A CRITIQUE OF THE PROPRIETARY NATURE OF SHARE RIGHTS IN AUSTRALIAN PUBLICLY LISTED CORPORATIONS

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[This article critiques the values, assumptions and justifications relied upon in Australia to defend shares in public corporations as property. It also exposes some of the inconsistencies and contradictions which infect the legal regulation of share ownership in light of the recent case of Gambotto v WCP Ltd.† *Three arguments are presented. First, despite the High Court's endeavours, shares in modern public corporations are property in name only. Secondly, the definition of a share as a thing, rather than a right to an income stream, reflects the historical derivation of share ownership rather than the expectations of modern shareholders in public corporations. Thirdly, property law doctrines encourage shareholders to act in their own self-interest. The article concludes that the re-assertion of the proprietary nature of share ownership in* Gambotto *will not radically alter the balance of power between majority and minority shareholders in Australian public corporations.]*

CONTENTS

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† (1995) 182 CLR 432 ('*Gambotto*').

INTRODUCTION

The publicly listed corporation is the dominant form of large business enterprise in the twentieth century. Institutional investors are the archetypal shareholder of the modern publicly listed corporation.[1] The corporation and its shareholders share a fundamental goal: the generation of revenue by the corporation for the corporation and on behalf of its shareholders. Shareholders receive a portion of that revenue in the form of periodic dividends. In all other respects, they play a passive role in the corporate enterprise. Investors ratify the profit-making goal by investing in the corporation through the purchase of shares via the share market. The share market determines the value of individual shares by reference to the corporation's revenue-making potential. Where the corporation does not meet its profit-making targets, shareholders are free to exit a corporation through the stock market and invest elsewhere. For all of these reasons, the conception of a share in a publicly listed corporation as a capitalised dividend stream is a compelling one. Yet the Australian High Court does not agree. It contends that a share is an investment containing a hard inner core of proprietary rights.[2]

There is surprisingly little discussion in Australian case law or academic literature about the nature and scope of a share's proprietary core, given that there is much to debate. For a start, does the conception of a share as a *thing* (an investment) rather than a *right to income* (a dividend stream) reflect the historical derivation of share ownership expectations, rather than the expectations of modern shareholders? Historically, share ownership included rights of management and control of the corporate enterprise, yet the contrary is the case in

[1] G P Stapledon, *Institutional Shareholders and Corporate Governance* (1996) 4–5.
[2] *Gambotto* (1995) 182 CLR 432, 447.

modern public corporations.[3] Secondly, a prevailing objective of corporate law, through mechanisms such as the statutory oppression remedy,[4] is to ensure that majority shareholders have regard for the interests of all shareholders, not just themselves. Are property law doctrines to be regarded as alternate mechanisms for addressing such concerns? How can they be so regarded when the same doctrines justify individual shareholders having regard to their own interests ahead of others?[5] Thirdly, is there any point in denying the reality that the proprietary core of a share in a public corporation is an empty shell? The *Corporations Law*, the principal statute regulating Australian corporations, defeats the most important protections afforded to shares as proprietary rights. Why pay homage to the proprietary nature of a share if the very protections which afford it that nature no longer exist?

This article seeks to expose the inconsistencies and contradictions which infect the legal regulation of share ownership in modern public corporations in Australia.[6] The High Court's discussion of share rights in the recent case of *Gambotto*[7] provides the spring board for a wider discussion of share ownership. That decision continues to generate a wealth of academic commentary from doctrinal,[8] comparative law[9] and theoretical perspectives.[10] This article adds to the third vein of analysis. Previous theoretical discourse has focused exclusively on the distributional effects of affording shares different types of legal protection, such as property and contract law protections. This article explores the rights of property which make up a share per se and the values, assumptions and justifications relied on to defend those rights in relation to modern public corporations. This article is divided into four parts. Part I explains why shares are property in

3 Adolf Berle and Gardiner Means, *The Modern Corporation & Private Property* (revised ed, 1968) xii–xxiii.

4 *Corporations Law* s 260.

5 *Peters American Delicacy Co Ltd v Heath* (1939) 61 CLR 457 ('*Peters*'), 507 (Dixon J), approved in *Gambotto* (1995) 182 CLR 432, 444 (Mason CJ, Brennan, Deane and Dawson JJ), 452–3 (McHugh J).

6 The purpose of the critique is to inform debate, not to promote another model of share ownership at the expense of the proprietary model.

7 (1995) 182 CLR 432.

8 Robert Baxt, 'Further Victories for Minority Shareholders' (1995) 23 *Australian Business Law Review* 293; Elizabeth Boros, 'The Implications of *Gambotto* for Minority Shareholders' in Ian Ramsay (ed), Gambotto v WCP Limited: *Its Implications for Corporate Regulation* (1996) 87; Stephen Kevans, 'Oppression of Majority Shareholders by a Minority? *Gambotto v WCP Limited*' (1996) 18 *Sydney Law Review* 110; Vanessa Mitchell, 'Victory for Minority Shareholders' (1995) 16 *The Company Lawyer* 219; Brendan Pentony, 'Majority Interests v Minority Interests: Achieving a Balance' (1995) 5 *Australian Journal of Corporate Law* 117; Dan Prentice, 'Alteration of Articles of Association — Expropriation of Shares' (1996) 112 *Law Quarterly Review* 194.

9 Deborah DeMott, 'Proprietary Norms in Corporate Law: An Essay on Reading *Gambotto* in the United States' in Ramsay (ed), above n 8, 90; Vanessa Mitchell, 'The US Approach Towards the Acquisition of Minority Shares: Have We Anything to Learn?' (1996) 14 *Company and Securities Law Journal* 283.

10 DeMott, above n 9; Saul Fridman, 'When Should Compulsory Acquisition of Shares Be Permitted and, if So, What Ought the Rules Be?' in Ramsay (ed), above n 8, 117; Peta Spender, 'Guns and Greenmail: Fear and Loathing after *Gambotto*' (1998) 21 *Melbourne University Law Review* 96; Michael Whincop, '*Gambotto v WCP Limited*: An Economic Analysis of Alterations to Articles and Expropriation Articles' (1995) 23 *Australian Business Law Review* 276; Michael Whincop, 'An Economic Analysis of *Gambotto*' in Ramsay (ed), above n 8, 102.

name only. Part II outlines the jurisprudential sub-text of the position taken by the writer and responds to criticisms of the writer's approach made by Spender.[11] Part III contrasts the traditional values and expectations of shareholders in joint stock companies with those of minority shareholders in modern public corporations. Part IV questions the efficacy of the proprietary model as a mechanism for resolving conflicts of interest between minority and majority shareholders in public corporations.

I TWO BODIES, ONE SOUL?

A *Forms of Protection*

> A share is liable to modification or destruction in appropriate circumstances, but is more than a 'capitalized dividend stream': it is a form of investment that confers proprietary rights on the investor.[12]

The High Court majority's definition of a share in *Gambotto*[13] contemplates that a share enjoys two forms of legal protection:

- first, as an enforceable contract between a corporation and a shareholder according to the covenants in the corporation's charter documents; and
- secondly, as a piece of intangible property subject to the protection of property law.

Part I analyses both forms of protection, focusing predominantly on the proprietary form of shares. A third aspect of a share's legal protection, not discussed here, is the statutory rights of shareholders under the *Corporations Law* to access corporate information and to obtain remedial assistance from the courts.[14]

B Gambotto

Gambotto involved a challenge to the validity of an alteration of the articles of association of an Australian publicly listed corporation, WCP Limited ('WCP'). Section 176 of the *Corporations Law* provides for the alteration of articles of a corporation by a special resolution passed by a three-fourths majority of shareholders.[15] The proposed alteration enabled another shareholder 'entitled for the purposes of the *Corporations Law* to 90 per cent or more of the issued shares' to compulsorily acquire the remaining issued shares in WCP. WCP's majority

[11] Spender, above n 10.

[12] *Gambotto* (1995) 182 CLR 432, 447 (Mason CJ, Brennan, Deane and Dawson JJ).

[13] Ibid.

