloch giving him (i) a right to cast at any general meeting that number of votes as would equal all other votes cast, plus one and (ii) power to remove a director and appoint someone else; (b) that no shares be allotted to A.T.I. without written authority of Tulloch.

At a meeting of directors of A.T.I. on 26th April it was resolved to give leave of absence to Tulloch and to apply for 4996 £1 shares in Australian Hardware which, if allotted, would make the company a subsidiary of A.T.I. Neither Rose nor Best told McFadden about the meeting of directors of Australian Hardware on 21st April. They insisted upon approval of the grant of leave to Tulloch as a condition of their approval of the resolution to apply for shares in that company.

On 30th April a service agreement for 15 years was entered into between Australian Hardware and Tulloch giving the latter a right to £35,000 in the event of termination of the agreement and entitling him to be interested in any competing business. On 2nd May, Rose, Best and Hyams (on behalf of Tulloch) as directors of Evro Tool Co. Pty. Ltd. and Evro Hardware Pty. Ltd. (subsidiaries of A.T.I.) entered into certain agreements with Australian Hardware to take back at full value from Australian Hardware all Evro stock as a contra against a loan made to Australian Hardware should either Evro company be directed by A.T.I. to call the loan up and that payment of the balance of the loan be deferred until 30th June, 1965. These agreements put Tulloch, Rose and Best in a strong position to bargain with A.T.I. with regard to the allotment to it of shares in Australian Hardware and also affected detrimentally the financial position of the A.T.I. group.

Negotiations then took place between A.T.I. and Australian Hardware for the latter to become a wholly owned subsidiary of A.T.I. Tulloch, Rose and Best were agreeable to this and to the cancellation of Tulloch's service agreement (which the judge was satisfied was used as a bargaining point) only on condition that they all be allotted shares fully paid up in the company to the value of £3,000, in exchange for their three £1 shares in Australian Hardware and that Tulloch be appointed managing director of Australian Hardware at a salary of £2,500 per annum. The resolutions carried by the directors of that company on 21st April and 2nd May, 1962, were to be

rescinded. At a meeting of A.T.I. directors on 12th July, 1962, from which McFadden was absent, it was agreed to adopt the agreements but because Tulloch, Rose and Best were directors of A.T.I. it was necessary to have the agreement ratified by the company in general meeting.

Joske, J. was satisfied that the respondents knew that Australian Hardware was in a difficult financial position and that their shares were worthless. His Honour was satisfied that they intended, despite their fiduciary duties as directors, to exert pressure for their own benefit to secure a present of £3,000 worth of shares each in the company. This they did in the course of the company's business and in his Honour's view this clearly constituted oppressive conduct. It appears that his Honour also regarded the fact that they failed to disclose relevant facts at the meeting of 21st April as oppressive.

The petitioner company, Macamco Pty. Limited (a shareholder in A.T.I.) gave notice requiring the directors of A.T.I. to call an extraordinary general meeting to consider the company's affairs and gave nine points, arising from the facts as stated, to be considered. However, when the notice of the meeting was circulated it was in brief general terms and did not refer to the matters raised by Macamco. This, his Honour thought, was another example of the respondents' lack of probity and deliberate non-disclosure in the affairs of the company which was "all part of a policy to control the meeting for their own benefit and not the company's, as I find".[34]

His Honour was also satisfied of certain other facts. He found that the share register had been improperly transferred to Sydney and entries made therein; that at the meetings held to answer Macamco's requisitions the minute book had been tampered with and the rules as to proxy votes breached; that the respondents knew Tulloch's expenses for his trip came from A.T.I.'s overdraft and were prepared to continue indefinitely making the company's overdraft available to Australian Hardware to enable it to carry on business with meagre capital, much debt and without real control by A.T.I. In resisting control by A.T.I. the respondents were not acting *bona fide* but in a continuing attempt to benefit themselves at the expense of A.T.I., and contrary to its interest.

The petitioners, McFadden and Macamco Pty. Ltd. sought an order, not that the company be wound up, but that the respondents be ordered to purchase from the petitioners their shares in the company at a determined price. For the respondents it was contended that the powers contained in s. 186 could only be invoked as against a controlling majority in the company and that at no stage did the individual respondents constitute a majority.

