

# **Enlightened Shareholder Value and the New Responsibilities of Directors**

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Dean Hearn, after whom this lecture is named, was one of those wide-ranging nineteenth century intellectuals whom the twenty first century regards with awe. Not only was he a professor of constitutional law and jurisprudence (still a combination one finds at some universities, though it is dying out) but also professor of modern history and literature, political economy and logic. Clearly not for him the sharp and every multiplying modern-day boundaries between disciplines and sub-disciplines, between departments and centres, which divide knowledge and understanding into every more limited packages. I cannot escape that modern specialising tendency but I thought that the least I could do, from within the area of corporate law, was to choose a reasonably broad theme to tackle in this lecture. So I am going to address the question of whose interests directors should promote when they exercise the managerial powers vested in them. In particular, I shall make some remarks on shareholder/stakeholder debate in modern company law and, in particular, the place of creditors' interests in this debate. My lecture is divided into three parts – no doubt Dean Hearn would have approved this traditional, indeed, ancient, division – and will consist of some remarks on the formulation of directors' basic duty of loyalty, on a new reporting requirement called the Operating and Financial Review and on the so-called duty owed by directors to creditors.

First, then, some remarks on the basic duty of loyalty. In large companies, that is companies which are large not only in terms of economic value but also the number of their shareholders, delegation of wide-ranging management powers from the shareholders to a smaller group of people is inevitable and desirable. That smaller group is normally referred to by lawyers as the board of directors, by business school professors as the senior management of the company, but for the purposes of this

lecture I don't think I need to investigate the differences between those two overlapping concepts. Wide-ranging delegation of management powers is desirable, from the shareholders' point of view, on grounds of expertise, speed of decision-making and commitment, but, as we all know, such delegation gives rise to agency costs for the shareholders. Will the board competently and loyally pursue the shareholders' interests or will it rather seek to pursue its own interests and/or opt for a quiet life? One important role for company law, and in particular for the law of directors' duties, is to reduce shareholders' potential agency costs so that the benefits of delegation exceed its costs. This means, of course, that a legal duty which generates more costs than it saves is not worth having.

The underlying theory of English – and I think Australian – company law is that directors' managerial powers are the result of a delegation from the shareholders, even if such delegation now is regarded as having a constitutional and not just an agency character to it. Consequently, the role of directors' duties is naturally seen as being focussed on the promotion of the interests of the shareholders. Nevertheless, once those powers have been delegated, as they routinely are in large companies, the scene is set for a more wide-ranging debate. Should the interests of the shareholders be the exclusive focus of company law and the law of directors' duties in particular or should a wider 'stakeholder' focus be adopted? This is not a new question by any means. It was, after all, the focus of the famous debate between Professors Berle of Columbia and Dodd of Harvard a number of decades ago. It is interesting to note that this debate arose in a jurisdiction where the standard analysis is that directors' powers are conferred, at least at their core, not by the company's constitution but by the companies' legislation. Where directors' powers are theoretically the result of legislative, rather than shareholder, delegation the question of whose interests they are meant to serve is naturally a more open one. Nevertheless, even when those powers are theoretically derived from the shareholders, the question of whether mandatory law should constrain the exercise of the powers still seems to me an open one. It may or may not be wise for the legislature to attempt such constraints, but I do not think it can be argued to be improper for the legislature to do so.

The reason for raising this debate again tonight is that the shareholder/stakeholder discussion has been central to a number of important scholarly debates in recent years, especially over the proposition, usually associated with Henry Hansmann of Yale and Reinier Kraakman of Harvard, that, globally, company law systems in

developed economies are converging on the exclusively shareholder model. This is also an issue of practical policy importance in the European Union, which contains examples of countries strongly committed, respectively, to the shareholder model, on the one hand, and the stakeholder model, on the other, so that the process of developing harmonised company law for the EC constantly hits up against this fundamental divide. So far, for example, attempts to produce a harmonised law on directors' duties have failed to bear fruit, precisely because of this obstacle, and mechanisms to facilitate cross-border mergers, where progress is at last being made, have become immensely complex in consequence of the attempt to produce merger legislation which does not have to plump for one model or the other. I refer here to the recent legislation creating the European Company (which is a form of incorporation provided by Community, not national, law) and the proposed Directive on cross-border mergers.