[14] Members have the right to inspect the register of debenture holders (s 1047(5)) and the register of disqualified directors (s 243(3)). Members are also entitled by court order to arrange for the books of the corporation to be inspected by an auditor or legal practitioner on their behalf: s 319. They are entitled to a copy of the financial statements and reports laid before the annual general meeting (s 315(3)) and they may inspect the auditor's report (s 331F). Notice of every meeting of shareholders is required to be served upon every shareholder unless the articles of association provide otherwise: s 247(4). Shareholders are entitled to inspect and request copies of the minutes of such meetings: s 259. As to remedial assistance, see ss 260 and 1324, discussed below.

[15] *Corporations Law* s 176(1), read together with s 253.

shareholders held 99.7 per cent of the issued capital of the corporation. Gambotto, a minority shareholder, challenged the validity of the new compulsory acquisition power. The High Court found in his favour, striking down the new article because it effected a fraud on the minority shareholders.

Two judgments were given by the High Court. Both provided for new restrictions on the use of the alteration power by a majority shareholder to effect a modification or expropriation of minority shares. The majority held that an amendment which inserts a power of expropriation into the articles must satisfy a two-step test.[16] First, the expropriation must be for a proper purpose. Secondly, it must not operate oppressively in relation to minority shareholders. The onus of proving both steps lies with the majority shareholders.[17] McHugh J, in a separate judgment, also adopted a two-step test and the same onus of proof requirement.[18] The nature of, reasons for and differences between the two formulations have been debated elsewhere.[19] The aspects of the judgments that are of interest here are the judges' conceptions of the nature of a share and the use of the fraud on the minority doctrine to promote the proprietary form of share entitlements. The majority judgment emphasised the proprietary nature of a share as a means of narrowing the scope of amendments to articles which could be said to be for a proper purpose. By contrast, the minority judgment emphasised particular proprietary rights as a means of expanding the scope of oppression claims which could be raised as part of the fraud on the minority doctrine.

1 *Majority Judgment*

The definition of a share at the start of Part I, taken from the majority judgment, consists of two parts. The first part acknowledges that a share is a dividend stream liable to modification or destruction in regulated conditions.[20] This refers to the fact that a share is a contract under seal between a corporation and its members formed pursuant to a corporation's memorandum and articles of association (the 'membership contract'). The reference arises from the discussion of the modification and destruction of a share. A share may be destroyed under a number of provisions of the *Corporations Law*,[21] but modifications can only take place pursuant to s 176 of the *Corporations Law*. Section 176 permits modification by alteration of a corporation's articles of association, which by s 180(1) also forms the membership contract between the corporation and its shareholders. Section 180(1) provides that the membership contract comprises, inter alia, the articles in force 'for the time being'.[22] Those words contemplate that a change in

16 *Gambotto* (1995) 182 CLR 432, 447 (Mason CJ, Brennan, Deane and Dawson JJ).

17 Ibid.

18 Ibid 453.

19 See especially Baxt, above n 8; Boros, 'The Implications of *Gambotto*', above n 8; H Ford, R Austin and I Ramsay, *Ford's Principles of Corporations Law* (8th ed, 1997) 1045–7; Kevans, above n 8; Mitchell, 'Victory for Minority Shareholders', above n 8; Pentony, above n 8; Prentice, above n 8, Ian Ramsay, 'Key Aspects of the Decision of the High Court in *Gambotto v WCP Ltd*' in Ramsay (ed), above n 8, 2.

20 *Gambotto* (1995) 182 CLR 432, 447.

21 *Corporations Law* ss 701, 411–13.

22 Ibid s 180(1)

the articles pursuant to s 176 of the *Corporations Law* effects a change in the membership contract.

The second part of the majority's definition provides that a share is an investment which confers proprietary rights.[23] This part is problematic. The judgment suggests that a share has two proprietary forms which can be expropriated: first, the share itself and secondly, valuable proprietary rights 'attaching to the share'.[24] The majority did not define or give examples of these rights. Furthermore, they did not explain the relationship between those proprietary rights and the contractual form of a share recognised by the first part of their definition.

The High Court majority emphasised the proprietary nature of a share under the first limb of their two step test. They held that an expropriation for the advancement of the interests of the company as a legal and commercial entity, or those of the majority shareholder, was an expropriation with an improper purpose.[25] Such actions did not give sufficient weight to the 'proprietary nature of a share'.[26] They did not define this expression. WCP presented evidence that expropriation would confer administrative savings upon the company and tax benefits upon the majority shareholders. The majority concluded that these purposes allowed the majority to expropriate for personal gain.[27] It also circumvented the protections provided to minority shareholders by the *Corporations Law* for orthodox expropriation schemes.[28] The majority also held that minority shareholders should not shoulder the burden of proving that the alteration was invalid. Such an approach was commercially expedient and failed (again) to attach sufficient weight to the 'proprietary nature of a share'.[29]

2 *Minority Judgment*

McHugh J focused on the second part of his two step test, the requirement that the amendment not be oppressive to minority shareholders. He held that the amendment satisfied the first step because it enabled WCP to reduce its tax liability.[30] He described shares as both 'private rights' and 'private property' but did not define either concept. He also acknowledged the contractual form of shares, referring specifically to the 'general contractual power' to alter the articles of association.[31] McHugh J commented that in the absence of an article in the membership contract authorising the compulsory acquisition of a member's shares, shareholders could legitimately expect to hold their shares until they chose to sell them or the company was wound up.[32] He further observed:

23 *Gambotto* (1995) 182 CLR 432, 447.
24 Ibid 444–5.
25 Ibid 446.
26 Ibid.
27 Ibid.
28 Ibid 445. The majority held that expropriation by amendment of the articles could only be justified where the continued shareholding of the minority could reasonably be viewed as detrimental to the corporation.
29 Ibid 447.
30 Ibid 455.
31 Ibid 453.
32 Ibid 456

> Under these circumstances, to require shareholders to sell their shares against their will is an infringement of their rights as autonomous beings to make their own decisions and to carry out their own actions.[33]

The rights described by McHugh J are proprietary in character but were not defined as such. They arise from the legal protection afforded to shares as private property discussed in further detail shortly: the right to voluntary transfer and the right to uninterrupted use of a share.[34] McHugh J referred to individual autonomy to justify the protection of such rights. This reveals the influence of liberal ideology on his deliberations and is discussed in Part II. The existence of these 'rights' formed the basis upon which McHugh J determined that the majority shareholder had the onus of proving that the expropriation was procedurally and substantially fair.[35] He considered that an amendment granting a power of expropriation, in the absence of such proof, was prima facie oppressive to minority shareholders.[36] McHugh J concluded that the disputed amendment was oppressive to the minority shareholders because WCP had not satisfied the requirement of full disclosure.[37]

C *Contractual Form of Shares*

As neither judgment in *Gambotto* offers a detailed explanation of a share's contractual and proprietary characteristics, recourse to statutory provisions and other case law is needed to 'flesh out' the judges' conceptions of a share. Starting with the contractual form of a share, corporate law conceives of a share as a bundle of rights enforceable as a membership contract given statutory force by s 180 of the *Corporations Law*. The content of that bundle of rights varies between corporations. Three standard rights in membership contracts are the right to receive a dividend if one is declared, the right to the return of capital on winding up and the right to attend and vote at general meetings of the company.[38] They mirror the primary concerns of most investors in relation to their investments, including concerns over income, the security of investment and the right to review the investment manager's performance.

The articles of association of a public corporation typically provide for the payment of a half-yearly dividend on the recommendation of the board of directors and following a declaration at a general meeting.[39] Dividends must be paid out of profits or otherwise in accordance with s 191 of the *Corporations Law*. There is no obligation to declare a dividend. If a corporation is wound up, the articles typically provide for the surplus assets to be distributed amongst the shareholders in proportion to their shareholding.[40] Participation in the surplus is

[33] Ibid.
[34] See below n 67 and accompanying text.
[35] *Gambotto* (1995) 182 CLR 432, 456–7.
[36] Ibid 456.
[37] Ibid 459–60.
[38] Laurence Gower, *Gower's Principles of Modern Company Law* (5th ed, 1992) 361
[39] *Corporations Law*, sch 1, table A, reg 86
[40] See, eg, *Corporations Law*, sch 1, table A, reg 97.

subject to compliance with the statutory procedures for the winding up of the corporation. These depend on the economic circumstances of the corporation prior to liquidation.[41] Articles of association give shareholders an implied right to vote on resolutions at shareholder meetings.[42] Section 249(1)(c) of the *Corporations Law* reinforces this right. It provides that in default of such articles, each member has one vote per share.