Mr. Justice Joske in his judgment canvassed the relevant principles: first, that the petitioner must be a member of the company;[35] secondly, that the section does not apply to every case where the facts would justify the making of a winding-up order under the "just and equitable" rule, but only to those cases which have in them the requisite element of oppression; thirdly, that the phrase "the affairs of the company are being conducted" suggests *prima facie* a continuing process and is wide enough to cover anyone taking part in the affairs of the company whether *de jure* or *de facto*; and, fourthly, that the conduct must be "oppressive" in the sense established by the cases, there being no statutory definition of that term.[36]

His Honour held: (1) That as between parent and subsidiary company there must be the utmost good faith. This is a reciprocal mutual requirement which necessitates not only that the holding company must exercise good faith towards the subsidiary company but also the subsidiary must exercise good

[34] *Id.* at 79.
[35] *Id.* at 81.
[36] *Id.* at 81.

faith towards the holding company.[37] (2) That there can be oppression under s. 186 by a minority. There is no express mention in the section that the remedy is only available against majorities. In his Honour's view the section "is wide enough to cover oppression by anyone who is taking part in the conduct of the affairs of the company *de facto* or *de jure*".[38] (3) That the facts of the case otherwise justified the making of a winding-up order on the ground that it would be just and equitable that the company be wound up. Such an order would, however, unfairly prejudice the petitioners and he therefore decided to grant the relief sought by the petitioners.

It is not clear why his Honour should have regarded the third finding as a necessary condition precedent to relief under the section. It is respectfully submitted that the second limb of s. 186(2)(b)[39] would have justified the order granted.

After hearing evidence as to value his Honour ordered that Tulloch, Best and Rose purchase the shares of the petitioners in the company at par value, being for £10,250 in all. The petitioners also sought an order which would secure the payment of the money for the shares by way of charging such payment on the shares which the individual respondents already held in the company. This was refused on the ground that a power to order security was not expressly conferred by s. 186 and consequently was exercisable only in the process of execution. The order could not, therefore, be embodied in the judgment itself.

CONCLUSIONS

The section provides a welcome new remedy. The wide discretion given to the courts shows a legislative intention that the section be far-reaching. "Indeed being a remedial measure and not to be construed narrowly (see *Meyers Case supra*) it should be regarded as intended to terminate defects in the pre-existing law."[40] The cases have since shown shortcomings and the section should be amended to eliminate these. It is submitted that amendments could be made in regard to the following.

1. The requirement that the remedy is only available to a member or members[41] in respect of oppression suffered in the capacity of a member should be relaxed. Any such relaxation must necessarily be specific but surely at least a debenture holder should have the remedy. It is true that, theoretically at any rate, he can protect himself by the terms of his contract or security so that the company cannot unilaterally escape its obligations or vary them as it can in the case of a shareholder. But such theoretical protections are cold comfort nowadays when far too many supposedly solid companies crash without warning. The debenture holder has sufficient interest in the company's fortunes and is so likely to be affected by oppressive conduct as to warrant a right to a remedy. Also, if a legal representative of a deceased shareholder is excluded from the remedy, this situation should be rectified.[42] In principle it would seem to be desirable that the remedy be available to a director who is not a member of the company or directors who have been dismissed from office. It is true that following on a report by an inspector the Minister may apply for an order[43] but it is submitted that in many cases the Ministerial procedure

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[37] *Id.* at 81. Applied *Scottish Co-Operative Wholesale Society Ltd.* v. *Meyer supra* n. 15.

[38] *Id.* at 81.

[39] ". . . or that, for any other reason, it is just and equitable to make an order under this section (other than a winding up order) make such order as it thinks fit . . .".

[40] *Per* Joske, J. in the *Associated Tool Industries Case supra* n. 2 at 83.

[41] *Elder* v. *Elder and Watson supra* n. 17.

[42] See recommendations of the Cohen and Jenkins Committees *supra* n. 24.

[43] S. 186(1) Companies Act, 1961 (N.S.W.).

will be too late to prevent irreparable damage. This problem will be further considered below.

2. The remedy should be easier to obtain. The word "oppressive" appears to be unduly restrictive and the section should be given an extended operation. The Jenkins Committee suggested "unfair and prejudicial" instead of "oppressive". Fortunately the courts seem to be fairly liberal, the sensible test being in *Elder* v. *Elder and Watson Ltd.*[44] of a "visible departure from the standards of fair dealing and a violation of the conditions of fair play on which every shareholder who entrusts his money to a company is entitled to rely".[45] Pending any amendment some reliance might be placed on certain allied provisions of the Act especially s. 222(f) which speaks of actions being "unfair and unjust to other members"[46] and on the just and equitable ground for winding up in s. 222(h).[47] Section 222(h) comes at the end of a long list of grounds for winding up; it is obviously intended to cover situations not specifically provided for and it is submitted that it would extend to "unfair or unjust" conduct by directors. True it is that Joske, J. in the *Associated Tool Case*[48] said that s. 186 "does not purport to apply to every case in which the facts would justify the making of a winding-up order under the 'just and equitable' ground, but only to those cases of that character which have in them the requisite element of oppression".[49] It might be argued that those cases having within them the requisite element of oppression include cases of "unfair and unjust" conduct. At any rate it is clear that it would be desirable for the section to be amended to substitute some such words as "unfair and prejudicial" for "oppressive".

