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Financial distressed companies and directors' obligation to consider creditors' interests: An Anglo-Australian comparison of the obligation's trigger and application

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Abstract
Many common law jurisdictions recognise that directors have an obligation to consider the interests of company creditors when the company is experiencing financial distress. Despite numerous cases attempting to crystalise legal principles related to this obligation and significant academic commentary on the topic, the parameters of the obligation remain uncertain. This paper provides an analytical comparison of the latest case law in Australia and the UK concerning the two most important issues that exist in relation to this obligation, namely when is the obligation triggered and what do directors have to do to ensure that they comply with the obligation. We found that the UK courts appear to be adopting a much more restrictive approach regarding the trigger for the obligation, whereas the obligation may arise much earlier in Australia, due to the liberal framing of the trigger. An analysis of case law also revealed that the weight attached to the interests of creditors once the obligation is triggered seems to be much more significant in the UK, compared to Australia. This analysis is important as there is no doubt that courts in other common law jurisdictions, and particularly in the Commonwealth, will examine the Australian and UK jurisprudence in making their decisions in relation to any claim that directors have failed to comply with the obligation to consider the interests of creditors.

Keywords
directors' duties, directors' obligations, directors' duty to creditors, creditor interests, duty to creditors

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Introduction

For the most part, in common law jurisdictions directors have a duty to act in the best interests of their company[1] and this effectively means the interests of the company's shareholders.[2] However, in many of these jurisdictions, if the company is in financial distress there is a shift in the focus of the duty and directors are obliged to consider creditor interests in the management of their company. The basis for this obligation can be traced back to the dictum of Mason J of the High Court of Australia in *Walker v Wimborne*[3] when his Honour said (with Barwick CJ concurring) that:

> In this respect it should be emphasised that the directors of a company in discharging their duty to the company must take into account the interests of its shareholders and its creditors. Any failure by the directors to take into account the interests of creditors will have adverse consequences for the company as well as for them… [a creditor's] interests may be prejudiced by the movement of funds between companies in the event that the companies become insolvent.[4]

Ever since the decision in *Walker*[5] there has been, notwithstanding the fact that Mason J's comment was obiter, a developing jurisprudence across many common law jurisdictions in relation to this obligation. The obligation was accepted by the New Zealand Court of Appeal in *Nicholson v Permakraft*[6] in the early 1980s and, as one might expect, by several Australian decisions in the 1980s. In 1988, the English Court of Appeal acknowledged the existence of the obligation in *Liquidator of West Mercia Safetywear Ltd v Dodd.*[7]

While the obligation imposed on directors in relation to creditor interests has been the subject of many decided cases in common law jurisdictions, such as Ireland,[8] Canada,[9] Hong Kong[10] and New Zealand,[11] the two jurisdictions from where we find the most comment and discussion,

1. An obligation that has been given statutory form in Australia (s 181(1)(a) of the Corporations Act 2001 (Cth)), while express statutory provision is made for the retention of the general law duty (see s 185 of the Corporations Act 2001 (Cth)). This is different compared to the position in the UK, where the duty has been codified (s 172 of the Companies Act 2006, expressing it as a duty to 'promote the success of the company'). See Paul Davies, Sarah Worthington, and Christopher Hare, *Gower's Principles of Modern Company Law*, 11th ed (Sweet and Maxwell, 2021), [10-026]–[10-039]; Andrew Keay, *Directors' Duties*, 4th ed (LexisNexis, 2020), Chapter 6; RP Austin & IM Ramsay, *Ford, Austin and Ramsay's Principles of Corporations Law*, 17th ed (LexisNexis 2018), [8.070]–[8.150] for a general discussion in relation to this duty. Also see Rosemary Teele Langford, 'The Duty of Directors to Act Bona fide in the Interests of the Company: A Positive Fiduciary Duty? Australia and the UK Compared' (2011) 11 *Journal of Corporate Law Studies* 215; and Rosemary Teele Langford 'General law and statutory directors' duties: "unmixed oil and water" or "integrated parts of the whole law"? (2015) 131 *Commercial Law Quarterly* 635; for more detailed discussion in relation to the different approaches adopted in Australia and the UK.
2. See eg *Greenhalgh v Arderne Cinemas Ltd* [1951] 1 Ch 286, 291.
3. (1976) 137 CLR 1.
4. ibid 6–7.
5. *Walker* (n 3).
6. [1985] 1 NZLR 242.
7. (1988) 4 BCC 30, 33.
8. See eg *Re Frederick Inns Ltd* [1994] 1 ILRM 387; *Re Swanpool Ltd* [2006] 2 ILRM 217.
9. See eg *People Department Stores Inc (Trustee of) v Wise* [1998] QJ No 3571. However, the decision was overturned on appeal and in *Trustee of People's Department Stores Inc v Wise* 2004 SCC 68 the Canadian Supreme Court held that the fiduciary duty of directors is solely to the company, and that this does not change according to the financial state of the company. The decision was affirmed in *BCE Inc v 1976 Debentureholders* 2008 SCC 69.
10. See eg *Moulin Global Eyecare Holdings ltd v Lee Sin Mei* [2014] HKCFA 63.
11. See eg *Nicholson* (n 6); *David Neil and Co Ltd (in rec) v Neil* (1986) 3 NZCLC 99,658; *Hilton International Ltd (in liq) v Hilton* [1989] NZLR 442.

and which has in turn led to the greatest development of the obligation, is Australia and the UK. This is exemplified, first, by the fact that even though it is nearly 40 years old, the judgment of Street CJ in the New South Wales Court of Appeal case of *Kinsela v Russell Kinsela Pty Ltd*[12] is regularly cited and much of it approved in recent case law, as are the decisions of the Western Australia Supreme Court both at first instance[13] and on appeal[14] in *The Bell Group Ltd (ACN 008 666 993) v Westpac Banking Corporation*. Secondly, by the fact that there has been a lot of case law in the UK since 2002 dealing with claims based on a breach of the obligation and in 2022 the UK Supreme Court handed down a substantial and comprehensive judgment in *BTI 2014 LLC v Sequana SA*[15] which focused on the obligation.

This paper provides an analytical comparison of the law in Australia and the UK concerning the two most important issues that exist in relation to this obligation to consider creditor interests, namely when is the obligation triggered and what do directors have to do to ensure that they comply with the obligation?[16] It is submitted that this analysis is important as there is no doubt that courts in other common law jurisdictions, and particularly in the Commonwealth, will examine the Australian and UK jurisprudence in making their decisions in relation to any claim that directors have failed to comply with the obligation to consider the interests of creditors, particularly as these two jurisdictions are at the forefront of the developments in this area. The approach adopted by the judiciary in each of these jurisdictions, as well as any potential divergence between the jurisdictions, are therefore significant to the development of the obligation in other Commonwealth and common law jurisdictions.[17] This matter has become of even greater importance since the delivery of the judgment of the UK Supreme Court in *Sequana*,[18] which has created a lot of interest across the common law world. The paper seeks to drill down as far as the cases are concerned in an attempt to identify and consider the approach which the UK and Australian courts have adopted in order to provide some insight for courts in common law jurisdictions.

The paper develops as follows. First, there is a brief background to the obligation. Secondly, it provides an overview of some of the arguments advanced in favour of the obligation.[19] Thirdly, there is an analysis of the law in Australia and the UK concerning the point at which the obligation arises. Next, the paper analyses the law in Australia and the UK as to what the law requires directors to do when the obligation applies. Finally, there are some concluding remarks.

12. (1986) 4 NSWLR 722.
13. *The Bell Group Ltd (ACN 008 666 993) v Westpac Banking Corporation (ACN 007 457 141) (No 9)* [2008] WASC 239.
14. *Westpac Banking Corporation v The Bell Group Ltd (in liq)* [2012] WASCA 157; (2012) 2709 FLR 1.
15. [2022] UKSC 25, [2022] 3 WLR 709, [2023] BCC 32.
16. Rosemary Teele Langford and Ian Ramsay, 'The contours and content of the "creditors' interests duty"' (2021) 21(1) *Journal of Corporate Law Studies* 85, 85 note that these are the two key areas of uncertainty that persist in respect of the obligation to creditors.
17. Such as Ireland and Hong Kong.
18. *Sequana (UKSC)* (n 15).
19. A detailed analysis and critique of the arguments in favour of and against this obligation falls outside the scope of this paper, however. For further information regarding this aspect, see, e.g. Andrew Keay, 'Directors' Duties to Creditors: Contractarian Concerns Relating to Efficiency and Over-Protection of Creditors' (2003) 66 *Modern Law Review* 665; The Hon Justice KM Hayne, 'Directors' Duties and a Company's Creditors' (2014) 38 *Melbourne University Law Review* 795; Peter Watts, 'Why as a matter of English-law principle directors do not owe a duty of loyalty to creditors upon insolvency' [2021] *Journal of Business Law* 103.