Section 180 of the *Corporations Law* requires both the corporation and its members to conform to the covenants in the memorandum and articles of association 'in force for the time being'.[43] Alterations to the articles pursuant to s 176 of the *Corporations Law* can change the membership contract protected by s 180. Section 180(3) provides that alterations requiring members to increase their shareholding or liability to contribute to company capital or which restrict their share transfer rights are not binding on existing members. A shareholder can take action to enforce rights under the membership contract pursuant to either s 180 or s 260 of the *Corporations Law*. Section 260 gives a shareholder standing to sue where the corporation is shown to be acting in an oppressive manner. It offers a wide range of remedies.[44] Shareholders have restricted enforcement rights under their membership contract. The shareholder can only sue for non-performance of the membership contract where the non-performance affects the shareholder's rights as a member of the corporation.[45] The remedies available for infringement are declaratory and injunctive relief. A member's right to common law damages for breach of a membership contract has not been clearly established in existing case law.[46]

D *Proprietary Form(s) of Shares*

The proprietary aspects of a share arise from the protection afforded to shares by s 1085(2) of the *Corporations Law*. This provision states that shares are forms of property subject to the laws applicable to personal property. *Gambotto*, in line with earlier Australian case law,[47] suggests that shares have two property forms. First, the bundle of rights which makes up a share is a piece of property. Secondly, individual incidents or rights in that bundle have a proprietary character. If the combined bundle of rights is proprietary, it should follow that every incident in that bundle is also proprietary. Yet, it is not possible to be confident about this conclusion because of the inarticulate, 'half conscious' conception of property

41 Ibid ch 5.

42 Ibid sch 1, table A, regs 42–52. Spender says this conclusion is contentious: Spender, above n 10, 117.

43 *Corporations Law* s 180(1).

44 Ibid s 260.

45 *Hickman v Kent or Romney Marsh Sheep Breeders' Association* [1915] 1 Ch 881, 900 (Astbury J); *Eley v Positive Government Security Life Assurance Co Ltd* (1875) 1 Ex D 88. For a contrary view, see *Swabey v Port Darwin Gold Mining Co* (1889) 1 Meg 385. A shareholder who is also a director, may also sue where his or her rights are affected as a director. Section 180 of the *Corporations Law* provides that the memorandum and articles is a contract under seal between the company and each eligible officer.

46 *Ardlethan Options Ltd v Easdown* (1915) 20 CLR 285.

47 *Peters* (1939) 61 CLR 457.

adopted by judges when discussing the proprietary form of shares.[48] Prentice recently described the task of defining a share's proprietary core as 'one of the most difficult conceptual issues in company law'.[49]

A starting point is the description of a share as a chose in action.[50] This describes the category of proprietary right of which shares are a part but does not reveal any insights about their proprietary character. A chose in action is a generic term describing a myriad of unrelated proprietary interests.[51] In *Peters American Delicacy Co Ltd v Heath*,[52] cited in both judgments in *Gambotto*, Dixon J defined a share as '[p]rimarily ... a piece of property conferring rights in relation to distributions of income and of capital' defined in 'many respects' by the articles of association.[53] By the use of the word 'primarily', Dixon J acknowledged that a share has another legal form under the membership contract. He also acknowledged that the articles of association define share rights in 'many respects'. These comments suggest that there are incidents of a share which are both proprietary and contractual in nature. They also contemplate that there exist some proprietary aspects of a share which are not defined by the membership contract. As Dixon J did not address either issue directly, there is a danger in these speculations. Of a shareholder's right to vote, Dixon J observed:

> They [the shareholders] vote in respect of their shares, which are property, and the right to vote is attached to the share itself as an incident of property to be enjoyed and exercised for the owner's personal advantage.[54]

It is curious that when the High Court in *Gambotto* had an opportunity to revisit Dixon J's conception of a share, they mentioned but did not adopt his definition.[55] The *Gambotto* majority developed their own definition in even broader terms. McHugh J described some rights encompassed by share ownership but did not define the legal form of those rights. This article previously inferred that the rights described by McHugh J are proprietary in character.[56] This reflects an instrumentalist interpretation of property under which the legal protection afforded to shares as private property defines the proprietary character of the bundle of rights making up a share.[57] This may also be what Dixon J and the majority in *Gambotto* intended by their respective, but broad descriptions of shares as proprietary rights. Due to the absence of clearer judicial insights, Part I now adopts an instrumentalist approach for the purpose of further exploring the proprietary core nature of a share.

48 Kevin Gray, 'Property in Thin Air' (1991) 50 *Cambridge Law Journal* 252, 306.
49 Prentice, above n 8, 197.
50 Gower, above n 38, 358–9; Ford, Austin and Ramsay, above n 19, 716.
51 Robert Pennington, 'Can Shares in Companies Be Defined?' (1989) 10 *The Company Lawyer* 140, 143.
52 (1939) 61 CLR 457.
53 Ibid 504 (Dixon J).
54 Ibid 503–4 (Dixon J).
55 *Gambotto* (1995) 182 CLR 432, 443 (Mason CJ, Brennan, Deane and Dawson JJ), 452 (McHugh J).
56 Ibid 443 (Mason CJ, Brennan, Deane and Dawson JJ), 456 (McHugh J).
57 Alan Ryan, 'Utility and Ownership' in Raymond Frey (ed), *Utility and Rights* (1984) 175.

E *Proprietary Incidents of a Share Resulting from Property Law*

Property law creates and protects rights through the doctrines of fragmentation, exclusivity, indefeasibility and voluntary alienability.[58] A share is a proprietary interest created via the dual processes of separation and fragmentation. The share represents a proprietary interest or estate in a corporation but not the corporation's assets. The corporate law doctrine of separate legal entity separates the corporate enterprise from its shareholders. The corporation owns the enterprise, shareholders own shares in the corporation.[59] Further fragmentation occurs by the separation of the rights to possession, management and control of the corporation's assets from other ownership rights.[60] These rights would otherwise be united if all the proprietary interests in the corporation were owned by the one person. Fragmentation enables a large number of persons to simultaneously hold identical proprietary interests such as shares.

Ownership of a share carries the assumption that its owner has independent title to its underlying rights.[61] This appears to include the various entitlements incurred by the membership contract under the articles of association. The doctrine of indefeasibility holds that proprietary rights are enforceable against all other rights subsequently created.[62] Indefeasibility protects a share from being defeated or destroyed except by way of a voluntary transfer or upon winding up of the company. This was the property law right to which McHugh J referred in his discussion of the oppression of shareholder rights in *Gambotto*.[63] The *Corporations Law* permits modification, destruction and expropriation of share rights in regulated conditions discussed shortly. Voluntary alienability describes the right of the owner of a proprietary interest to transfer that interest to another on terms determined by the owner. In the corporate context, the right exists up until the moment when the corporation is wound up. A voluntary transfer in a publicly listed company takes place through the share market. Shares are exceptionally fungible. As Part III further explains, they suit modern investor demands.[64]

Both *Peters*[65] and *Gambotto*[66] raise the prospect that rights under the membership contract are also proprietary in nature. Three such rights discussed earlier were the rights to receive a dividend, to the return of surplus capital on winding up and to vote at general meetings. A shareholder's right to vote is a known

58 M A Neave, C J Rossiter and M A Stone, *Sackville and Neave: Property Law. Cases and Materials* (5th ed, 1994) 92, 189, 242 and 595.

59 *Saloman v Saloman* [1897] AC 22. Spender argues that this is an artificial concept which the High Court was justified in interpreting liberally. Spender, above n 10, 109–10. *Contra* Friedman, above n 10, 121.

60 Berle and Means, above n 3.

61 *Peters* (1939) 61 CLR 457, 507 (Dixon J).

62 Neave, Rossiter and Stone, above n 58, 467ff.

63 (1995) 182 CLR 432, 452 (McHugh J).

64 Gower, above n 38, 360; Whincop, '*Gambotto v WCP Limited*', above n 10, 278

65 (1939) 61 CLR 457, 511.