In the UK itself the scholarly and policy debate on this issue has been lively in recent years, in part because between 1998 and 2001 there was carried out on behalf of the relevant govt dept a comprehensive review of British company law, said to be the first such review since the C19. I should disclose that I was a member of its Steering Group. Some of the Group's recommendations, notably the mandatory Operating and Financial Review (OFR), which I shall come onto in a minute, have been implemented already as part of the British response to Enron et al, but the bulk of our proposals, as amended by the government, will be introduced into Parliament in the next month or so, as the Company Law Reform Bill, and will probably reach the statute book next year. It is impossible to have a comprehensive review of company law without dealing with the shareholder/stakeholder question, the answer to which determines the approach to so many of the controversial areas in company law. Accordingly, we spent a good deal of the first part of our work on the topic, under the guidance in particular of the late and much lamented John Parkinson, of Bristol University and a major proponent of the stakeholder view.

Let me give you the main components of our conclusions straightaway. First, somewhat to John's disappointment, no doubt, we endorsed the traditional shareholder-centred philosophy of British company law, but advocated a modernised version of it, which we dubbed 'enlightened shareholder value'. Second, the ESV approach showed itself not only, or, in my view, even most prominently, in the formulation of directors' duties, but also in the additional mandatory reporting requirement contained in the OFR. It's not an exaggeration to say that the OFR was,

in the eyes of many people, the other side of the bargain in which a relatively traditional formulation of directors' duties was adopted. What I propose to do in this lecture is to say a bit more about the theory which it seems to me can be used to justify the ESV approach and then to move onto one particular issue, which was left unresolved in the CLR's work, which is the question of where creditors' interests fit into the ESV approach.

Perhaps the first point to make is that, following the Law Commission's earlier recommendations, the CLR proposed and the govt accepted that there should for the first time in British company law be a statutory statement of directors' duties. At present, the core components of those duties are to be found only in case-law. The new Bill contains a statutory statement of all those duties, at least as they apply whilst the company is a going concern, but a statement pitched at a high level, so that, it is hoped, judicial creativity will still have sufficient scope to play its traditional role in developing the duties in the future. Moreover, except where the statutory statement clearly departs from the current law, as it does by putting the directors' duty of care on an objective basis, much of the existing case-law will remain relevant as an aid to the interpretation of the statutory duties. The purpose of the restatement was primarily educative; only to a secondary extent reformative.

As far as tonight's topic is concerned, the crucial question is what the statutory statement says about the interests which the directors should promote when exercising their discretionary powers. The common law mantra that the duties of directors are owed to the company has long obscured the answer to this question. Although that is a statement of the utmost importance when it comes to the enforcement of duties and their associated remedies, it tells one nothing about the answer to our question, whose interests should the directors promote? This is because the company, as an artificial person, can have no interests separate from the interests of those who are associated with it, whether as shareholders, creditors, employers, suppliers, customers or in some other way. So, the crucial question is, when we refer to the company, to the interests of which of those sets of natural persons are we referring? Of course, one could take the view that the beauty of referring to the interests of the company, without any further specification of what is meant, is that the answer to my question is left wholly ambiguous and obscure. This may be a way of avoiding political controversy but it does not generate transparent law.

**SL 1**

In any event, the government does propose to specify what is meant by the interests of the company and to adopt the majority view of the prior common law, ie that the company means its members, normally, therefore, the shareholders. Thus, the draft Bill states as follows (note the user-friendly drafting style):

“As a director of a company you must act in the way you consider, in good faith, would be most likely to promote the success of the company for the benefit of its members as a whole.”

This is, I think, clear, and it's pleasing to note that the meaningless phrase 'in the interests of the company' has altogether disappeared. However, this formulation does not so far have much an ESV quality about it.