Background

As mentioned earlier, following the comments of Mason J in *Walker*[20] that directors must undertake some consideration for the interests of their companies' creditors, a number of cases in New Zealand and Australia applied them as did the English Court of Appeal in *West Mercia Safetywear*.[21] A jurisprudence began to evolve during the 1980s, although the development of the law tended to be ad hoc, leading the Federal Court of Australia to say that the law was in a state of uncertainty. In *Re New World Alliance Pty Ltd (rec and mgr apptd), Sycotex Pty Ltd v Baseler*[22] it was said that the authorities in this area were somewhat unsatisfactory and this was partly due to the fact that statements in some cases appeared to have resulted from a misreading of comments by Mason J in *Walker*.[23]

Since the early 1990s we have seen many cases decided in both Australia and the UK whereby directors have been found liable for not considering the interests of their companies' creditors. In obiter the Australian High Court in 2000 in *Spies v The Queen*[24] acknowledged the existence of the obligation and, arguably, the most famous case in Australia which concerned the obligation came in 2008, the case of *The Bell Group (No 9)*.[25] The decision, delivered by Owen J of the Supreme Court of Western Australia, was a mammoth one in length and it found that directors had not complied with the obligation to consider the interests of creditors and held banks liable as knowing third parties. The decision was appealed to the Court of Appeal in Western Australia[26] and by a 2-1 majority the appeal was dismissed. The English Court of Appeal got another chance to give an opinion on the obligation in 2019 in *BTI 2014 LLC v Sequana SA*.[27] David Richards LJ (as he then was) (and with whom Longmore and Henderson LJJ agreed) accepted that the obligation applied where a company was insolvent, and it could arise where a company's financial circumstances were dire and short of insolvency. The judgment of the Court of Appeal was appealed and after a wait of 18 months the UK Supreme Court handed down a judgment which, again, acknowledged the existence of the obligation.

As mentioned earlier, over the whole period of the existence of the obligation, the two issues that have caused some concern and led to general uncertainty are (1) when is the obligation triggered? (2) how must directors, who are subject to the obligation, act in relation to the creditors and their interests? This leads us to an examination of these two issues by considering and analysing the approach(es) that is evident in Australia and the UK in order to determine whether it is possible to arrive at greater certainty and understanding of what is the trigger for the obligation and what are directors to do when subject to the obligation.

It must be emphasised that directors do not owe a duty to creditors. The obligation to consider creditors' interests is an aspect of the directors' duty to act in the best interests of the company. Hence, in the paper we refer to the directors' responsibility as an obligation.

20. *Walker* (n 3).
21. *West Mercia Safetywear* (n 7), 33.
22. [1994] FCA 531.
23. *Walker* (n 3).
24. (2000) 201 CLR 602.
25. *The Bell Group (No 9)* (n 13).
26. *The Bell Group (appeal)* (n 14).
27. [2019] EWCA Civ 112, [2019] 2 All ER 784, [2019] 1 BCLC 347, [2019] BCC 631, [2019] BPIR 562.

Rationale[28]

Numerous arguments have been advanced for the extension of directors' duties to include creditors' interests, often from an economic perspective. The first of these relates to identifying the residual risk-bearers in a company, depending on the financial state of the company. Shareholders are typically afforded the status of residual risk-bearers, as it is assumed that this status would provide them with the appropriate incentives to make discretionary decisions; and as they are regarded as the group most capable of absorbing any losses resulting from poor corporate performance and therefore carrying the risk of failure, should be entitled to the company's residual income.[29] Their position as residual risk-bearers is also supported by the accounting statement that shareholders' equity is represented by the difference between assets and liabilities. However, when the company experiences financial distress, limited liability serves to displace the risk that shareholders normally carry onto creditors, resulting in the latter effectively becoming the residual risk-bearers, with the obligation to consider creditors interests 'seek[ing] to mitigate the shift'.[30] On the basis of this approach, it is broadly accepted that creditors are to displace shareholders as residual risk-bearers when the company experiences financial distress.[31] This justification appears to be the one espoused by the court in *Kinsela v Russell Kinsela Pty Ltd (in liq)*, with the court stating:

> In a solvent company the proprietary interests of the shareholders entitle them as a general body to be regarded as the company when questions of the duty of directors arise. If, as a general body, they authorise or ratify a particular action of the directors, there can be no challenge to the validity of what the directors have done. But where a company is insolvent the interests of the creditors intrude. They become prospectively entitled, through the mechanism of liquidation, *to displace the power of the shareholders* and directors to deal with the company's assets. It is in a practical sense *their assets and not the shareholders' assets* that, through the medium of the company, are under the management of the directors pending either liquidation, return to solvency or the imposition of some alternative administration.[32]

28. For a more detailed discussion of this issue, see Andrew Keay, 'Pursuing the Judicial Foundation for the Obligation of Directors to Consider the Interests of their Financially Distressed Company's Creditors' in Rosemary Teele Langford (ed), *Corporate Law and Governance in the 21st Century: Essays in Honour of Professor Ian Ramsay* (Federation Press, 2023) 93.
29. Frank H Easterbrook and Daniel R Fischel, *The Economic Structure of Corporate Law* (Harvard University Press, 1991) 68, as referred to by Stéphane Rousseau, 'The Duties of Directors of Financially Distressed Corporations: A Québec Perspective on the *Peoples* Case' (2004) 39 *Canadian Business Law Journal* 368, 381. Also see Anil Hargovan and Timothy M Todd, 'Financial Twilight Re-Appraisal: Ending the Judicially Created Quagmire of Fiduciary Duties to Creditors' (2016) 78 *University of Pittsburgh Law Review* 135, 141.
30. Andrew Keay, 'The Duty of Directors to Take Account of Creditors' Interests: Has It Any Role to Play?' [2002] *Journal of Business* Law 379, 386.
31. Anil Hargovan and Jason Harris, 'For Whom the Bell Tolls: Directors' Duties to Creditors after *Bell*' (2013) 35(2) *Sydney Law Review* 433, 436; Andrew Keay, 'The Director's Duty to Take into Account the Interests of Company Creditors: When Is It Triggered?' (2001) 25 *Melbourne University Law Review* 315, 317–318; Keay, 'The Duty of Directors to Take Account of Creditors' Interests: Has It Any Role to Play?' [2002] *Journal of Business* Law 379, 386; Rosemary Teele Langford and Ian Ramsay, 'The contours and content of the "creditors' interests duty"' (2021) 21(1) *Journal of Corporate Law Studies* 85, 88.
32. *Kinsela v Russell Kinsela Pty Ltd* (1986) 4 NSWLR 722, 730 (emphasis added). See also *Bell Group (No 9)* (2008) 39 WAR 1, 466 [4421].

Secondly, it is suggested that directors and shareholders may engage in excessive risk-taking as insolvency approaches, as they have everything to gain, but nothing to lose if the 'gamble' does not pay off.[33] Empirical evidence appears to support this assumption,[34] and the 'moral hazard' is well-described as follows:

> Shareholders get all the benefits from the firm's success – if a risky venture pays off, they get all the return. Yet if it fails, they do not bear the full cost of failure – creditors will bear some of this cost. The concern, from an economic perspective, is that this may lead to a form of moral hazard if shareholders are able to externalise the risk of their activities, to the extent that those risks exceed their capital contributions.[35]

An obligation to creditors could serve as an important check on this type of behaviour, as it will serve to align directors' interests with those of creditors, rather than those of shareholders, as would otherwise have been the case.[36] According to some, the risk-taking rationale has 'dominated' the analysis of rationales for the duty to creditors.[37]

A third reason advanced for the obligation is that the company may be prejudiced by directors not taking the interests of creditors into consideration.[38] This rationale is supported by Owen J in *The Bell Group Ltd (in liq) v Westpac Banking Corporation (No 9)*,[39] and was also a view expressed by Mason J in *Walker v Wimborne.*[40]

Finally, in *Sequana* Lady Arden said that the reason for the obligation was that the obligation redressed the situation in which creditors, who had a greater economic interest in the company than shareholders on insolvency had no control over the conduct of its business.[41] The other judges, and particularly Lords Reid and Hodge, generally agreed with that view.

33. Anil Hargovan and Jason Harris, 'For Whom the Bell Tolls: Directors' Duties to Creditors after *Bell*' (2013) 35(2) *Sydney Law Review* 433, 436; Danilo Scarlino, 'Zone of Insolvency, Directors' Duties and Creditors' Protection in US' [2018] *European Business Law Review* 1, 7–8; Rosemary Teele Langford and Ian Ramsay, 'The contours and content of the "creditors' interests duty"' (2021) 21(1) *Journal of Corporate Law Studies* 85, 89; Kristin van Zwieten, 'Director Liability in Insolvency and Its Vicinity' (2018) 38(2) *Oxford Journal of Legal Studies* 382, 389.
34. Andrew Keay, 'The Shifting of Directors' Duties in the Vicinity of Insolvency' (2015) 24 *International Insolvency Review* 140, 145, with reference to R Daniels, 'Must Boards Go Overboard? An Economic Analysis of the Effects of Burgeoning Statutory Liability on the Role of Directors in Corporate Governance' in J Ziegel (ed), *Current Developments in International and Comparative Corporate Insolvency Law* (Oxford, Clarendon Press, 1994) 549, recognising that the view is challenged by others, eg R de Barondes, 'Fiduciary Duties of Officers and Directors of Distressed Corporations' (1998) 7 *George Mason Law Review* 45, 62.
35. David Goddard, 'Corporate Personality – Limited Recourse and its Limits' in Ross Grantham and Charles Rickett (eds), *Corporate Personality in the 20th Century* (Bloomsbury Publishing Plc, 1998) 11, 25–26. Also see Anil Hargovan and Timothy M Todd, 'Financial Twilight Re-Appraisal: Ending the Judicially Created Quagmire of Fiduciary Duties to Creditors' (2016) 78 *University of Pittsburgh Law Review* 135, 142.
36. Kristin van Zwieten, 'Director Liability in Insolvency and Its Vicinity' (2018) 38(2) *Oxford Journal of Legal Studies* 382, 389.
37. ibid 382, 390.
38. Rosemary Teele Langford and Ian Ramsay, 'The contours and content of the "creditors' interests duty"' (2021) 21(1) *Journal of Corporate Law Studies* 85, 89, with reference to *Walker v Wimborne* (1976) 137 CLR 1, 6–7.
39. *The Bell Group (No 9)* (n 13), 465–466 [4418].
40. *Walker* (n 3).
41. *Sequana (UKSC)* (n 15), [263].