66 (1995) 182 CLR 432, 447.

incident of property.[67] Are dividend and excess capital rights also proprietary in nature? Dividends are not automatic rights. They depend on the board of directors of a corporation first exercising its discretion to declare a dividend. Can something which is discretionary be a proprietary right? Recent cases suggest that a persistent refusal by the board of directors to pay a dividend may be grounds for an oppression action under s 260 of the *Corporations Law*.[68] The relationship between proprietary rights and oppression is an area requiring further debate by academic commentators. If the right to receive any surplus capital is proprietary, how is it possible that secured and unsecured creditors claim in advance of shareholders in the liquidation? The proprietary right must be a much reduced one compared with the rights enjoyed before liquidation. If the proprietary right is a right to receive the excess after satisfaction of all other claims, what protection does it offer for shareholders? There is much work still to be done to understand the particular incidents or rights which make up a share's proprietary core.[69]

F *Tensions between Contractual and Proprietary Forms*

It is tempting to view the classification of share rights into contractual and proprietary forms as a semantic exercise. This article argues that it is not. The form of a share right determines the protection which it attracts from the legal system. A proprietary right carries the assumption that its owner has independent title to the right.[70] Independent title attracts protection from the doctrine of indefeasibility, which prevents its destruction without the owner's consent. A contractual right can be varied under the articles of association pursuant to s 176 of the *Corporations Law*. Tension arises when a right is both contractual and proprietary in form. The *Corporations Law* permits variation of the very rights which the doctrine of indefeasibility forbids without shareholder consent. Here lies the source of the inconsistencies and contradictions between the two forms of legal protection afforded to shares:

> Prima facie rights altogether dependent upon articles of association are not enduring and indefeasible but are liable to modification or destruction; that is, if and when it is resolved by a three-fourths majority that the articles should be altered.[71]

Tensions between contractual and property-related share rights result from conflicting interests between majority and minority shareholders in a corporation. The majority seeks to vary share rights under the membership contract, which the

[67] *Peters* (1939) 61 CLR 457, 511.

[68] *Re Bagot Pastoral Co Pty Ltd; Shannon v Reid* (1992) 9 ACSR 129; *Roberts v Walter Developments Pty Ltd* (1992) 10 ACLC 804. Both cases discussed a refusal to declare a dividend coupled with the payment of high directors' fees, not just refusal to declare a dividend.

[69] Share premiums raise similar concerns. They are not treated by the *Corporations Law* in the same way as other share capital. There is no right to a dividend in respect of the share premium: *Corporations Law* ss 191–5.

[70] *Peters* (1939) 61 CLR 495, 507 (Dixon J).

[71] Ibid.

minority opposes because it will affect their entitlements. Section 176 prescribes the conditions required to affect an alteration of articles and in turn, the membership contract. It is also a mechanism for dispute resolution which requires the parties to the conflict to determine an adjustment of their competing interests.[72] The conflict is resolved in favour of the shareholder who secures 75 per cent of the votes[73] subject to the protections discussed shortly. The power of alteration makes defeasible those share rights dependent on the membership contract. The power is wide enough to be used for expropriation of minority shares by a majority. If so used, the power also undermines the voluntary transfer and exclusivity protection afforded to shares by property law doctrines. The contractual form of a share is preserved. The membership contract is automatically adjusted where the majority votes in favour of the amendment.

G *Protection of Minority Share Rights*

The power of alteration in s 176 is subject to limitation by general principles of law and equity.[74] Judicial doctrines such as fraud on the minority and statutory provisions such as ss 180 and 260 act as implied restraints on the exercise of the amendment power by majority shareholders. They give minority shareholders standing to challenge the validity of alterations. Shareholder rights under ss 180 and 260 were discussed earlier in this section. In the case of fraud on the minority, it is unclear whether the standing arises under s 176 itself or independently in equity.[75] The doctrine requires that the amendment satisfy additional tests, depending on the type of amendment involved.[76] The two step test for amendments to allow expropriation of minority shares or valuable proprietary rights attaching to shares was discussed previously.[77] Dixon J rationalised the doctrine in the following terms:

> If no restraint were laid upon the power to alter articles of association, it would be possible for a shareholder controlling the necessary voting power so to mould the regulations of a company that its operations would be conducted or its property used so that he would profit either in some other capacity than that of member of the company or, if as member, in a special and peculiar way inconsistent with the conceptions of honesty so widely held or professed that departure from them is described, without further analysis, as fraud.[78]

Peters[79] and *Gambotto*[80] are two of many cases involving a challenge to the validity of an alteration of articles on the ground that it constituted a fraud on

[72] Ibid 512.
[73] *Corporations Law* s 176(1), read together with s 253
[74] *Allen v Gold Reefs of West Africa Ltd* [1900] 1 Ch 656.
[75] As to the relationship between oppression under s 260 of the *Corporations Law* and oppression in the foregoing context of fraud on the minority, see Boros, 'The Implications of *Gambotto*', above n 8, 87–8.
[76] *Gambotto* (1995) 182 CLR 432, 445 (Mason CJ, Brennan, Deane and Dawson JJ).
[77] Ibid 445 (Mason CJ, Brennan, Deane and Dawson JJ), 453 (McHugh J).
[78] *Peters* (1939) 61 CLR 457, 511 (Dixon J).
[79] Ibid.
[80] (1995) 182 CLR 432, 445 (Mason CJ, Brennan, Deane and Dawson JJ), 453 (McHugh J)

minority shareholders.[81] The outcomes do not always favour minority shareholders. In *Peters*,[82] the alteration affected the extent of the minority's entitlement to receive bonus shares. The court determined that the alteration was valid. In *Gambotto*,[83] the alteration was struck down. Varying case outcomes prompted one judge to observe sagely:

> It seems to me that the truth is that the courts in each generation or in each decade have set a line up to which shareholders have been allowed to go in affecting the rights of other shareholders by alterations of Articles of Association, and beyond which they have not been allowed to go. It seems to me that no amount of legal analysis or analytical reasoning can conceal the fact that the decision has in the past turned, and must turn ultimately, on a value judgment formed in respect of the conduct of the majority — a judgment formed not by any strict process of reasoning or bare principle of law but upon the view taken of the conduct.[84]

This dictum highlights the underlying influence of value judgments about relations between majority and minority shareholders upon both the contractual and proprietary models of share rights. It also suggests the value judgments by courts may be tending towards sympathy for minority shareholders.[85] The contractual model favours majority shareholders because they control shareholder voting power. Does the proprietary model favour minority shareholders? Part IV critiques the use of the proprietary model of share rights as a means of redressing the imbalance between majority and minority shareholders in public corporations.

H *Defeat of the Proprietary Form*

Other provisions in the *Corporations Law* exacerbate the tense relationship between the contractual and proprietary forms highlighted in the preceding discussion. Section 1085 of the *Corporations Law* preserves the application of the property doctrines discussed earlier in relation to shares. Shares thereby enjoy rights of indefeasibility, exclusivity and voluntary alienability. Yet, what the *Corporations Law* recognises by one provision, it removes by several others. Several provisions of the *Corporations Law* restrict or override the application of property doctrines to shares. They include:

- the previously discussed power of alteration in s 176;

[81] Eg *Allen v Gold Reefs of West Africa Ltd* [1900] 1 Ch 656; *Sidebottom v Kershaw, Leese & Co Ltd* [1920] 1 Ch 154; *Dafen Tinplate Co v Llanelly Steel Co* [1920] 2 Ch 124; *Heron v Port Huon Fruitgrowers' Co-operative Association Ltd* (1922) 30 CLR 315; *Shuttleworth v Cox Brothers & Co Ltd* [1927] 2 KB 9; *Greenhalgh v Arderne Cinemas Ltd* [1951] Ch 286; *In Re Bugle Press Ltd* [1961] Ch 270.

[82] (1939) 61 CLR 457, 511.

[83] (1995) 182 CLR 432, 445 (Mason CJ, Brennan, Deane and Dawson JJ), 453 (McHugh J).

[84] *Crumpton v Morrine Hall Pty Ltd* [1965] NSWR 240, 244 (Jacobs J).

[85] Elizabeth Boros, 'Altering the Articles of Association to Acquire Minority Shareholders' in Barry Rider (ed), *Realm of Company Law* (forthcoming) 117–24; Elizabeth Boros, *Minority Shareholders' Remedies* (1995).