**SL 2**

The ESV element is to be found in the further provisions that 'in fulfilling the duty imposed by this section you must take into account (where relevant and so far as reasonably practicable)' a number of further matters. These are, first, 'the likely consequence of any decision in both the long-term and the short-term.' So the shareholder focus is explicitly stated not to be an excuse for short-termism. In my view, the common law never required short-termism, but the number of student essays I have read which equate shareholder interests with short-term interests suggest the misconception was quite widespread.

Second, the directors must take into account 'any need of the company' to have regard to the interests of its employees; business relationships with suppliers, customers and others; the impact of its operations on the community and the environment; and to maintain a reputation for high standards of business conduct. As far as directors' duties are concerned, this is the heart of the ESV approach. The aim is to make it clear that although shareholder interests are predominant (promotion of the success of the company for the benefit of its members), the promotion of shareholder interests does not require riding roughshod over the interests of other groups upon whose activities the business of the company is dependent for its success. In fact, the promotion of the interests of the shareholders will normally require the interests of other groups of people to be fostered. The interests of non-shareholder groups thus need to be considered by the directors, but, of course, in this shareholder-centred approach, only to the extent that the protection of those other interests promotes the interests of the shareholders. The statutory formulation can be said to express the insight that the shareholders are not likely to do well out of a company whose workforce is constantly on strike, whose customers don't like its

products and whose suppliers would rather deal with its competitors. Nor is this insight necessarily new. In a related context Bowen L J said in the C19 that the 'law does not say that there are to be no cakes and ale, but there are to be no cakes and ale except such as are required for the benefit of the company.' (*Hutton v West Cork Ry*) The main difference with new statutory formulation is that Bowen L J was probably identifying a discretion to take into account non-shareholder interests, whilst the Bill creates a duty to do so.

Thus, there is no doubt that the CLR's formulation of the basic objective of directors' duties is towards the shareholder, rather than the stakeholder, end of the spectrum. In my view, going more widely than this simply produces a formula which is unenforceable and paradoxically thus gives management more freedom of action than they previously had. A wider formulation, it is true, might work if there was extensive reconstruction of the composition of the board so as to reflect stakeholder interests, but no jurisdiction, not even Germany, which of course represents only one stakeholder interest on the board, the employees, has ever sought to turn the board into a sort of representative Parliament of all those potentially affected by the company's actions – and I would suggest it is for good reasons in terms of effective decision-making that such restraint has been shown.

Even with the ESV version of shareholder duties, however, there is a real risk that the proposed reformulation can be regarded as merely playing with words. What is going to ensure that directors' behaviour does in fact change as a result of the imposition of a duty to take into account stakeholder interests? The lawyer's response might be to say that legal action or the threat of it against directors for breach of duty will be the driving force behind behavioural change. However, in my view litigation has never been an effective means of enforcing the basic duty of the director to act in the best interests of the company – and is unlikely to be so in relation to that duty as reformulated. This is because of the highly subjective formulation of that duty, which is proposed to be retained. The duty is to act, you will recall, in the way the *director* thinks in good faith (not the way the court thinks) will promote the success of the company. This is in sharp contrast to actions based on conflicts of interest, where the test is objective. The importance of the subjective formulation of the basic duty was pointed out by the British CA in the 1940s in *Re Smith & Fawcett* and the point was recently reiterated in a dramatic way in *Regentcrest plc v Cohen* (2001). There, two weeks before the company went into liquidation, the board voted to release the company's claim for some \$3.5m against

two of its directors (who did not vote on the issue). A claim for breach of duty against the approving directors failed on the grounds that at that time they still honestly believed it was feasible to save the company and that the chances of doing so would be increased by keeping the directors who owed the money to the company fully committed to that process. Thus, proving breach of this subjectively formulated duty is extremely difficult, unless the directors cannot come up with even a half-plausible answer to the question of why they acted as they did. Consequently, although there is a steady trickle of litigation on directors' duties arising out of conflicts of duty and interest or out of the diversion of corporate opportunities – an objective test – there is very little – and less that is successful – on the fundamental duty to act in the best interests of the company.