The trigger

Financial distress and creditors' interests

The Australian case of *Walker*[42] is often cited as the precursor for the extension of directors' obligations to include creditors' interests as part of their duty to their company.[43] Even though Mason J did not explicitly link the existence of the obligation to creditors to the company's financial state, a series of subsequent decisions highlight the relevance of this aspect. In Australia, cases on this point seem to indicate different views. In one of the earliest cases after *Walker*[44] in which a duty to creditors was recognised – *Ring v Sutton*,[45] the impugned transactions were performed while the companies were still solvent. This judgment was widely criticised, however,[46] and in a subsequent decision, *Grove v Flavel*,[47] the court indicated that it was not persuaded by a proposition that *Ring v Sutton* supported the notion of a duty of directors to consider creditors' interests independent from insolvency or financial difficulties.[48] This conclusion chimes with comments in an English Court of Appeal judgment of the 1980s, *Multinational Gas and Petrochemical Co v Multinational Gas and Petrochemical Services Ltd*.[49] Here the Court rejected the argument that the directors owed an obligation to take into account creditors' interests after the directors made a bad decision, when the company was amply solvent at the time. Subsequent UK decisions have clearly espoused the fact that financial distress of some sort was a prerequisite to the advent of the obligation. Thus, some degree of financial instability or distress is required for the obligation to creditors to be activated. This concept is phrased in different ways, which creates uncertainty regarding the point in time when the duty arises.

Required degree of financial distress

In *Kinsela*, the court indicated that where 'a company is *insolvent* the interests of the creditors intrude'[50] and that 'the directors' duty to a company as a whole extends in *an insolvency context* to not prejudicing the interests of creditors'.[51] As the company in this case was obviously insolvent, there was no need for the court to formulate a trigger that would apply more broadly. The court expressed reluctance to 'attempt to formulate a general test of the degree of financial instability which would impose upon directors an obligation to consider the interests of creditors', and seemed to hint that the degree of financial distress would determine the extent to which the

42. *Walker* (n 3).
43. Andrew Keay, 'The Director's Duty to Take into Account the Interests of Company Creditors: When Is It Triggered' (2001) 25 *Melbourne University Law Review* 315, 320 describes '[t]he duty to creditors as having its genesis' in this case.
44. *Walker* (n 3).
45. (1980) 5 ACLR 546.
46. See Bruce S Butcher, *Directors' Duties: A New Millenium, A New Approach* (Kluwer, 2000) 176; Len Sealy, 'Directors' "Wider" Responsibilities – Problems Conceptual, Practical and Procedural' (1987) 13 *Monash University Law Review* 172, 175; 180; Len Sealy, 'Directors' Duties – An Unnecessary Gloss' (1988) 47 *Cambridge Law Journal* 175, 176.
47. (1986) 43 SASR 410.
48. ibid 420.
49. [1983] Ch 258.
50. *Kinsela* (n 12), 730 (emphasis added).
51. ibid 732–733 (emphasis added).

directors could 'justifiably expose the company'.[52] Owen J indicated support for the notion that the 'degree of financial instability and the degree of risk to the creditors are interrelated' in *The Bell Group (No 9)*.[53] There are a plethora of UK decisions[54] where the courts have accepted that the obligation is triggered when a company is insolvent, such as *Re Pantone 485 Ltd*,[55] *Colin Gwyer v London Wharf (Limehouse) Ltd*,[56] *Re Cityspan Ltd*,[57] *Roberts v Frohlich*,[58] *Re HLC Environmental Projects Ltd*,[59] and *Re Bowe Watts Clargo Ltd* [60] at first instance, and David Richards LJ indicated in several parts of his leading judgment in the Court of Appeal in *Sequana*[61] that the obligation is triggered by insolvency.[62] On appeal, the Supreme Court agreed,[63] although Lord Briggs exhibited a more restrictive trigger, saying that insolvency could only be a trigger where insolvent liquidation or administration is probable and there is no light at the end of the tunnel for the company. His Lordship was concerned that what could be temporary insolvency for a company should not be considered as a trigger for the obligation.

In Australian cases where the insolvency of the company was not as obvious, the court did not hesitate to embrace a broader formulation of the trigger. The circumstances that could trigger the duty to creditors have been described in any number of ways, for example 'a real and not remote risk of liquidation';[64] 'a real risk of insolvency';[65] 'Kinsela insolvency';[66] 'insolvent or nearing insolvency';[67] 'insolvent, nearly insolvent or of doubtful solvency';[68] 'insolvent, [whether] there should have been concern for its solvency, or [whether] its solvency would be jeopardised by the [transaction]';[69] 'actually insolvent or very close to inevitable insolvency';[70] 'imminent insolvency';[71] 'impending insolvency';[72] 'approaching insolvency';[73] 'facing insolvency';[74] 'a

52. ibid 733.
53. *The Bell Group (No 9)* (n 13), [4419].
54. See Keay (n 1), 420–427.
55. [2002] 1 BCLC 266.
56. [2002] EWHC 2748 (Ch), [2003] 2 BCLC 153.
57. [2007] EWHC 751 (Ch); [2007] 2 BCLC 522; [2008] BCC 60.
58. [2011] EWHC 257 (Ch); [2011] 2 BCLC 625, [2012] BCC 407, [85].
59. [2013] EWHC 2876 (Ch), [92].
60. [2017] EWHC 7879 (Ch).
61. *Sequana (CA)* (n 27).
62. ibid [195], [213], [214]
63. *Sequana (UKSC)* (n 15), [90], [203].
64. *Grove* (n 47), 170.
65. ibid.
66. *Allatech Pty Ltd v Construction Management Group* [2002] NSWSC 757, [4].
67. *Re New World Alliance* (n 22), 550. Also see *Sunburst Properties Pty Ltd (in liq) v Agwater Pty Ltd* [2005] SASC 335, [159].
68. *Lyford v Commonwealth Bank of Australia* [1995] FCA 267, 283.
69. *Linton v Telnet Pty Ltd* (1990) 30 ACSR 465; [1999] NSWCA 33, [38].
70. *Geneva Finance Ltd (Receiver and Manager Appointed) v Resource & Industry Ltd* [2002] WASC 121, [15].
71. ibid [20].
72. ibid [21].
73. ibid [26].
74. *Kalls Enterprises Pty Ltd (in liq) v Baloglow* [2007] NSWCA 101, [162]; relied on in, for example, *Fitz Jersey v Atlas Construction Group Pty Ltd (in liq); Yazbek v Gleeson as Liquidator of Atlas Construction Group Pty Ltd (in liq); Fitz Jersey Pty Ltd v Atlas Co* [2021] NSWSC 1692, [1106]. Ian M Ramsay, *Company Directors: Principles of Law and Corporate Governance*, LexisNexis, 2nd ed, 2023, *Governance*, LexisNexis, 2nd ed, 2023, 515 supports the principles as stated in *Kalls Enterprises* and submits that judgments indicate that the duty arises when the company is 'insolvent, or is facing insolvency, [in the sense that] there is a real and not remote risk of insolvency'.

financial state short of actual solvency';[75] 'a financial state short of insolvency…including 'doubtful solvency';[76] 'actual or prospective insolvency';[77] 'the context of insolvency or near insolvency, which includes a real and not remote risk that creditors will be prejudiced by the dealing in question';[78] 'the company's poor financial position';[79] and so forth.

The English courts have not been as productive in devising formulae for the triggering of the obligation prior to actual insolvency. This was probably largely due to the fact that most of the cases that have reached the courts involved companies that were insolvent at the time of the directors' alleged miscreant behaviour and so the courts have not had to be precise about when the obligation might arise prior to insolvency. In the High Court of England and Wales, in *Colin Gwyer*,[80] the deputy judge said that the obligation may arise when the company is doubtfully solvent or on the verge of insolvency,[81] and earlier Sir Richard Scott VC in *Facia Footwear Ltd v Hinchliffe*[82] referred to the obligation occurring when a company is in a parlous financial state.[83] In *Re HLC Environmental*[84] John Randall QC (sitting as a deputy judge of the High Court of England and Wales) said, after referring to several of the formulae mentioned in the cases, some of which are set out above, that they add up to the same thing, something that Lord Reed PSC noted in *Sequana*.[85] The former opined that:

> I do not detect any difference in principle behind these varying verbal formulations. It is clear that established, definite insolvency before the transaction or dealing in question is not a pre-requisite for a duty to consider the interests of creditors to arise.[86]

Lord Reed said that many of the formulae that have been employed provided a sense of imminence of insolvency.[87]

In the Court of Appeal in *Sequana*,[88] David Richards LJ observed that judges had shied away from a single form of words, and they had chosen instead to employ a variety of expressions.[89] His Lordship declined to give his imprimatur to any of the existing formulae and was critical of many of them. The judge said that some of the descriptions considered convey something less than insolvency, but he felt that they were too vague to serve as a useful test for determining when the obligation arose.[90] The judge cautiously espoused the view that the obligation could be triggered before insolvency and held that the obligation arose when the directors

75. *The Bell Group (No 9)* (n 13), [4445].
76. *Parbery v QNI Metals Pty Ltd* [2018] QSC 107, (2018) 358 ALR 88, [243].
77. *Termite Resources NL (ACN 112 036 398)(in liq) v Meadows* [2019] FCA 354, [202].
78. *Re IW4U Pty Ltd (in liq)* (2021) 150 ACSR 146; [2021] NSWSC 40, [31]; relied on in, for example, *Re ACN 152 546 453 Pty Ltd (in liq)* [2022] NSWSC 974, [83].
79. *Re Bryve Resources Pty Ltd* [2022] NSWSC 647, [73].
80. *Colin Gwyer* (n 56).
81. ibid [74].
82. [1998] 1 BCLC 218.
83. ibid 228.
84. *Re HLC Environmental* (n 59).
85. *Sequana (UKSC)* (n 15), [88].
86. *Re HLC Environmental* (n 59), [94], [95].
87. *Sequana (UKSC)* (n 15), [88].
88. *Sequana (CA)* (n 27), [213].
89. ibid [216].
90. ibid [213].