- the provisions enabling compulsory acquisition of minority shares following a takeover,[86] scheme of arrangement[87] or amalgamation;[88]
- the voluntary administration provisions;[89]
- the voluntary liquidation provisions;[90] and
- the provisions regulating reductions of capital.[91]

Some were expressly introduced for the purpose of eliminating minority shareholders. Others contain mechanisms not introduced for that purpose but which facilitate such eliminations.[92] As the operation of the various mechanisms, pre- and post-*Gambotto* have been analysed by other commentators, the discussion here is in broad terms.[93] Some of the provisions are the subject of reform proposals.[94]

Each of the provisions contains a mechanism by which a minority shareholder can be made to sell shares to the majority or hand their shares back to the corporation for destruction. In the case of alteration of articles, the rights making up the minority's share can be modified, expropriated or destroyed. The various mechanisms override the minority's exclusive and indefeasible title to the shares and underlying share rights. The rights to hold and sell those shares on voluntary terms also become casualties when the right of indefeasibility is lost. The minority shareholder receives compensation for the loss of shares but plays a limited role in determining the amount of compensation paid, although most of the mechanisms provide a means by which the minority can seek legal redress on that issue from the courts.

Most of the mechanisms were not introduced by the *Corporations Law* for the express purpose of eliminating minority shareholdings. The problem with non-orthodox mechanisms is that they may defeat shareholder expectations in illegitimate circumstances.[95] Only the express expropriation procedures specify a minimum level of protection for minority shareholders, which they can enforce through the courts. Prior to *Gambotto*, the use of non-orthodox mechanisms to expropriate shares gained some judicial acceptance.[96] Section I now considers how *Gambotto* changed the landscape.

86 *Corporations Law* ss 701, 414.
87 *Corporations Law* ss 411–12.
88 *Corporations Law* s 413.
89 *Corporations Law* pt 5.3A.
90 *Corporations Law* pt 5.5. See Quentin Digby, 'Eliminating Minority Shareholdings' (1992) 10 *Company and Securities Law Journal* 105, 115–16.
91 *Corporations Law* s 195.
92 *Corporations Law* ss 701, 714.
93 See, eg, Digby, 'Eliminating Minority Shareholdings', above n 90; Damian Grave, 'Compulsory Share Acquisitions: Practical and Policy Considerations' (1994) 12 *Company and Securities Law Journal* 240 For a post-*Gambotto* discussion, see generally Ian Ramsay (ed), above n 8.
94 See especially Legal Committee of Companies and Securities Advisory Committee, *Compulsory Acquisitions Report* (1996).
95 Grave, 'Compulsory Share Acquisitions', above n 93, 258.
96 *Nicron Resources Ltd v Catto* (1992) 8 ACSR 219.

I *Impact of* Gambotto

Gambotto[97] restricts the potential for minority shareholdings to be compulsorily acquired by amendment of a corporation's articles of association. It also puts in doubt expropriations facilitated by the non-orthodox expropriation schemes now discussed.[98] Fridman argues that the express expropriation schemes provided by the *Corporations Law* are to be treated in the post-*Gambotto* era as an exclusive statutory code governing expropriations.[99] What seems to have been forgotten in the analysis of *Gambotto* is a discussion of what the case does not, or more aptly, cannot do. *Gambotto* cannot bring back the protections removed by the *Corporations Law*. *Gambotto* has not stopped expropriations per se but has instead placed additional restrictions on the procedures used to effect them. Expropriations and modifications of share rights will continue in the post-*Gambotto* era. They can still take place either under the orthodox provisions or by way of alteration of the articles which satisfies the rigorous new two step test.[100]

The High Court in *Gambotto* acknowledged that property rights in shares in public corporations are ultimately defeasible. Exclusivity and voluntary transfer rights are casualties of expropriation mechanisms in the *Corporations Law*. Without indefeasibility, exclusivity and voluntary transfer rights, what is left of the proprietary core of a share? Shareholders of public corporations cannot assume that their rights and entitlements under the membership contract will remain in the same form for the duration of their shareholding.[101] Nor can they assume that they will choose the time and circumstances under which they can divest their shareholdings. For these reasons, the author argues that shares in Australian public corporations must be viewed as proprietary rights in name only. They remain legal entitlements, but are no longer subject to the protections afforded by property law doctrines.

J *Provoking Debate*

Whatever might be left of a share's proprietary core, the High Court's decision in *Gambotto* demands that corporate law pay more attention to it. Why is that so? One school of thought holds that the debate about shareholders' proprietary rights detracts from *Gambotto*'s central concern, namely, increasing the checks and balances on majority shareholders in public corporations.[102] A second viewpoint argues that if a 'wider' conception of property is adopted for the purposes of analysis, the conclusion that shares are proprietary rights in name

97 (1995) 182 CLR 432, 445 (Mason CJ, Brennan, Deane and Dawson JJ), 453 (McHugh J).

98 For a discussion of non-orthodox expropriations post-*Gambotto*, see generally Quentin Digby, 'The Implications of Gambotto for Non-Takeover Aspects of Compulsory Acquisitions A Comment' in Ramsay (ed), above n 8, 70; Damian Grave, 'Compulsory Share Acquisitions: Practical and Policy Considerations' in Ramsay (ed), above n 8, 14.

99 Fridman, above n 10, 123.

100 See above nn 21–2 and accompanying text.

101 *Peters* (1939) 61 CLR 457, 503 (Dixon J).

102 Boros, 'Altering the Articles of Association', above n 85, 126–7.

only cannot hold.[103] The author responds to this criticism, first by investigating in Part II the jurisprudential sub-text for the property analysis offered in this article, then by exploring in Part III the changing expectations of shareholders in modern corporations. Concerns about relations between majority and minority shareholders in public corporations are taken up in Part IV.

II ACCOUNTS OF PROPERTY

A *Jurisprudential Analysis*

Spender, as part of a wider review of the theoretical commentary on *Gambotto,* has two objections to the writer's exploration of share ownership. She argues that liberal-utilitarian analysis depends on questionable presuppositions and does not give a complete account of the social order in corporations.[104] Controversially, she contends that the High Court in *Gambotto* adopted a different paradigm for analysis, which she calls the 'associative' model of the corporation.[105] Part II defends the jurisprudential basis of Part I's analysis and challenges Spender's reading of *Gambotto*. Liberal-utilitarian analysis is one of three approaches to defining property evident in *Gambotto* and resulting academic commentary. Part II begins by outlining the three approaches before addressing Spender's criticisms. The discussion is in broad terms and as such, involves some hazards.[106]

B *Defining and Justifying 'Property'*

Defining property involves submerging oneself in difficult jurisprudential abstractions about the role of property as an institution in society.[107] Liberal ideology assumes that a person has an individual right in society to use and dispose of property and that right is either granted or enforced by the legal system. A central concern of liberal ideology is the need to reconcile liberal property rights with other people's rights, such as the right to free and independent development.[108] From the debate has evolved different accounts of the nature of property. They range along a spectrum, from those which interpret property as deriving from natural rights of ownership to those which treat it as an artificial

[103] Spender, above n 10, 112–15.

[104] Ibid 126–8.

[105] Ibid 127.

[106] This article does not purport to provide a comprehensive exposition of jurisprudential theories of property. The viewpoints and critical positions of their proponents vary across a wide spectrum The discussion reflects the writer's judgment about what are the main positions and presuppositions supporting the particular theories discussed in this article. They would not necessarily command widespread assent among academics and philosophers. The author does not purport to neutrally describe theories.

[107] Gray, above n 48, 306; A M Honoré, 'Ownership' in Anthony Guest (ed), *Oxford Essays in Jurisprudence* (1961) 107, 111, Andrew Reeve, *Property* (1986) 22–3, Alan Ryan, *Property* (1987) 1–2; Spender, above n 10, 110ff.

[108] Crawford Macpherson, 'Liberal-Democracy and Property' in Crawford Macpherson (ed), *Property: Mainstream and Critical Positions* (1978) 199, 199–200.

creation.[109] The former approach, within which the scholarship relied on by Spender falls, is known as natural law theories of property.[110] The latter approach describes a utilitarian account of property rights. A third approach, lying somewhere between these two extremes, is Locke's labour theory of property.[111] It appears to have been adopted by the majority judges in *Gambotto*, with McHugh J favouring a utilitarian account of property.