It is true that the new requirement to take into account stakeholder interests in deciding what will promote the company's success is formulated partly in an objective way: where relevant such matters must be taken into account, subject to a reasonably practicable defence. In theory, therefore, there is opened up a new avenue of attack on directors' decisions, ie that although the decision was taken in subjective good faith, the directors did not take account of all relevant considerations. My guess, however, is that British judges will not use this opportunity to develop public-law like controls on the exercise by directors of their discretion and certainly the CLR's strategy did not depend upon their so doing – or even wish to encourage them to do so. Rather the enforcement method which the CLR envisaged as likely to have the main impact in practice was disclosure via the OFR, plus action taken on the basis of that disclosure. Thus, although the OFR has already been implemented in the UK, whilst the reformulated duty is still going through the legislative process, in the CLR's strategy the two were closely linked.

So, let me turn now to the OFR.

### **SL 3**

The OFR is the latest addition to the annual reports which a quoted company must make. In contrast to the hard, backward-looking numerical data contained in the company's financial statements, the OFR is a forward-looking document, not confined to financial data, and giving the directors' view of the drivers of its business, outlining its corporate strategy and assessing the quality of the relationships which underpin that strategy. I have put on the slide a portion of the relevant new schedule to the Act, which deals with the matters pertinent to this lecture. There are three main

criticisms which have been advanced about the OFR and its likely effectiveness, which I would like briefly to discuss. First, it is said that the OFR is likely to generate simply self-serving twaddle, of the type already found in some company's environmental and social reports, rather than useful data. There is no doubt that this is a real risk. OFRs, to be useful, need to be comparable across companies and, within a single company, across time periods, but without being reduced to formulaic statements. In relation to the traditional accounts, this result is achieved, to the extent that it is achieved, mainly through accounting standards. Likewise, for the OFR the British Accounting Standards Board has produced a Reporting Standard. No doubt, that Reporting Standard will need refinement in the future. Reporting standards for financial data have been around in their modern form for at least half a century but are still controversial, as those following the debates of IASs will know. Reporting standards for the OFR will also face difficulty, but I am hopeful that useful and usable benchmarks and KPI's can be developed.

Some reliance in dealing with this problem is also placed on auditing, but not very much, because the OFR is designed to be the directors' report, not the auditors' report. The auditors are simply asked to certify whether the OFR is consistent with the information contained in the company's accounts and any other information they have obtained in the course of their duties, but not whether the OFR presents a true and fair view of the company's position or even, as was initially proposed, that the directors have prepared the OFR 'after due and careful enquiry'. (s 235(3A) and see the original proposal in the draft Regs.)

Second, the OFR has been criticised because it is presented in the legislation as a report to the shareholders, not to stakeholders in general. (Sched. 7ZA, para 1). This restriction has the virtue of producing conceptual harmony, since, as I have said, the directors' duty to take into account stakeholders' interests is firmly placed in the context of promoting the company for the benefit of its members. Nevertheless, there is no doubt that the directors could have been asked to produce a report of the benefit of the public at large as well as for shareholders. Whether this restriction will make much difference in practice is doubtful. Even those who criticise the restriction accept that the OFR is supposed to state the *directors'* view of how the company is going to develop, and so the fact that a particular pressure group thinks the company should adopt some different strategy would not affect the directors' reporting obligation, even without the shareholder restriction, so long as the directors' did not accept the pressure group's analysis.