3. The requirement that oppression be continuing should be clarified. The fact that the oppression might have stopped at the time of the petition should not necessarily bar the petitioner. A liberal interpretation ought to be applied in such cases as a single misapplication of funds, where the effects of deprivation of such funds could be felt for a long time.[50]

4. Allied to this last proposition is the situation regarding apprehended oppression. As Jacobs, J. said in the *2GB Case*,[51] "The section gives no power to anticipate". It is submitted that this aspect is most in need of amendment. Surely prevention is better than cure. An injunction to prevent the controlling faction taking steps which will produce oppression is desirable so long as the petitioner can prove a reasonable likelihood that oppression will otherwise result.

A further factor indicating the need for reform is the possibility that a minority whose shares have been expropriated by the majority may be without a remedy under s. 186 because they are no longer "members". If an injunction preventing enforcement of the resolution were obtained, the petitioners would remain members but the oppression would not be continuing. In such cases the shareholder is at present forced to rely on the general law remedies which are less flexible. It is desirable that the section cover such situations. One possibility is to extend "member" to include a person deprived of membership by the act of oppression complained of, or more simply, the

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[44] *Supra* n. 17.
[45] *Id.* at 55.
[46] See 222(f) *supra* n. 7.
[47] *Supra* n. 7.
[48] *Supra* n. 2.
[49] *Id.* at 81.
[50] See *In re Hanneta Ltd.* unreported, 2nd November, 1953. See (1953) 216 *L.T.Jo.* 639. The Jenkins Committee suggested amendment to provide for a remedy where, although a course of conduct could not be made out, one unfair act could be shown. See Cmnd. 1749 par. 206 and recommendations in par. 212(f) and 212(e); if given effect, the latter will empower the court to authorize the bringing of proceedings in the name of the company against third parties.
[51] *Supra* n. 1.

petitioner could obtain an order preventing the majority from depriving the minority of their shares and then an order that the controlling faction should not take steps of such a kind that would perpetrate a new oppression or oppressive conduct of a different kind aimed at achieving substantially the same result.

5. In *Meyer's Case*,[52] both Viscount Simonds[53] and Lord Keith of Avonholm[54] adopted the view of Lord Cooper in the Court of Sessions[55] that "whenever a subsidiary is formed as in this case with an independent majority of shareholders, the parent company must, if it is engaged in the same class of business, accept as a result of having formed such a subsidiary an obligation so to conduct what are in a sense its own affairs as to deal fairly with its subsidiary". From the point of view of nominee directors Lord Denning[56] pointed out that the *dictum* of Lord Blanesburgh in *Bell* v. *Lever Bros. Ltd.*,[57] that a director of one company was at liberty to become a director also of a rival company, must be reconsidered because such a director now risks an application under the section if he subordinates the interests of the one company to those of the other. The comments made by Joske, J. in the *Associated Tool Case*[58] are also noteworthy in this connection.

In the *2GB Case*[59] Jacobs, J. was faced with something of a dilemma when he spoke of the inability of the directors to rely on a *bona fide* belief that Fairfax would take care of things. On the one hand, the mere possibility of conflicting duties of directors does not ground a remedy nor is mere acquiescence of nominee directors to their puppet masters *per se* a breach of duty. But acquiescent directors who leave things to their masters in the belief that they will do the right thing may be in breach of their own duties if in the result their masters do the wrong thing, especially as the reasoning of Jacobs, J. was based on the general principles of duties of directors and majorities. In *Meyer's Case*[60] it was pointed out that it was no defence to say that the nominee directors had merely been inactive and failed in their duty to defend the subsidiary company's interests when they ought to have done something. It seems that the requirements of commercial enterprise will not allow a principle of non-delegability of directors' duties to be extensively applied, but it is submitted that the section is a most useful and necessary device if applied, as in *Meyer's Case*,[61] against those in *de facto* or *de jure* control.

6. It is to be hoped that although the courts require the petitioner to state the nature of the relief sought, they will, in appropriate situations, exercise as much initiative as was exercised in *Re Harmer*.[62]

7. In the *Associated Tool Case*[63] Joske, J. pointed out there was no power in the section for him to include an order for security in the judgment. An amendment to provide for this would be most desirable.

There has always been a problem of protecting minorities without depriving the majority of benefits accompanying control of voting power. Section 186 fulfils a necessary purpose in helping to solve the problem. Amendments in the areas mentioned will better ensure the solution.

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[52] *Supra* n. 15.
[53] *Id.* at 343.
[54] *Id.* at 362.
[55] (1954) S.C. at 391.
[56] *Scottish Co-Operative Wholesale Society Ltd.* v. *Meyer supra* n. 15 at 368.
[57] (1932) A.C. 161 at 195.
[58] *Supra* n. 2.
[59] *Supra* n. 1.
[60] *Supra* n. 15.
[61] *Supra* n. 15.
[62] *Supra* n. 16.
[63] *Supra* n. 2 at 85.