A discussion of property jurisprudence is complicated by three issues. First, some writers have observed a distinction between property as 'things', its meaning in common usage, and 'rights' in or in relation to those things.[112] Secondly, property is neither a static nor absolute concept.[113] The relationship between rights of property and the underlying object of those rights evolves with changes in the assumptions, values and justifications on which both the institution and rules of property rely.[114] The different conceptions of property and ownership as held by philosophers and legal scholars pose the final complication. In law, ownership and property concepts are preoccupied with resource allocation. In jurisprudence, their preoccupation is with justifying property as an institution in society.[115]

1 *Natural Law Account of Property*

Natural law theories start from the position that property rights do not depend on either governments, legal systems or laws for their existence.[116] They are a naturally deriving bundle of rights accruing to individuals in liberal societies. Property laws exist for the purpose of protecting natural property rights. Laws which violate, modify or defeat such rights are viewed as unenforceable by natural law commentators. Consistent with these views, a share must be viewed as a naturally deriving bundle of proprietary rights, despite contrary evidence in the *Corporations Law*.[117] Laws, such as s 1085 of the *Corporations Law*, exist to protect and preserve the pre-existing proprietary aspects of a share. Statutory provisions which modify or expropriate share rights in public corporations, such

[109] Ryan, 'Utility and Ownership', above n 57. Between the two views range many other justificatory theories, including the labour theory, the social contract theory, the first occupancy theory and the personhood theory. See, eg, Gray, above n 48, 295.

[110] Ryan, 'Utility and Ownership', above n 57, 175. There are a range of viewpoints and critical positions within natural law jurisprudence. An exposition is beyond the scope of this article. For a dissertation on the natural theories of property in modern jurisprudence, see Stephen Buckle, *Natural Law and the Theory of Property: Grotius to Hume* (1991).

[111] Gray, above n 48, 295; Macpherson, 'Liberal-Democracy and Property', above n 108, 201.

[112] Snare argues that 'property' in common usage means both the thing and the concept of ownership: Frank Snare, 'The Concept of Property' (1972) 9 *American Philosophical Quarterly* 200. For an alternate view, see Crawford Macpherson, 'The Meaning of Property' in Macpherson (ed), above n 108, 2

[113] Gray, above n 48, 295–6.

[114] Ibid 295–9. The evolution of shareholder values and expectations is discussed in Part III.

[115] Ibid 294.

[116] Ryan, *Property*, above n 107, 61–70. The arguments presented here draw predominantly from this scholarship.

[117] A share is an artifical construct. The *Corporations Law* provides for the registration of corporations limited by shares: 115(1)(a). A share is defined in s 9 as 'a share in the capital of a body, and includes stock except where a distinction between stock and shares is expressed or implied'.

as those discussed in Part I, must be viewed as ineffective in so far as they infringe proprietary rights. If so, the proprietary rights attaching to such shares remain intact, irrespective of procedures taken under these statutory provisions. Some natural law theorists would go so far as to say that owners of shares are not obliged to obey such laws.[118] It is hard to sustain this account of share ownership in the face of the modern regulation of share ownership, such as the express expropriation mechanisms in the *Corporations Law*, as discussed in Part I.

2 *Utilitarian Account*

Utilitarians view all legal rights as artificially created by (positive) laws, rather than deriving naturally. Utilitarians define property as a bundle of legal rights created by property laws which facilitate the use and exchange of a natural resource but which is not essentially connected with that resource.[119] They accept that newer laws can be used to modify, destroy or remove these rights altogether. The arguments presented in Part I fall within this paradigm. Shares are artificially created constructs. The legal doctrines of exclusivity, indefeasibility and voluntary alienability define the proprietary core of a share in a public corporation.[120] These doctrines regulate the use of many resources in society, in addition to shares. They neither arise from nor bear a direct connection with any particular resource or thing over which they apply. If the protection provided by these doctrines is removed, the proprietary nature of the underlying resources changes. In the case of shares in a public corporation, those protections can be removed under the provisions of the *Corporations Law* discussed in Part I.

3 *Labour Account*

The third account of property, informing the judgment of the High Court majority in *Gambotto,* is the hardest to sustain in relation to shares in modern public corporations. The High Court majority defined a share as a thing (an investment) conferring proprietary rights on a shareholder.[121] This interpretation reflects the conception of property as 'rights' in relation to a 'thing', drawing upon Locke's concept of property.[122] Locke justified the institution of property on the ground that it protected a person's labour invested in gathering or exploiting resources. A 'labour' account of the property in shares assumes a connection between the capital contribution of the investor (the personal effort of the investor) and the corporate enterprise in which the investment is made (the exploited resource). A direct connection between investor and resource reflects the historical derivation of most property forms. Investment in modern public corporations is indirect, except in the case of public share floats. Investors purchase a liquid investment, a capitalised dividend stream, which they can resell through the stock market. As Part III further explains, the derivative nature of their investment severs the

118 See, eg, Ryan, *Property*, above n 107, 62.
119 Ibid 117.
120 See above Part I(E).
121 *Gambotto* (1995) 182 CLR 432, 447 (Mason CJ, Brennan, Deane and Dawson JJ).
122 Macpherson, 'Liberal-Democracy and Property', above n 108, 201.

connection between investors and resource, thereby removing the foundation central to Locke's justification of property.

C *Presuppositions of Liberal-Utilitarian Analysis*

Spender argues that liberal-utilitarian analysis is suspect because it requires the assumption that corporations are populated by individuals rationally pursuing their own goals so as to maximize their personal utility levels.[123] Part I adopted a liberal-utilitarian framework for the purpose of arguing that the rights attaching to shares as property forms have been removed by statutory enactment. It does not promote any particular model of the public corporation, nor require any assumption that shareholders are 'atomistic rational maximisers'.[124] A utilitarian theory of property concerns itself with justifying the domination of the institution of property over other liberal rights in society. It justifies that domination on the ground that property is the most secure form of legal entitlement through which the law can promote socially desirable ends.[125] These ends include making people happy and secure so that they are induced to work productively and efficiently.[126] Other entitlement forms include rights deriving from contract and tort law. In comparison with other entitlement forms, property accords the owners of resources the most extensive rights which the law offers.[127] They enable individuals to appropriate, transfer and bequeath resources whilst also providing security and confidence to resource owners.[128]

D *Jurisprudential Influences in* Gambotto

Spender argues that the High Court in *Gambotto* adopted an associative model of share ownership, but it is not clear which aspects of the judgments she contends support this viewpoint.[129] This article takes issue with Spender's theoretical slant on *Gambotto*. Both judgments of the High Court reveal traces of liberal analysis. The judgment of McHugh J reveals elements of a liberal-utilitarian analysis as discussed in Part I. It is true that McHugh J expressed distrust in the sharemarket as a mechanism for determining the fair value of

123 Spender, above n 10, 126–7.

124 Part IV looks at one behavioural consequence of resolving majority-minority shareholder conflicts using property mechanisms.

125 The discussion of utilitarianism in this article draws from Benthamite scholars including Bentham and Ryan. See generally Jeremy Bentham in J H Burns and H L A Hart (eds), *An Introduction to the Principles of Morals and Legislation* (1970); Alan Ryan, *Property and Political Theory* (1984) 91–3.

126 Ryan, *Property and Political Theory*, above n 125, 91–3.

127 Ibid. Utilitarians accept that there are other legal entitlement forms which also promote general welfare, making it necessary to disentangle property from other entitlement forms. See Bentham, above n 125, 211–13. The seminal groundwork required for this task was undertaken by Hohfeld: see generally Wesley Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning and Other Legal Essays* (1923). For its application to property and liability entitlement forms, see Madeline Morris, 'The Structure of Entitlements' (1993) 78 *Cornell Law Review* 822.