What can be said, thirdly, is that disclosure of information by itself gives stakeholders no particular method for putting pressure on the company. Of course, directors may refrain from certain courses of action, if they have to be disclosed, ie the threat of reputational harm may restrain certain types of activity. But whereas the shareholders will have the general meeting and their other governance rights for responding to the information contained in the OFR – or the market may react to the publication of the OFR - non-shareholder groups have no such tools at their disposal. However, it is difficult to see how company law could provide the mechanisms for a general stakeholder input into corporate governance in the absence of a much more radical reform of company law than the CLR was willing to contemplate – and, indeed, as I have said, more radical than any country, including Germany, has been willing to contemplate. The furthest one can sensibly go is to use corporate law to produce information which is of use to stakeholders, because that is a low-cost by-product of the information which management has to produce for shareholders. Financial information produced for shareholders and put in the public domain has long been used by non-shareholder groups for their own ends. The OFR in the future will provide a wider range of information which will be of utility to both shareholder and non-shareholder groups.

Let me turn now to the third part of my talk, which deals with the place of creditors in the formulation of directors' duties. Over recent decades, there has been a development of case-law, beginning in Australia, but now spreading through many of the common law jurisdictions, including Britain, which has generated what may be loosely called a duty on directors to creditors. Some people have argued that this development has cast doubt on the shareholder-centred focus of company law. My view is that these creditor-regarding developments are certainly to be welcomed but that they do not generate the doubt I have just mentioned. Rather, they show that company law has become more sensitive to issues raised by managerial conduct when the company is in financial difficulty and when the shareholders' financial stake in the company has evaporated or all but. At this point, requiring the directors to have exclusive regard to the interests of the shareholders lacks a coherent rationale and in fact can generate perverse incentives for the directors, as I shall argue in a minute. Nevertheless, the question of precisely how the interests of the creditors are to be fitted into a defensible scheme of directors' duties is not an easy one to answer; so difficult has the British government found it that its proposed statutory statement simply states that the duties imposed by it have effect 'subject to any enactment or

rule of law requiring directors, in certain circumstances, to consider or act in the interests of the creditors of the company' – but without specifying those circumstances or the duty that might then arise. In short, a cop out, if I may use the term.

Two important conceptual points to begin with. First, despite some stray dicta, no court in a common law jurisdiction that I am aware of has in fact based a decision on a duty owed by directors to creditors. The duty remains, as it always has been in the common law, a duty owed to the company. This is important because it means that the duty is enforceable only by the company, meaning the board, or the general meeting or a shareholder in a derivative action, but not by the creditors, even the creditors collectively, short of insolvency. As Gummow J said in *Sycotex* 'the result is that there is a duty of imperfect obligation owed to creditors, one which the creditors cannot enforce save to the extent that the company acts on its own motion or through a liquidator.'

What is going on here, it seems to me, is that the courts are viewing the creditors as constituting the company. But this brings me to my second point. The creditors are viewed by the courts as constituting the company only when the company is at or near the point of insolvency. Again, despite some stray dicta to the contrary, especially in the recent decision of the Supreme Court of Canada in *Peoples Department Stores v Wise*, no court has found the creditors to constitute the company whilst the company is in a healthy financial state. What can be said, as Austin, Ford and Ramsay do in their recent book on company directors is that 'it is now clear that a duty to avoid action contrary to the interests of the creditors exists where the company is insolvent or is nearing insolvency.' (p 277) Note that this is a very cautious formulation: it does not say that even near insolvency the creditors are to be the sole constituent of the directors' concern. They must avoid action contrary to the creditors' interests, but, subject to that, it could be argued, they must act to promote in the interests of the shareholders. It is a tort-like duty, in other words, to avoid harm to creditors, not a fiduciary-like duty to promote their interests.

So, to summarise, it can be said that the so-called directors' duty to creditors has not altered the traditional common law formulation that directors' duties are owed to the company but rather the position is that, as the company nears insolvency, the company should be understood as embracing not just the interests of the shareholders but also and perhaps eventually exclusively the interests of the