knew or should have known that the company was or was likely to become insolvent. However, on appeal the Supreme Court disagreed with this as the trigger. While the Supreme Court judges did not approve of any of the formulae set out above, a majority of judges (Lords Reed and Hodge and Lady Arden) did indicate that the obligation might arise prior to insolvency, and that was when a company was bordering on insolvency.[91] Lord Briggs (with whom Lord Kitchen agreed) did not refer to the obligation being triggered when a company is bordering on insolvency. He said that:

> I would prefer a formulation in which either imminent insolvency (ie an insolvency which directors know or ought to know is just round the corner and going to happen) or the probability of an insolvent liquidation (or administration) about which the directors know or ought to know, are sufficient triggers for the engagement of the creditor duty.[92]

Although the statements of the Supreme Court judges on the obligation's trigger were obiter (apart from their rejection of the approach adopted in the Australian case of *Kalls Enterprises*[93] that the obligation arose when there was a real and not remote risk of insolvency), and, therefore, do not settle the matter, given the regard for Supreme Court obiter it is likely that judges at first instance and in appeal courts in the UK will follow one of these approaches and only hold that the obligation has arisen when the company can be said to be bordering on insolvency or where insolvency is imminent. What these terms actually mean in practice is uncertain. It does mean that the facts of each case will remain critical in determining whether the obligation was triggered.

The *Sequana* dicta might also be regarded by some State and Territory Supreme Court judges and Federal Court judges in Australia as highly persuasive.[94] Having said that, the Supreme Court rejected the notion that the obligation arises when there is a real and not a remote risk of insolvency and yet several State and Federal courts have accepted this formula as a trigger and, therefore, might reject what the UK Supreme Court had to say on the matter of a pre-insolvency trigger.[95]

Even though the notions discussed above in relation to what is the relevant trigger, all point towards financial instability, the degree of financial distress that is required to activate the duty to creditors is by no means clear.[96] There is an obvious difference between a degree of financial distress that would indicate, for example, a company being 'actually insolvent or very close to inevitable insolvency';[97] 'bordering on insolvency',[98] or 'impending insolvency';[99] compared to a financial state of affairs that can be described as no more than a 'poor financial position'[100] – a state that

91. *Sequana (UKSC)* (n 15), [12], [88], [207], [246], [247], [279].
92. *Sequana (CA)* (n 27), [203].
93. *Kalls Enterprises* (n 74).
94. However, it has been noted that the importance of jurisdictional context and different statutory regimes should not be discounted. See Dan Butler KC, 'Directors' Duties on the Precipice of Insolvency: The Sequana Decision' (2023) 30 *Insolvency Law Journal* 183, 195.
95. For instance, see, *Grove* (n 47), 170; *Kalls Enterprises* (n 74), [162]; *Termite Resources NL* (n 77), [202]; *Re IW4U* (n 78), [31]; *Re ACN 152 546 453* (n 78), [83].
96. Also see The Hon Justice KM Hayne AC, 'Directors' Duties and a Company's Creditors' 38 (2014) *Melbourne University Law Review* 795, 815–816.
97. *Geneva Finance* (n 70), [15].
98. *Sequana (UKSC)* (n 15), [12], [88], [207], [246], [247], [279].
99. *Geneva Finance* (n 70), [21].
100. *Re Bryve Resources* (n 79), [73].

could be very far removed from ‘impending insolvency’. There is an attempt to deal with this nuance difference in one of the more recent cases – *Termite Resources NL*.[101] The court indicates that the company in question was not ‘insolvent or nearing insolvency’, but that ‘the authorities indicate that test is broader than ‘nearing insolvency’ or ‘doubtful solvency’ and that the obligation to creditors ‘is enlivened when there is a ‘real and not remote risk of insolvency’.[102] It is debatable whether this explanation serves to provide clarity regarding the required degree of financial distress that would trigger the obligation to creditors and has been rejected by the UK Supreme Court. The same could be said for the formulations given by the UK Supreme Court. The judges who advocated ‘bordering on insolvency’ as being a trigger did not elaborate on what they meant by the term. Does it mean ‘nearing insolvency’, ‘close to insolvency’, ‘verging on insolvency’ or what? As far as the trigger favoured by Lord Briggs, ‘imminent insolvency’, is concerned, his Lordship saw it occurring when directors know or ought to know insolvency is just round the corner and going to happen.[103] This might well be different from ‘bordering on insolvency’ which may be regarded as being something that occurs at a point further away from actual insolvency than imminent insolvency, but the distinction is not clear, if there is in fact a distinction. Thus, the position taken by the Supreme Court does not assist the achievement of greater certainty in relation to the trigger.[104] What it does do is to reject unequivocally the view espoused in *Kalls Enterprises* and later cases like *Termite Resources NL*[105] that the obligation arises when there is a real and not a remote risk of insolvency. This means that courts in other common law jurisdictions will have to decide whether they feel that it is appropriate to embrace a position which is on the liberal side of a construction of the obligation as adopted in Australia or follow the more restrictive *Sequana* approach.

Relevance of impact on creditors

The uncertainty concerning the trigger pre-insolvency is exacerbated by the fact that the trigger is not applied as an independent mechanism in some instances, but linked to the potential impact that director conduct could have on creditors’ interests. In *Kalls Enterprises*,[106] for example, the court states that ‘the company need not be insolvent at the time and the directors must consider [the] interests [of creditors] *if there is a real and not remote risk that they will be prejudiced* by the dealing in question’.[107] It is possible to see UK courts also link impact with the state of the company as constituting the basis for the obligation to arise. In *Re MDA Investment*

101. *Termite Resources NL* (n 77).
102. ibid [707]–[708].
103. *Sequana (CA)* (n 27), [203].
104. A point which motivates some commentators to suggest that there may be a need for a codification or partial codification of the obligation to consider creditor interests. See, e.g., John Quinn and Philip Gavin, ‘The creditor duty post *Sequana*: lessons for legislative reform’ (2023) 23 *The Journal of Corporate Law Studies* 271. While s 172(3) of the UK’s Companies Act 2006 provides that the duty imposed by s 172(1) is subject to any enactment or rule of law requiring directors to consider creditors’ interests, the sub-section does not set out when this will occur. This has been left to the courts.
105. *Termite Resources NL* (n 77).
106. *Kalls Enterprises* (n 74).
107. ibid [162] (emphasis added). Also see *Re IW4U* (n 78), [31]. David Richards LJ in *Sequana (CA)* (n 27), [213], said that if risk of insolvency was the trigger, then it would ‘have a chilling effect on entrepreneurial activity’.

Management Ltd[108] Park J stated the duty arose where the company, 'whether technically insolvent or not, is in financial difficulties to the extent that its creditors are at risk'.[109] In like manner Lewison J (as he then was) in *Ultraframe Ltd v Fielding*[110] held that 'when a company, whether technically insolvent or not, is in financial difficulties to the extent that its creditors are at risk, the duties which the directors owe to the company are extended so as to encompass the interests of the company's creditors as a whole'.[111]

Relevance of directors' knowledge of financial distress

The way in which the trigger is expressed in *Grove* suggests that knowledge on the part of the director is required in order for the obligation to creditors to arise: '[a] director of a company… who, upon acquiring information *which leads him to believe that the company is facing a risk of liquidation'*; 'the "duty" of a director to have regard to the interest of creditors when the company is *known to be insolvent*'; and '*knowledge* of a real risk of insolvency'.[112] This could raise the question as to whether a director must have knowledge of the company's particular financial state of affairs in order for the obligation to be triggered. In light of expectations that directors be familiar with a company's financial state,[113] it is submitted that subjective knowledge of financial instability would not be required to trigger the duty. This argument is supported by statements of the court to the effect that the interests of creditors should be taken into consideration 'where *objective circumstances* require this'.[114]

This issue has not been completely resolved in the UK. In *Sequana*[115] a majority of Lord Briggs (with whom Lord Kitchin concurred) and Lord Hodge considered that the obligation would arise if the directors knew or ought to know that the company was insolvent or bordering on insolvency or that an insolvent liquidation or administration was probable. Whereas Lord Reed[116] was less certain than Lords Briggs and Hodge that it was essential that the directors 'know or ought to know' that the company was insolvent or bordering on insolvency, or that an insolvent liquidation or administration was probable, and felt that it was unnecessary and inappropriate to express a concluded view on the issue without hearing argument on the matter. Likewise, Lady Arden said that she would leave the matter to another day.[117] However, the majority approach is consistent with that taken in earlier cases. For instance, in *Re HLC Environmental*[118] the deputy judge rejected the submission that the obligation is only triggered if the director was aware that the company was in the financial state that triggered the obligation. The test propounded by the majority in *Sequana* on knowledge is not dependent