128 Ryan, *Property*, above n 107, 53.

129 Spender, above n 10, 126ff. The writer assumes that Spender refers to the two judgments read as a whole.

shares.[130] However, distrust of the market does not constitute a rejection of the liberal-utilitarian account of either proprietary form of a share. At best, it indicates misgivings about a strict law and economics model of the corporation.[131] Traces of the labour theory of property evident in the judgment of the High Court majority in *Gambotto* were mentioned earlier in this part. It may well be that the majority had only a 'half-conscious' perception of their liberal premise but it is still evident in their judgment. Further support can be drawn from their acknowledgment that the right to vote is an incident of property exercised by a shareholder for personal advantage.[132] McHugh J acknowledged the influence of liberal philosophy when he explained that individual autonomy, freedom and equality justified the protection of share rights.[133]

E *Spender's Solution*

Spender argues that the author's approach in Part I focuses on the defeasible and fungible qualities of shares in public corporations at the expense of other qualities.[134] Rejecting any instrumentalist definition of property, Spender prefers Gray's definition of property as a power-relation constituted by legally sanctioned control over access to the benefits of excludable resources.[135] Spender relies on the eleven incidents of ownership identified by Honoré as determining characteristics of property.[136] She contends that shares in modern public corporations still possess most of these characteristics. They are: the rights to possess, use, manage and receive income, the rights to return of capital, security and transmissibility and absence of term, a prohibition against harmful use, liability to execution and residuary rights.[137] Honoré has acknowledged that only four of his eleven indicia are 'cardinal features': the rights to unrestricted use, to exclude, to alienate and to immunity from expropriation.[138] Honoré's cardinal features correspond with the rights of exclusivity, voluntary alienability and indefeasibility discussed in Part I.

On closer analysis, Honoré's account offers a similar interpretation of property laws in a modern legal system to the one presented by this article. It has two features in common with a liberal-utilitarian account of property. Both features are the subject of criticism by Spender in relation to the analysis presented in Part I of this article. First, Honoré's account has a liberal premise. It draws upon

130 *Gambotto* (1995) 182 CLR 432, 457–8. Spender points this out earlier in her article, above n 10, 106–8.

131 For criticism of those misgivings, see Whincop, 'An Economic Analysis of *Gambotto*', above n 10, 112–13.

132 *Gambotto* (1995) 182 CLR 432, 443.

133 Ibid 456.

134 Spender, above n 10, 115.

135 Ibid, citing Gray, above n 48, 295.

136 Honoré, 'Ownership', above n 107, 113. Honoré defines 'property' to mean both the thing owned and the concept of its ownership: at 128.

137 Ibid.

138 Ibid.

natural law theory supporting the liberal-democratic paradigm.[139] Secondly, it accepts implicitly that property is an instrument subject to government regulation. Honoré's indicia include some rights and obligations which might be said to derive naturally, such as the rights of use and management, as well as some created by laws, such as expropriation rights.[140] Honoré's writings suggest that modern property laws are to be viewed as artificial conventions which regulate the extent of natural ownership rights.[141] He accepted that because property laws regulate the extent of ownership, they may be able to remove ownership rights altogether. Honoré argued that a general (legal) power of expropriation is fatal to the institution of ownership, unless that power was vested in public or state authorities.[142] Part I of this article outlined the expropriation powers which exist in relation to shares in public corporations.[143] It appears then, that the criticisms made by Spender of the writer's approach in Part I must apply equally to the account of property offered by Honoré.

1 *Honoré's Indicia*

What is distinctive about Honoré's attempt is that it defines ownership as a set of benefits and burdens, not just benefits.[144] Commentators suggest that this wider conception of ownership comes at a cost. Eleftheriadis argues that it provides no clear means for separating the bundle of rights which are property from other rights protected by the legal system.[145] The indicia suggest that property defines all legal relations between people with respect to a particular thing. This conception of property has been challenged by utilitarian commentators.[146] They argue that people can relate and interact with 'things' without issues of ownership entering into the matter.[147] If this view holds, indicia of ownership need to explain what makes property unique compared with other legal rights. The author contends that the three unique features of property are those discussed in Part I.

Some aspects of Honoré's indicia are present in other entitlement forms besides property. For example, the right to exclude can be enjoyed under the rubric of both property and personal rights within contract law or tort law.[148] The prohibition against harmful use can be similarly enjoyed.[149] In a separate work, Honoré described two features which make property distinctive from other legal rights.[150]

139 Ryan, *Property*, above n 107, 61–2.
140 Honoré, 'Ownership', above n 107, 113, 119–20.
141 Ibid.
142 Ibid 119.
143 See above Part I(H).
144 Ryan, *Property*, above n 107, 53.
145 Paulos Eleftheriadis, 'The Analysis of Property Rights' (1996) 16 *Oxford Journal of Legal Studies* 31, 53; *contra* Ryan, *Property*, above n 107, 54
146 See, eg, Bentham, above n 125, 208–12; Eleftheriadis, above n 145; Hohfeld, above n 127; Morris, above n 127.
147 Ryan, *Property*, above n 107, 55.
148 Eleftheriadis, above n 145, 48–9. Cf Gray, above n 48, 294–5.
149 Ryan, *Property*, above n 107, 54.
150 A M Honoré, 'Rights of Exclusion and Immunities against Divesting' (1960) 34 *Tulane Law Review* 453, 456–9.

First, property rights impose duties on others generally, by virtue of membership of the community and the legal system.[151] Secondly, property rights correspond to duties of exclusion, not of positive performance.[152] Gray argues that it is the first of these two features which is the core of property.[153] However, neither seems to sufficiently explain the distinction between property rights and other rights protected by the legal system. The first feature, generality, does not provide adequate guidance for determining what is distinctive about property.[154] The second feature is not unique to property rights, as mentioned above.

2 *Spender's Analysis of Share Ownership*

Putting the flaws in Honoré's indicia aside, Spender's conclusion that shares have the character of property is still contentious.[155] Two further problems arise. First, because the *Corporations Law* provides a power of expropriation to majority shareholders, shares satisfy Honoré's indicia only in a fatally qualified way. Secondly, traditional proprietary rights no longer exist in the form described by Spender. As to the first issue, shares satisfy each of Honoré's indicia only if the operation of the expropriation provisions in the *Corporations Law* is ignored. In particular, expropriation powers qualify a minority shareholder's right to possession and power to exclude others, as well as the shareholder's powers of alienation and transfer. Defeasibility of shares coupled with the existence of expropriation mechanisms appears fatal to the proprietary form. Even Honoré concedes this. Honoré argues that property rights can continue to exist where the power of expropriation is vested in state or public authorities.[156] The power of expropriation in the *Corporations Law* is vested in majority shareholders, not government authorities.

As to the second issue, Spender acknowledges a decline in the rights of use and management attaching to shares but observes that shareholders still enjoy a right to income, arising from their capital being invested in the corporation.[157] These comments ignore the realities of modern corporate life. The relationship between corporate investor and corporation has undergone a fundamental change since the advent of the public corporation in the twentieth century. Rights to use, management and income no longer exist in the form described by Spender, as Part III now argues.

[151] Ibid 456.
[152] Ibid 458–9.
[153] Gray, above n 48, 294.
[154] Eleftheriadis, above n 145, 51–3.
[155] Spender, above n 10, 117.
[156] Honoré, 'Ownership', above n 107, 120.
[157] Spender, above n 10, 114.

III INVESTING IN PUBLIC CORPORATIONS

A *Origins*

Part III sketches the evolution of shareholder expectations and rights in modern public corporations. The analysis supports the conclusion that modern shares are best conceived of as capitalised dividend streams. After charting these changes, the writer will return to the definition of a share central to the judgment of the majority in *Gambotto* and suggest why that definition reflects investor expectations which have no place in modern public corporations.

The evolution of companies limited by shares provides a means of analysing the origins of corporate investor expectations. The initial grant of legal protection to shareholders transformed the expectations of early investors into legal entitlements.[158] The law relating to limited liability companies developed by analogy with the law relating to partnerships and unincorporated joint stock corporations.[159] Partners' expectations reflected their legal rights:[160] ownership, possession and control of the enterprise by collective agreement.[161] Dependence on collective agreement prevented the shares in a partnership from being transferred.[162] Beginning in the eighteenth century, large partnerships began to re-form themselves as unincorporated associations known as joint stock companies.[163] The characteristics of shares in partnerships were accorded to shares in joint stock companies and, in turn, to the modern limited liability company. One of the most important was to afford shareholders the same legal protection afforded to partners by partnership law. Shares became rights protected by property law.[164] A partnership was a proprietary interest in the assets of the partnership enterprise, but a share was a proprietary interest in the company, rather than its assets.[165] The characteristics of the joint stock company formed by contract, or under seal, have been transmitted to the limited liability company by the modern membership contract.[166]

158 Pennington, above n 51, 140.
159 Ibid.
160 Jennifer Hill, 'The Shareholder as Cerberus: Redefining the Shareholder's Role in Modern Australian Corporate Law' in Sam Ricketson (ed), *Fifth National Corporate Law Teachers' Conference* (1995) vol 1, 7
161 According to equitable doctrines, partners were beneficially entitled to the totality of the partnership assets with no ownership rights in respect of a particular asset Each partner had an equitable right to acquire the assets of the partnership to be properly administered for business purposes and in payment of debts on partnership dissolution· Pennington, above n 51, 141
162 This continues to be the case. *Partnership Act 1958* (Vic) s 36
163 Pennington, above n 51, 141.
164 Ibid
165 Ibid 142.
166 Ibid.