company's creditors. Is this a welcome development? I think it is, because limited liability creates perverse incentives for directors as the company nears insolvency if directors' duties continue to be formulated as referring only to the shareholders' interests. Since the creditors are normally restricted to the corporate assets for the satisfaction of their claims by the doctrine of limited liability, shareholders are relieved against the downside risk of their decisions once the shareholders' equity in the company has evaporated. So long as the company has a positive net value, the rule that losses are borne by the shareholders first provides an incentive for directors, acting for shareholders, to take on only appropriately risky projects. Once that equity has been dissipated, or has been reduced to a very low level, the incentive is for directors, acting for shareholders, to take on excessively risky projects, for their attention can focus exclusively on the potential up-side of decisions. Directors are in a position to ignore, when comparing projects, the chances of a negative outcome. Thus directors will prefer a project with, for example, a 30% chance of yielding 10 over one with a 20% chance of yielding 10, even if the former has a 70% chance of yielding -100, whereas the latter has an 80% chance of yielding -5.

Let it also be noted that this downside risk falls disproportionately on the unsecured creditors. Just as, when the company is a going concern, we equate the interests of the company, not with all shareholders, but with the ordinary shareholders, so on insolvency we should equate the interests of the company, not with all creditors, but with the unsecured creditors, a potentially important point if the interests of groups of creditors diverge, as they undoubtedly will. In other words, if the ordinary shareholders are the residual claimants on the company's income stream when the company is a going concern, the unsecured creditors take that position when the company nears insolvency.

However, translating this analysis into legal provisions is not easy. There are costs of creditor protection, arising out of the fact that creditors are more risk averse than shareholders. Creditors, at least those with fixed returns, will naturally give a lower value to the potential benefits of any proposed project than shareholders because creditors do not share to the same extent as shareholders in the profits which may be realised. A creditor-driven system of corporate governance is likely to be risk averse. In terms of the encouragement of enterprise, therefore, there is every reason to give shareholders pride of place in corporate governance so long as the company is a going concern in which the shareholders have substantial equity. In such a case we can be confident that shareholders will embark on only appropriately risky projects,

because they will be exposed to the downside as well as the upside of their decisions, ie their equity in the company will decrease or increase according to the degree of success or lack of success of the project. Only near insolvency does this argument cease to apply and do the creditors become vulnerable.

So, in public policy terms a crucial issue arises as to the definition of the precise point at which these creditor-regarding provisions should be triggered, ie at what point should the shareholder-regarding duty be modified so as to recognise explicitly the interests of the creditors. Closely linked to that issue is the question of how constraining of the directors the creditor-regarding provisions should be. There are a number of possible combinations. One example is provided by the German AktG. Its provisions are triggered only when the company is insolvent (though either a cash-flow or a balance-sheet test of insolvency is enough) and they simply require the directors to put the company into liquidation. So, this is a duty which applies at a late stage and is very precisely formulated. In essence, it is designed simply to constrain the directors' freedom to trade whilst insolvent.

Rather similar it seems to me is s 588G of the Australian Companies Act, with the important exception that insolvency under the Australian legislation is defined solely on a cash-flow basis and does not, unlike the German legislation, embrace balance sheet insolvency. Thus, it is likely to be triggered even later in the company's financial decline than the German legislation. Also, of course, the legislation is phrased negatively – the directors must prevent the company from incurring further debts – rather than positively, so that the directors are given somewhat greater scope under the Australian rule in deciding what mechanism to invoke to deal with the company's insolvency. Nevertheless, as expressed by Austin, Ford and Ramsay, the policy underlying the Australian legislation seems close to that of the German: once insolvency arrives, 'any question of the company having a possibility of being rehabilitated and incurring further debts in the meantime is a question for the creditors rather than the directors.' (p 408) – or, one might add, the shareholders.

#### **SL 4**

At the other end of the spectrum the CLR contemplated introducing a duty which would bite when the director ought to have realised that it was 'more likely than not that the company will at some point be unable to pay its debts as they fall due' and would require the director board to 'take such steps as he believes will strike a reasonable balance between reducing the risk that the company will be unable to pay

its debts as they fall due and promoting the success of the company for the benefit of its members as a whole.’ So this was a duty which would bite early – if cash-flow insolvency was predictable on a balance of probabilities - and by the same token the content of the duty was very imprecisely phrased: simply as a duty to balance creditor and shareholder interests. The Government rejected this suggestion as contrary to its rescue culture, ie they feared it would put pressure on directors to close potentially saveable businesses.