108. [2003] EWHC 2277 (Ch), [2004] 1 BCLC 217, 245, [2004] BPIR 75.
109. ibid [70].
110. [2005] EWHC 1638.
111. ibid [1304].
112. *Grove* (n 47), 421 (emphasis added).
113. See eg *ASIC v Adler* (2002) 41 ACSR 72, [372]; *ASIC v Rich* (2003) 44 ACSR 341, [77], where the court indicated that the statutory duty of care and diligence under s 180(1) of the Corporations Act 2001 (Cth) requires directors, among other things, to have a reasonably informed opinion of the company's financial capacity. A point also made by Lady Arden in *Sequana*.
114. *ASIC v Somerville* (2009) 77 NSWLR 110; [2009] NSWSC 934, [37] (emphasis added).
115. *Sequana (UKSC)* (n 15).
116. ibid [90].
117. ibid [281].
118. *Re HLC Environmental* (n 59).

totally on subjective considerations and this is consistent with the test for wrongful trading in the UK,[119] namely the director is liable if he or she knew *or ought to have concluded* that there was no reasonable prospect of the company avoiding insolvency liquidation, and also the test for insolvent trading in Australia, namely that directors do not need to know that their company was insolvent when debts were incurred before they can be liable if there are reasonable grounds for suspecting that the company is insolvent.[120]

Point in time of financial distress

Another issue regarding the trigger is closely related to the way in which the content of the duty is phrased, particularly in cases where the obligation to creditors is essentially seen as nothing but a restriction on the right of shareholders to ratify a breach of directors' duties.[121] The question that arises is whether the financial difficulty or insolvency of the company should have been present at the point in time when directors performed the actions complained of, or rather at the point in time when shareholders attempt to ratify the breach of directors' duties. In *Australasian Annuities Pty Ltd (in liq) v Rowley Super Fund Pty Ltd*,[122] and on appeal, *Australasian Annuities Pty Ltd (in liq)(recs and mgrs apptd) v Rowley Super Fund Pty Ltd,*[123] for example, a company was clearly solvent at the point in time when the breach of directors' duties occurred, but insolvent at the time of the purported ratification. Warren CJ expressed unequivocal support for the relevant point in time being the point at which the purported ratification took place,[124] with similar sentiments echoed by Garde AJA.[125] Reliance was placed on the following passage from *Kinsela*:

> It is, to my mind, legally and logically acceptable to recognise that, where directors are involved in a breach of their duty to the company affecting the interests of shareholders, then shareholders can either authorise that breach in prospect or ratify it in retrospect. Where, however, the interests at risk are those of creditors I see no reason in law or in logic to recognise that the shareholders can authorise the breach. Once it is accepted, as in my view it must be, that the directors' duty to a company as a whole extends in an insolvency context to not prejudicing the interests of creditors (*Nicholson v Permakraft (NZ) Ltd* and *Walker v Wimborne*) the shareholders do not have the power or authority to absolve the directors from that breach.[126]

Based on the above discussion, it seems that there could be reliance on the obligation to consider the interests of creditors even in relation to director conduct that occurred while the company was solvent. This adds another layer of uncertainty and confusion regarding the question of when the obligation to creditors is triggered. However, it is worth noting that while *Kinsela* involved a restriction on the ability of shareholders to ratify particular director conduct, the impugned transactions occurred at a time when 'the company's financial position was, to say

119. Insolvency Act 1986, s 214.
120. Corporations Act 2001 (Cth), s 588G.
121. See par 4 below regarding the content of the duty to creditors.
122. [2013] VSC 543.
123. (2015) 318 ALR 302; (2015) ACSR 312; [2015] VSCA 9.
124. ibid [78].
125. ibid [257].
126. *Kinsela* (n 12), 732.

the least, precarious'.[127] It is submitted that in the UK there are comments in both *Sequana*[128] and the Court of Appeal in *Official Receiver v Stern (No 2)*,[129] that support the approach taken in *Australasian Annuities (on appeal)*.[130]

Summary

The Australian legal principles appear far from clear insofar as the trigger of the obligation to creditors is concerned. It has been acknowledged that '[t]he Courts have avoided formulating any general test of the degree of financial instability necessary to give rise to a duty by directors of a company to consider the interests of its creditors'.[131] The same could be said about the UK decisions. Even though there is a UK Supreme Court judgment on the subject, the judges have provided two differently expressed pre-insolvency triggers, 'bordering on insolvency' and 'imminent insolvency', and it is not clear what they mean and whether they are the same or close in meaning. However, it does appear as if the UK decisions suggest a point that is much closer to actual insolvency, compared to the position in Australia. This could mean that in the future UK liquidators will be more reluctant than their Australian counterparts to institute proceedings against directors for breach of the obligation. Also, it might provide directors in the UK with some comfort, as it would appear that they will not need to be concerned about creditor interests until insolvency is near. Arguably, that gives them greater certainty than they have had. It might also provide some solace for non-creditor stakeholders as it means that directors would be able to have regard for their interests until insolvency is close or has occurred.[132] This would, therefore, arguably enhance the enlightened shareholder value approach that exists in the UK.

While there is uncertainty pre-insolvency, both the Australian and UK courts appear to accept that insolvency constitutes a trigger, although in *Sequana* the majority of judges were concerned that this must not be temporary insolvency. On one hand, the reluctance to provide a definitive trigger is beneficial to the extent that it allows for flexibility and the opportunity for judicial discretion on a case-by-case basis. On the other hand, the obvious disadvantage is that directors do not have a clear idea of when the obligation is enlivened and accordingly when to tailor their conduct to ensure compliance with the obligation.

Content of the obligation

This part considers what directors need to do in order to comply with the obligation if it has been triggered.

Creditors' interests and ratification of a breach of directors' duties

There is a significant amount of uncertainty regarding the content of the duty to consider the interests of creditors.[133] The court in *Bell Group (No 9)* aptly notes that '[t]he nature and

127. ibid 723.
128. *Sequana (UKSC)* (n 15), [37]-[41], [149].
129. [2001] EWCA Civ 1787, [2002] 1 BCLC 119.
130. *Australasian Annuities (on appeal)* (n 123).
131. *Termite Resources NL* (n 77), [201].
132. This is pursuant to s 172(1)(a)-(f).
133. As recognised by commentators. See eg Rosemary Teele Langford and Ian Ramsay, 'The contours and content of the "creditors' interests duty"' (2021) 21(1) *Journal of Corporate Law Studies* 85, 103 who note that '[s]everal different tests can be formulated for what the creditors' interests duty requires of directors'.

content of the duty, in so far as it affects creditors, has been a matter of controversy in Australia for many years'.[134] Commentators have described the parameters of the duty to creditors as 'troublesome'[135] and a 'doctrinal mess'.[136]

In one of the earlier and most oft-cited cases on directors' duties to creditors, *Kinsela*, the court explains the obligation to consider the interests of creditors as follows:

> Where…the interests at risk are those of creditors I see no reason in law or in logic to recognise that the shareholders can authorise the breach. Once it is accepted, as in my view it must be, that the directors' duty to a company as a whole extends in an insolvency context to not prejudicing the interests of creditors, *the shareholders do not have the power or authority to absolve the directors from that breach*.[137]

This statement seems to indicate that the obligation to creditors does not require active consideration of creditor interests by directors, but rather serves to restrict the right of shareholders to ratify a breach of directors' duties to the company. A number of subsequent judgments rely on the statement in *Kinsela* to describe the obligation to creditors in such a narrow fashion,[138] most tellingly *Re New World Alliance*, with the court expressly indicating that 'the duty to take into account the interests of creditors is merely a restriction on the right of shareholders to ratify breaches of the duty owed to the company…similar to that found in cases involving fraud on the minority'.[139]

This approach seems to suggest that directors do not have to take any action or refrain from putting into effect any strategy that would be implemented if the obligation had not been triggered.

The above passage has been cited with approval by the Australian High Court in *Spies*,[140] potentially offering support for an interpretation that the duty to creditors involves no more than curbing shareholder power to ratify a breach of directors' duties. However, it is important to note that the High Court relies on this statement in regard to the ability (or inability) of creditors to directly enforce the duty, unequivocally stating that any remarks suggesting that 'directors owe an independent duty to, and enforceable by, the creditors by reason of their position as directors…are contrary to principle…and do not correctly state the law'.[141] Rather than narrowing the scope or content of the duty, it is suggested that the High Court only confirmed that the duty to creditors is an indirect, rather than direct duty to creditors, to be mediated through the

134. *The Bell Group (No 9)* (n 13), [4396].
135. Anil Hargovan and Jason Harris, 'For Whom the Bell Tolls: Directors' Duties to Creditors after *Bell*' (2013) 35(2) *Sydney Law Review* 433, 436, with reference to Royce Barondes *et al*, 'Twilight in the Zone of Insolvency: Fiduciary Duty and Creditors of Trouble Companies – History & Background' (2007) 1 *Journal of Business and Technology Law* 229, 238.
136. Anil Hargovan and Timothy M Todd, 'Financial Twilight Re-Appraisal: Ending the Judicially Created Quagmire of Fiduciary Duties to Creditors' (2016) 78 *University of Pittsburgh Law Review* 135, 147.
137. *Kinsela* (n 12), 732 (emphasis added).
138. See eg *GW Glenn Road Transport Pty Ltd (in liq)* BC9507341; *Australasian Annuities (on appeal)* (n 123), [77]–[79].
139. *Re New World Alliance* (n 22), 550 (own emphasis), with reference to JD Heydon, 'Directors' Duties and the Company's Interests' in PD Finn (ed) *Equity and Commercial Relationships* (1987), 120.
140. *Spies* (n 24), [94].
141. ibid [95].

legal person of the company. This interpretation is supported in *The Bell Group (No 9)*, with Owen J stating:

> [With reference to] the proposition that *Spies* rejected the notion of an obligation to consider the interests of creditors. I do not read anything in the judgment as compelling that conclusion…I am not able to accept the position urged on me by the banks if, as I have broadly interpreted it, it means relegating the position of creditors to virtual insignificance (save on questions of ratification).[142]

The UK jurisprudence appears not to be as narrow in approach as suggested by the above and tends to provide that the directors must engage in active consideration of the interests of the creditors when the obligation arises. For instance, in *Colin Gwyer*,[143] the deputy judge in that case, Leslie Kosmin QC, said that directors have to consider the impact of any decision on the ability of the creditors to recover the sums due to them from the company.[144] Other cases have laid down specific action that should be taken to ensure creditor interests are not prejudiced, such as reducing expenditure and 'tightening the corporate belt'.[145] In others it has been said that consideration of the creditors' interest might involve not commencing a project unless it was adequately funded,[146] or seeking refinancing that could support either a continuation of profitable trading of the company or the successful reorganisation of the company's affairs, as the termination of trading followed by the disposal of the assets of the companies on a forced sale basis could lead to heavy losses for the creditors.[147]

Consideration of creditor interests versus shareholder interests

Even though the clarification in *Spies*[148] regarding the *enforceability* of the obligation to creditors is seen as a positive development, many recognise that the judgment left a number of questions unanswered.[149] Does the obligation to creditors imply that directors should shift their attention from shareholder interests to creditor interests once the obligation is triggered? Or are directors required to balance the interests of creditors and shareholders, in complying with their obligations to the company? Or should directors' duties perhaps be seen as operating on a continuum with shareholder interests and creditor interests at opposite ends, where the extent to which creditor interests merit consideration, as compared to shareholder interests, depending on the particular degree of financial instability?

Careful consideration of some of these issues can be found in *Bell Group v Westpac Banking Corporation (No 9)*.[150] In assessing the parameters of the obligation, Owen J indicates that the

142. *The Bell Group (No 9)* (n 13), [4411]–[4412], [4423]–[4428]. This interpretation has been confirmed on appeal: *The Bell Group (appeal)* (n 14), [2045].
143. *Colin Gwyer* (n 56).
144. ibid [81]. This view was also voiced in *Re Idessa (UK) Ltd* [2011] EWHC 804 (Ch); [2012] BCC 315, [120].
145. *Re Idessa* (n 144), [92], [112].
146. For example, see *Roberts* (n 58).
147. *Facia Footwear* (n 82), 228.
148. *Spies* (n 24).
149. See eg Anil Hargovan, 'Directors' duties to creditors in Australia after Spies v The Queen – is the development of an independent fiduciary duty dead or alive?' (2003) 21 *Company and Securities Law Journal* 390; James McConvill, 'Directors' Duties to Creditors in Australia after Spies v The Queen' (2002) 20 *Company and Securities Law Journal* 4.
150. *The Bell Group (No 9)* (n 13).

authorities do not demand 'that the interests of creditors be treated as paramount',[151] but only 'emphasise the importance of treating the position of creditors with due deference'.[152] This prevents 'substituting for the duty to act in the interests of the company, a duty to act in the interests of creditors'.[153]

Directors remain required to act in the best interests of the company. However, company interests may intersect with those of shareholders,[154] or those of creditors where the obligation to creditors is triggered. That said, irrespective of whether it is the interests of the shareholders or creditors intersecting with the interests of the company, their interests remain separate and distinct from the 'interests of the company'.[155] Also, the company potentially being in financial difficulty does not mean that shareholder interests are 'supplanted' by those of creditors. In fact, Owen J emphatically states that '[r]egardless of the financial situation of a company (short of a winding up and dissolution), the shareholders retain their interest'.[156]

Certainly, the judges in *Sequana* appear to accept that when solvent the company interests are equivalent to the shareholders,[157] but when the company is insolvent then there is a shift and the creditors have the main economic interest in the company and their interests are the company's,[158] although they do clearly state that shareholders' interests as well as those of creditors must still be considered. Commentators have described this approach as a 'balancing exercise that directors must undertake to include the interests of different stakeholders that make up the interests of the company'.[159] While the Supreme Court in *Sequana* referred to the need for directors to engage in balancing, this exercise was clearly limited to the shareholders and creditors.

In Australia, uncertainty remains in regard to *how* directors should deal with the interests of creditors when the obligation to consider creditors' interests is triggered. Should the approach suggested by Owen J in *The Bell Group (No 9)*[160] be followed, where interests of certain groups of stakeholders could intersect with those of the company, and under particular circumstances, depending on the company's financial state, the interests of company creditors could intersect with those of the company. According to Owen J, creditor interests are not paramount and do not replace those of shareholders, which means that it is likely directors are expected to balance the interests of the group with reference to the particular degree of financial instability. Some commentators suggest that *Termite Resources NL*[161] follows a different approach, namely 'prioritising' creditors' interests once the duty is triggered, and express a preference for this approach as the 'balancing of interests' approach could cause uncertainty.[162]

151. Rosemary Teele Langford and Ian Ramsay, 'The contours and content of the "creditors' interests duty"' (2021) 21(1) *Journal of Corporate Law Studies* 85, 106 indicate preference for the opposite construct of this obligation, suggesting that directors should be required to prioritise creditors' interests once the duty is triggered.
152. *The Bell Group (No 9)* (n 13), [4438].
153. ibid [4439].
154. ibid [4395].
155. ibid [4393]–[4395].
156. ibid [4436].
157. *Sequana (UKSC)* (n 15), [59].
158. ibid [83], [256].
159. Anil Hargovan and Jason Harris, 'For Whom the Bell Tolls: Directors' Duties to Creditors after *Bell*' (2013) 35(2) *Sydney Law Review* 433, 442.
160. *The Bell Group (No 9)* (n 13).
161. *Termite Resources NL* (n 77).
162. Rosemary Teele Langford and Ian Ramsay, 'The contours and content of the "creditors' interests duty"' (2021) 21(1) *Journal of Corporate Law Studies* 85, 104. Also see Ian M Ramsay, *Company Directors: Principles of Law and Corporate Governance* (LexisNexis, 2nd ed, 2023) 518 who suggests that the exact parameters of the obligation will vary depending on the context.

It might be argued that until the advent of the judgment in *Sequana* the UK position on what the directors were required to do when subject to the obligation was, in some respects, at least, clearer than in Australia. There was clear unequivocal authority at the High Court level that when a company was insolvent the interests of the creditors were paramount,[163] and the Court of Appeal in *Sequana* accepted this.[164] Things were less clear when the company was not insolvent but in some sort of financial malaise, for while there was a majority of first instance judges who said that the creditors' interests were to be regarded as paramount in such a situation,[165] other decisions indicated that shareholder interests were still relevant. In *Re MDA Investment Management Ltd*[166] Park J stated that when a company is in financial difficulties, although not insolvent, the directors' duties owed to the company are extended so as to *include* the interests of the company's creditors as a whole, *in addition to* those of the shareholders. This statement appeared to be cited with approval in *Re Kudos Business Solutions Ltd*,[167] and Lewison J in *Ultraframe*[168] took the same approach and said that when a company is in financial difficulties the duties which the directors owe to the company are extended so as to encompass the interests of the company's creditors as a whole, *as well as* those of the shareholders.[169] In the Supreme Court in *Sequana* there was no absolute consistency among the judges when it came to the significance of creditor interests on the obligation being triggered before insolvency. Lord Reed said the interests of creditors acquire a discrete significance from those of shareholders, and require separate consideration, once the company's insolvency is imminent, as well as when insolvent liquidation or administration becomes probable.[170] Thus, this suggests paramountcy can apply prior to insolvency, but only when insolvency is extremely close. However, Lord Briggs (with whom Lords Hodge and Kitchin agreed) said that practical common-sense pointed strongly against a duty to treat creditors' interests as paramount when insolvency was imminent.[171] It will be recalled that, according to Lord Briggs, imminent insolvency is when directors know or ought to know that insolvency is 'just round the corner and going to happen'.[172] Lord Briggs had said earlier in his judgment that 'creditors are not to be treated as having the main economic stake in the company at least while a company is solvent or, if insolvent, while there is still light at the end of the tunnel'.[173] It is only if the creditors had the main economic interest, it is likely we can say that their interests should be seen as paramount. But this is not going to be, according to the majority in *Sequana*, until insolvent liquidation or administration is inevitable. Therefore, it seems that creditors' interests are not

163. For instance, see, *Colin Gwyer* (n 56), [74]; *Re Oxford Pharmaceuticals Ltd* [2009] EWHC 1753 (Ch), [2010] BCC 838, [92]; *Re Capitol Films Ltd (in administration)* [2010] EWHC 2240 (Ch), [2011] 2 BCLC 359, [49]; *Roberts* (n 58), [85]; *Re HLC Environmental* (n 59), [92].
164. *Sequana (UKSC)* (n 15), [222].
165. For instance, see *Colin Gwyer* (n 56), [74]; *Roberts* (n 58), [85]; *Re HLC Environmental* (n 59), [92]; *GHLM Trading Ltd v Maroo* [2012] EWHC 61, [2012] 2 BCLC 369, [165]. In fact, in the last case Newey J (as he then was) specifically stated that where a company was doubtfully solvent or on the verge of insolvency then the interests of the company were to be identified with those of the creditors (at [162]).
166. *Re MDA Investment Management Ltd* (n 108), [70].
167. [2011] EWHC 1436 (Ch); [2012] 2 BCLC 65, [43].
168. *Ultraframe* (n 110).
169. ibid [1304].
170. *Sequana (UKSC)* (n 15), [96]
171. ibid [173].
172. ibid [203].
173. ibid [164].

to be seen as paramount at least prior to insolvency eventuating, and only then if liquidation or administration is probable.