#### **SL 5**

This leaves as probably the best known of the pre-insolvency, creditor-regarding provisions the wrongful trading section of the British IA. Section 214 of the IA was introduced in 1986, has recently been commended for adoption at Community level by the European Commission’s High Level Group of company law experts and is currently being studied by the Commission to that end. This does impose creditor-regarding duties on the directors in advance of insolvency though only in a relatively short period prior to insolvency. The duty bites where the company may still be solvent on a cash-flow basis, but the directors realise or ought to have realised that the company had no reasonable prospect of avoiding insolvent liquidation. So action is required of the directors in advance of insolvent liquidation. However, because insolvent liquidation is unavoidable on any reasonable business basis, the legislation can be relatively firm about what action is required of the directors at that point. It is that they should take all such action with a view to minimising the loss to the company’s creditors as he ought to have taken – the director’s realisation and action being judged on a objective standard of negligence, not the traditional common law subjective standard. Thus, creditors’ interests are place centre stage. However, as with the common law duty, enforcement can take place only in liquidation and through the liquidator, whose recoveries enure for the benefit of the unsecured creditors and are not caught by any security interests, especially floating charges, which the company may have created.

It is to be noted that, not only does this duty bite in advance of insolvency, it does not operate necessarily so as to require the directors to put the company into liquidation or some other insolvency procedure. If it did, it would be like the German and Australian laws, but operating at an earlier point. The basis of section 214 is that management of the company is left with the directors, rather than being compulsorily transferred to a representative of the creditors, but the directors are required to act in a manner which protects the interests of the creditors. Since, *ex hypothesi*, there is

no reasonable prospect of the company avoiding insolvent liquidation, the directors necessarily have a limited scope to continue trading. Nevertheless, in some circumstances that may be the appropriate course of action under section 214.

I fear I have taxed your patience long enough. So let me conclude briefly. I have considered two types of reform of company law, one to recognised the interests of stakeholders generally and the other the interests of creditors specifically. Doing the first would require a more radical reconstruction of company law than the CLR was prepared to contemplate and so it limited its reforms to ESV and the OFR. Recognising creditor interests, by contrast, seems to me to raise no deep-seated issue of principle, provided that those interests are confined to the vicinity of insolvency. An issue of principle arises only when the interests of risk-averse creditors are given a mandatory position before that point is reached. Or to put it another way, the issue of principle expresses itself in the definition of the vicinity of insolvency. However, the two parts of my talk do join up, for there is, it seems to me, a stakeholder argument for not giving creditors priority before insolvency threatens. Unsecured creditors are likely to want a failing company to cease trading. Those with a potentially continuing interest in the company – employees, the local community as well as shareholders – may find a more risky strategy acceptable. So, although the interests of stakeholders may not find strong formal expression in company law, those interests will and should play a strong part when legislative policy in the company law area is being formulated.

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It then asks whether shareholder value would in fact have been enlightened by the OFR, given the institutional context in which it would have operated. While there are considerable grounds for scepticism about whether the OFR would have worked as the CLR expected, it is unfortunate that it was withdrawn because it was an important experiment in disclosure of qualitative information about intangible assets. The article concludes with some thoughts about whether shareholder value could still be enlightened in the absence of a mandatory OFR. This is a preview of subscription content, log in to ch Where directors's powers are theoretically the result of legislative, rather than shareholder, delegation the question of whose interests they are meant to serve is naturally a more open one. Nevertheless, even when those powers are theoretically derived from the shareholders, the question of whether mandatory law should constrain the exercise of the powers still seems to me an open one. The new Bill contains a statutory statement of all those duties, at least as they apply whilst the company is a going concern, but a statement pitched at a high level, so that, it is hoped, judicial creativity will still have sufficient scope to play its traditional role in developing the duties in the future.