Both the Australian jurisprudence and the Supreme Court in *Sequana* advocated the position that directors were to consider the shareholders and the creditors' interests, and, certainly, in the case of the *Sequana*, until a company's insolvent liquidation or administration is inevitable. Thus, this appears to suggest that it may be necessary for the courts to engage in a balancing exercise; balancing the interests of the shareholders and the creditors. What balancing actually entails in this context is difficult to ascertain. The cases provide little or no assistance. 'Balancing' involves, according to the Cambridge Dictionary: 'to give several things equal amounts of importance, time, or money so that a situation is successful'.[174] Some commentators have expressed it as 'assessing, weighing and addressing the competing claims of those who have a stake in the actions of the organization'.[175] Other commentators have pointed to another definition, namely that it involves weighing competing interests and analysing the relative strengths of the interests.[176] Whatever position one takes on this we have to acknowledge that the problem for directors is that when a company is in a financially parlous state the interests of shareholders and creditors can be 'starkly divergent',[177] and that could make the balancing task extremely difficult. Certainly, if balancing is required this might be seen as imposing greater burdens on directors who might see themselves as already subject to significant regulatory oversight within corporate governance frameworks. For instance, in the UK directors must have regard, as part of their duty pursuant to s 172(1) of the Companies Act 2006, to the interests of several stakeholder interests when determining what will promote the success of the company's business. Any requirement to engage in balancing has general been regarded in the corporate governance literature as causing significant problems in reviewing directorial conduct.

The judges in *Sequana*, seem to suggest that once the obligation arises and a balancing exercise must occur, the relative weight that is placed on each interest holder might be determined by a sliding scale, that is, the closer to insolvent liquidation or administration the company gets, the more weight should be given to creditors' interests, and when one gets to the point where insolvent liquidation or administration is inevitable, the creditors' interests become paramount. While not referring to a scale, Owen J in *Bell Group* opined that the greater the risk to creditors, the more directors should take the interests of creditors into consideration,[178] which suggests his reasoning is close to that of the UK judges, although he does not ever get to the point of saying that the creditors' interests are paramount at any stage. In fact, his Honour was concerned that if a court accepted that creditors' interests were paramount it 'would come perilously close to substituting for the duty to act in the interests of the company, a duty to act in the interests of creditors'.[179] More recently, White J in *Termite Resources NL*[180] appeared to agree with the

174. https://dictionary.cambridge.org/dictionary/english/balancing accessed, 31 October 2022.
175. S Reynolds, F Schultz and D Hekman, 'Stakeholder Theory and Managerial Decision-Making: Constraints and Implications of Balancing Stakeholder Interests' (2006) 64 *Journal of Business Ethics* 285, 286.
176. Rosemary Teele Langford and Ian Ramsay, 'The contours and content of the "creditors' interests duty"' (2021) 21(1) *Journal of Corporate Law Studies* 85, 104 and referring to the definition of 'balancing' in *The Free Dictionary* accessible at: https://dictionary.cambridge.org/dictionary/english/balancing.
177. *Prod. Res. Grp. LLC v NCT Corp Inc*. 863 A. 2d 772 (Del. Ch. 2004) at 790 and referred to in Anil Hargovan and Jason Harris, 'For Whom the Bell Tolls: Directors' Duties to Creditors after *Bell*' (2013) 35(2) *Sydney Law Review* 433, 437.
178. *The Bell Group (No 9)* (n 13), [4436]–[4439].
179. ibid [4439]
180. *Termite Resources NL* (n 77).

comments in *Ford, Austin and Ramsay's Principles of Corporations Law*,[181] which expressed the view that the closer the company is to insolvency, then the greater the weight that should be given by directors to the interests of creditors.[182]

Proscriptive or prescriptive obligation?

It is furthermore uncertain what is meant by an obligation to 'consider' creditor interests.[183] Telling directors to consider creditor interests might be seen as verging 'on the facile as it does not tell us exactly how directors should act, or how far directors have to go in fulfilling the requirement to consider the interests of creditors'.[184] The fact of the matter is that most cases do not address this issue. Does the obligation to consider creditors' interests impose a positive obligation on directors to act in a particular way, or should they merely refrain from performing certain acts under the obligation to creditors?

In Australia, this question is further complicated by uncertainty regarding the appropriateness of classifying directors' duty to act bona fide in the interests of the company as 'fiduciary'. This uncertainty, as well as the question of whether fiduciary duties are proscriptive or prescriptive in nature,[185] confronted Owen J in the *Bell Group* case at first instance. [186]

Owen J elaborated on what is expected of directors insofar as they have an obligation to 'consider' the interests of creditors as 'part of the duty to act in the interests of the company as a whole',[187] explaining that

> [i]n a group situation such as this, it demanded a tracing exercise to ascertain the effect on creditors of what was proposed…The directors did not do that tracing exercise. They did not ascertain the extent of external creditors of individual companies and nor did they consider how those creditors would be affected by what was proposed. [188]

181. RP Austin and IM Ramsay, *Ford, Austin and Ramsay's Principles of Corporations Law* (17th ed LexisNexis 2018), [8.100.12].
182. *Termite Resources NL* (n 77), [208].
183. As noted by commentators such as Anil Hargovan and Timothy M Todd, 'Financial Twilight Re-Appraisal: Ending the Judicially Created Quagmire of Fiduciary Duties to Creditors' (2016) 78 *University of Pittsburgh Law Review* 135, 157–159.
184. Andrew Keay, 'Directors' Duties and Creditors' Interests' (2014) 130 *Law Quarterly Review* 443, 451.
185. However, Rosemary Teele Langford, 'The Duty of Directors to Act Bona fide in the Interests of the Company: A Positive Fiduciary Duty? Australia and the UK Compared' (2011) 11 *Journal of Corporate Law Studies* 215, 230 notes that the 'distinction between prescriptive and proscriptive duties is in fact fragile'. Also, see Rosemary Teele Langford, 'General law and statutory directors' duties: "unmixed oil and water" or "integrated parts of the whole law"?' (2015) 131 *Law Quarterly Review* 635 for a discussion regarding the difference in approach between Australia and the UK in respect of codification of directors' duties, that could potentially also have an impact in this context.
186. A detailed discussion of these issues falls outside the scope of this paper. See Rosemary Teele Langford, 'The Fiduciary Nature of the Bona Fide and Proper Purposes Duties of Company Directors: *Bell Group Ltd (in liq) v Westpac Banking Corp (No 9)*, (2009) 31 *Australian Bar Review* 326; and Rosemary Teele Langford, 'Solving the Fiduciary Puzzle – the Bona Fide and Proper Purposes Duties of Company Directors' (2013) 41 *Australian Business Law Review* 127 for a comprehensive analysis of these issues in the context of the *Bell Group* case at first instance and on appeal.
187. *The Bell Group (No 9)* (n 13), [6064].
188. ibid.

The above statement, along with the type of director conduct that Owen J relied on to find a breach of directors' obligations, for example the fact that directors 'failed to arm themselves with clear and precise advice as to what was required of them given the financial position in which the companies found themselves', seem to indicate that the obligation to creditors could require positive action.[189] Even though this appears to suggest a prescriptive expression of the obligation, rather than directors merely being required to refrain from acting in a particular way (proscriptive expression of the obligation), Owen J was at pains to explain how a proscriptive approach to fiduciary obligations is maintained.[190] According to Leslie Kosmin QC in *Colin Gwyer*,[191] directors, in the process of considering the interests of creditors, have to take into account the impact of any decision on the ability of the creditors to recover the sums due to them from the company and do something about it.[192] As mentioned above, some UK cases have identified positive action that should be taken such as reducing expenditure.[193]

Owen J recognises that his framing of the obligation (prescriptively) 'can have overtones of negligence'[194] and that 'at first glance this may seem to be a failure of care skill and diligence',[195] but ultimately concludes that the case as pleaded is not 'negligence dressed up as misconduct of a different genre'.[196] Even though Owen J provided examples of director conduct that would indicate a breach of their obligations, the obligation was expressed as an obligation on directors to 'consider' the interests of creditors, rather than as a duty to actively protect the interests of creditors.[197]

On appeal in *Bell Group* a different approach, from that taken by Owen J, was adopted, with some statements potentially being able to cause confusion. Lee AJA, for example, suggests:

> Once it appears that a company is insolvent, creditors of the company are regarded as having a direct interest in the company…in the sense that an *obligation will then be imposed on the company* not to prejudice the interests of the creditors. The fiduciary duty of a director to act bona fide in the best interests of the company would require the director not to have the company ignore or attempt to defeat that obligation to creditors.[198]

The above construct in terms of whether there is an immediate obligation on the company, differs from the way in which previous authorities expressed the obligation, although in *Sequana* Lady Arden, said that directors are not 'to take any step which would materially

189. *The Bell Group (No 9)* (n 13), [6040].
190. *The Bell Group (No 9)* (n 13), [4581]. See The Hon Justice KM Hayne AC, 'Directors' Duties and a Company's Creditors' 38 (2014) *Melbourne University Law Review* 795, 806–807; Rosemary Teele Langford, 'The fiduciary nature of the bona fide and proper purposes duties of company directors: *Bell Group (in liq) v Westpac Banking Corp (No 9)*' (2009) 31 *Australian Bar Review* 326 for more detailed discussion in this regard.
191. *Colin Gwyer* (n 56).
192. [2002] EWHC 2748 (Ch), [2003] 2 BCLC 153, [81]. This view was also voiced in *Re Idessa* (n 144), [120]. See Keay (n 175).
193. *Re Idessa* (n 144), [92], [112].
194. *The Bell Group (No 9)* (n 13), [6095].
195. ibid [6097].
196. ibid [6095].
197. The Hon Justice KM Hayne AC, 'Directors' Duties and a Company's Creditors' 38 (2014) *Melbourne University Law Review* 795, 798.
198. *The Bell Group (appeal)* (n 14), [767] (own emphasis).

and adversely prejudice the interests of creditors, or to omit to take a step which could reasonably be taken by them, and which would prevent or reduce such prejudice'.[199]

Statements by Drummond AJA in the *Bell Group* appeal furthermore suggest a willingness to extend the scope of the obligation beyond how it is expressed in the trial judgment, by requiring directors to 'have regard *and give proper effect to the interests of creditors*.[200] Drummond AJA also indicates that the duty 'will not ordinarily be satisfied by directors who consider the impact that entry into a particular transaction by the company will have on its creditors but proceed with the transaction even though it causes significant prejudice to those creditors' and that non-compliance exposes directors to being 'in breach of their fiduciary duty to the company to exercise their powers for proper purposes'.[201]

This formulation goes beyond the balancing act suggested by Owen J and other authorities, and has been criticised by commentators.[202] It has also been suggested that a positive expression of the duty, requiring directors to do something, 'does not sit easily with a proper understanding of directors' duties'.[203] Placing the duty in the context of the 'proper purposes' obligation is also unusual. Commentators suggest that the preference for the more objective obligation, compared to the subjective duty to act in good faith in the interests of the company, allows the court to 'review the directors' decisions, and supports a more interventionist approach in commercial decision-making'.[204]

The position adopted in the appeal decision appears not to have been embraced in later decisions. The statement by Gleeson JA in *Re IW4U* that '[i]n the context of insolvency or near insolvency, which includes a real and not remote risk that creditors will be prejudiced by the dealing in question…, the standard under s 181(1) of the Corporations Act 2001 entails an obligation on the directors to *take into account the interests of creditors*'[205] is illustrative and indicates support for what has been labelled the 'consider-creditors theory'. This statement has been cited again in a number of subsequent decisions.[206]

The above discussion suggests that while the Australian position in respect of the contours of the duty remains uncertain,[207] it seems to favour a construct in terms of which directors are required to consider the interests of creditors,[208] without being subject to a positive obligation

199. *Sequana (UKSC)* (n 15), [288].
200. *The Bell Group (appeal)* (n 14), [2031]. However, see Ian M Ramsay, *Company Directors: Principles of Law and Corporate Governance* (LexisNexis, 2nd ed, 2023) 513 who respectfully disagrees with this statement and asserts that the duty to consider the interests of creditors is not part of the duty to act for proper purposes.
201. ibid [2042].
202. Anil Hargovan and Jason Harris, 'For Whom the Bell Tolls: Directors' Duties to Creditors after *Bell*' (2013) 35(2) *Sydney Law Review* 433, 435; 443; 445–448; Anil Hargovan and Timothy M Todd, 'Financial Twilight Re-Appraisal: Ending the Judicially Created Quagmire of Fiduciary Duties to Creditors' (2016) 78 *University of Pittsburgh Law Review* 135, 149.
203. The Hon Justice KM Hayne AC, 'Directors' Duties and a Company's Creditors' 38 (2014) *Melbourne University Law Review* 795, 801.
204. Anil Hargovan and Jason Harris, 'For Whom the Bell Tolls: Directors' Duties to Creditors after *Bell*' (2013) 35(2) *Sydney Law Review* 433, 444.
205. *Re IW4U* (n 78), [31] (emphasis added).
206. See eg *Re Bryve Resources* (n 79), [65]; *Re ZH International Pty Ltd (in liq)* (2022) 160 ACSR 473; [2022] NSWSC 2, [244]; *Re ACN 152 546 453* (n 78), [83].
207. A fact bemoaned by commentators. See eg Anil Hargovan and Jason Harris, 'For Whom the Bell Tolls: Directors' Duties to Creditors after *Bell*' (2013) 35(2) *Sydney Law Review* 433, 449.
208. Rosemary Teele Langford and Ian Ramsay, 'The contours and content of the "creditors' interests duty"' (2021) 21(1) *Journal of Corporate Law Studies* 85, 103 criticise this formulation of the duty to creditors for providing 'insufficient guidance to directors'.

to actively protect creditors' interests. While there are, as explained earlier, comments from some UK judges that envisage an obligation to act positively in favour of the creditors, there does not appear to be a strong thread running through the cases that requires this. The principle also remains that directors primarily owe their duties to the company and should therefore consider the interests of the company first and foremost when exercising their powers, and that the interests of a creditor, even a significant creditor, should not be 'equated' with the interests of the company.[209]

Summary

While there is some agreement between the Australian authorities and the UK Supreme Court concerning the content of the obligation, the point at which they seem to part company is where a company's insolvent liquidation or administration is inevitable. *Sequana* provides that at this point the creditors' interests do become paramount whereas the bulk of the Australian cases do not, even though at this point we can surmise that the creditors' interests would be regarded as carrying more weight.

Conclusion

The *Sequana* judgment has been eagerly awaited, and many are watching closely to assess the impact of the judgment in their jurisdiction. At first glance, it seems that *Sequana* signals a divergence from the current legal position in Australia, regarding the two issues discussed in this paper. In relation to the trigger for the obligation to consider the interests of creditors, the UK courts appear to be adopting a much more restrictive approach, indicating that the obligation will only be enlivened when the company's affairs are bordering on insolvency or insolvency is imminent, whereas the obligation may arise much earlier in Australia, due to the liberal framing of the trigger. Furthermore, the weight attached to the interests of creditors once the obligation is triggered seems to be much more significant in the UK, where creditor interests could indeed become paramount at this point, potentially even displacing shareholder interests, compared to Australia, where creditor interests are seen as having the potential to intersect with those of the company to some extent, but not necessarily to the exclusion of shareholder interests. The difference in approach is consistent with the rationale for the obligation based on the idea of creditors becoming the residual risk-bearers, effectively displacing shareholders in that sense. As discussed, this displacement is linked to the company being insolvent, however.[210] The emphasis on creditors' interests when insolvency is imminent, as stated in *Sequana*, is therefore justifiable and explicable on the basis of this particular rationale for the obligation. It also provides a possible explanation for the divergence in approach between the jurisdictions, where the Australia trigger is much more liberal, and therefore not able to eventuate a 'shift' to creditors' interests becoming paramount in the same way that imminent insolvency would be able to achieve.

209. *Re Bryve Resources* (n 79), [73]. This case presents unique circumstances in that the director was also a significant creditor and caused the company to make payments that would be to his benefit, but to the detriment of other creditors.
210. See discussion above par 3.

However, when considering the way in which the content of the obligation is expressed in both jurisdictions in conjunction with the trigger, the approach may not be as divergent as would appear at first glance. While English case law appears to be more accepting of the notion that creditor interests are paramount once the obligation is triggered, even to the extent that their interests could displace those of shareholders, the way in which Australian case law paints the obligation, indicating that there is a direct correlation between the extent to which creditors interests could intersect with those of the company and the degree of financial instability, potentially allows for a result that is not necessarily that dissimilar. If it is accepted that the closer a company is to insolvency, the more directors should give regard to the interests of creditors, an argument could be made that the approach is theoretically open to a suggestion that where the company is on the brink of insolvency, creditors interests have intruded so far that these interests have effectively displaced those of shareholders, similar to the position in England. It is interesting to consider the Australian approach that seems to suggest a gradual progression from shareholder interests being paramount to creditors interests intruding in proportion to the extent to which the company is experiencing financial distress, against the policy rationales for the obligation to consider creditor interests. The Australian approach does not appear to embrace the notion of creditors as residual risk-bearers to the same extent as *Sequana*, but instead is more aligned with the rationale that the company will ultimately suffer harm if creditor interests are neglected under circumstances of financial distress.

A significant difference is, of course, that prior to the point of 'imminent insolvency', or the company 'bordering on insolvency', creditors in England will have no protection in terms of an obligation to consider their interests, whereas Australian creditors may have some protection in terms of this obligation, even though it will be proportionately reduced the further removed the company is from a state of insolvency.

The Australian approach allows for more flexibility and greater discretion for the court to judge the conduct of directors from a commercial perspective, in order to establish whether sufficient consideration was given to creditor interests. This would require the court to 'sit in review of business decisions'[211] – something which the court is traditionally reluctant to do.[212] The narrower approach of the UK judiciary, on the other hand, provides more certainty to directors in relation to when creditor interests should be considered and also provides enhanced clarity in respect of the relevant weight that should be attached to creditor interests in comparison to shareholder interests, succeeding in addressing, to some extent, one of the longstanding concerns in regard to the burden that this obligation places on directors.[213]

The judgment in *Sequana* has no doubt progressed the development of the law in relation to the obligation to consider creditors' interests, albeit incrementally, and it will be interesting to see how other Commonwealth jurisdictions respond to the effect of this judgment, and to the divergence with the Australian position that is starting to appear.

211. Sealy, 'Directors' "Wider" Responsibilities – Problems Conceptual, Practical and Procedural' (1987) 13 *Monash University Law Review* 172, 179.
212. As noted by, for example, The Hon Justice KM Hayne AC, 'Directors' Duties and a Company's Creditors' 38 (2014) *Melbourne University Law Review* 795, 807; Rosemary Teele Langford, 'The fiduciary nature of the bona fide and proper purposes duties of company directors: *Bell Group (in liq) v Westpac Banking Corp (No 9)*' (2009) 31 *Australian Bar Review* 326, 344.
213. A concern noted by many; see eg Anil Hargovan and Timothy M Todd, 'Financial Twilight Re-Appraisal: Ending the Judicially Created Quagmire of Fiduciary Duties to Creditors' (2016) 78 *University of Pittsburgh Law Review* 135, 140.

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