B *Changing Nature of Ownership*

The partnership model of the corporation quickly came to be regarded as removed from reality.[167] The twentieth century witnessed the growth of public corporations with extensive capital requirements. Their growth led to a diffusion of share ownership between a large number of investors, of whom no one investor or group of investors held a sufficient shareholding to control the corporation.[168] A partner still played an active role in management, while a shareholder of a public corporation had no part whatsoever in its management. Ownership of public company shares no longer carried the traditional incidents of partnership enterprises. The separation of ownership and control implied power to managers and impotence to shareholders.[169] Shareholder vulnerability caused corporate scholars to re-characterise the entitlements of shareholders as those of owner principals, for whom management powers were held in trust. The separation of ownership and control is regarded as the paradigm of the modern public corporation.[170]

The significance of shareholders becoming subservient to the will of the controlling group of managers is not a mere decline in their power to participate in corporate management.[171] Their power to participate in management has been lost altogether. Shareholders still have a right to vote but it is of diminished importance unless the shareholder is part of a majority group in the corporation.[172] A minority shareholder has the ability to express an opinion at a general meeting, but no one is bound to take notice of it. They can take legal proceedings against the corporation but the complexities and expense of doing so act as a deterrent. Spender argues that not every shareholder conforms to this model of shareholder passivity.[173] She observes that some investors strenuously exercise their right to vote and their power is greater when general meetings are conducted on a show of hands.[174] Yet, as the Coles Myer example cited by Spender showed, this problem is overcome with respect to contentious issues by conducting polls.[175]

American commentators suggest that the paradigm of separation of ownership and control in public corporations may require review due to the phenomenal

167 William Bratton, 'The New Economic Theory of the Firm: Critical Perspectives from History' (1989) 41 *Stanford Law Review* 1471, 1489; see generally Mark Roe, *Strong Managers, Weak Owners* (1994) 13.

168 Berle and Means, above n 3, 74–8.

169 Hill, above n 160, 10.

170 Some commentators argue that, except in the case of close corporations, shareholders never owned nor controlled corporations. See, eg, Walter Werner, 'Corporations Law in Search of Its Future' (1981) 81 *Columbia Law Review* 1611, 1612.

171 Cf Spender, above n 10, 114.

172 Berle and Means, above n 3, xix.

173 Spender, above n 10, 116.

174 Ibid 117.

175 Barrie Dunstan, 'Hard Lessons from Humiliation', *The Australian Financial Review* (Sydney), 22 November 1995, 30.

growth in institutional investment in public corporations.[176] The same may also be the case in Australia. A survey conducted in 1991 found that institutional investors' holdings in local equities was 36 per cent.[177] A share ownership survey conducted by the Australian Stock Exchange in 1994 found that the total incidence of direct investment in Australian corporations was only 12.8 per cent.[178] The growth in institutional investment renews interest in the question of shareholder participation in public corporations. There is already evidence of increased participation in corporate governance issues by institutional investors.[179] It remains unclear whether increased participation will renew traditional investor expectations in public corporations, contrary to the views previously discussed. United States commentators argue that there will be no overall change, because there are rarely sufficient economic incentives for participation by institutional shareholders other than as passive investors.[180] Stapledon argues that there are also legal and economic disincentives to institutional investor activism in Australia.[181]

C *Changing Nature of Investment*

A second shift in shareholder expectations arises from the changed role of shareholder investment in corporations.[182] Corporations began as groups of investors pooling their individual risk capital to carry on a business enterprise. Their position was analogous to a land owner, who clears and cultivates land and subsequently sells a product of that labour. Public corporations no longer rely exclusively on investor-supplied capital. Berle and Means have conjectured that approximately 60 per cent of a corporation's capital requirements is internally generated through product sales, 20 per cent is borrowed from banks and 20 per cent is acquired through the issue of a range of equities, including shares.[183] They concluded that because of this phenomenon, the public corporation, and not its shareholders, has become the legal owner of the capital collected.[184] If these views hold, then the doctrine of separate legal entity, which separates sharehold-

176 Mark Roe, 'A Political Theory of American Corporate Finance' (1991) 91 *Columbia Law Review* 10.

177 G P Stapledon, 'The Structure of Share Ownership and Control: The Potential for Institutional Investor Activism' (1995) 18 *University of New South Wales Law Journal* 250, 254.

178 Australian Stock Exchange Limited, *Australian Shareownership Survey 1994* (1995) 7.

179 John Hurst, 'Coles: The Pressure Mounts', *The Australian Financial Review* (Sydney), 29 September 1995, 1, 32; Stapledon, 'The Structure of Share Ownership and Control', above n 177; Ian Ramsay and Mark Blair, 'Ownership Concentration, Institutional Investment and Corporate Governance: An Empirical Investigation of 100 Australian Companies' (1993) 19 *Melbourne University Law Review* 153.

180 Bernard Black, 'Shareholder Passivity Re-Examined' (1990) 89 *Michigan Law Review* 520; Edward Rock, 'The Logic and (Uncertain) Significance of Institutional Shareholder Activism' (1991) 79 *Georgetown Law Journal* 445, 453–63.

181 Stapledon, *Institutional Shareholders and Corporate Governance*, above n 1, ch 10; Ramsay and Blair, above n 179.

182 Berle and Means, above n 3, xii–xxvii. The arguments presented in this section draw from this scholarship.

183 Ibid xv.

184 Ibid.

ers from the underlying corporate enterprise, is both a de facto and de jure reality in public corporations.[185]

Berle and Means argued that shares in public corporations remain desirable to investors despite the changing relationship between corporations and their shareholders.[186] Their desirability now arises from their liquidity. An investor knows that shares are capable of being converted into cash within a short time period. The beneficial interest embodied in a share in a corporation is the expectation that a portion of the corporation's profits will be declared as dividends. That portion no longer bears any relation to the shareholder's contribution to the corporate capital because the shareholder no longer makes a direct contribution. An investor, except in cases of new share issues, purchases a derivative investment. The price paid for the shares does not add to the capital or assets of the corporations whose shares are bought. The role of the stockmarket is to act as a mechanism for liquidity, no longer to allocate capital. The shareholder does not take a risk in a new or increased enterprise. The investment represents an estimate of the chance of the corporation's shares increasing in value. The market value given to the share depends on dividend expectations.[187] As Berle and Means observed:

> The contribution his [the investor's] purchase makes to anyone other than himself is the maintenance of liquidity for other shareholders who may wish to convert their holdings into cash. Clearly he cannot and does not intend to contribute managerial or entrepreneurial effort or service. ... Stockholders toil not, neither do they spin, to earn their reward. They are beneficiaries by position only.[188]

D *Revisiting the Proprietary Nature of Shares*

A shareholder in a modern public corporation is a purchaser of a fungible stream of income, who enters and exits the corporation through the stock market.[189] Investors' expectations have shifted from securing responsibility and control to acquiring income streams, capital growth and liquidity.[190] The definition of a share by the High Court majority in *Gambotto,* as a thing (an investment) conferring proprietary rights, is the product of a bygone regulatory era.[191] In Part II, the jurisprudential sub-text supporting this definition was explained.[192] The majority's definition is not descriptive of the derivative nature of modern investment.[193] Rather, it reflects values and assumptions akin to those underlying

185 Cf Spender, above n 10, 109–10.
186 Berle and Means, above n 3, xix.
187 Ibid; Macpherson, 'The Meaning of Property', above n 112, 8.
188 Berle and Means, above n 3, xxiii.
189 Macpherson, 'The Meaning of Property', above n 112, 8.
190 Ibid.
191 *Gambotto* (1995) 182 CLR 432, 447 (Mason CJ, Brennan, Deane and Dawson JJ)
192 See above Part II(D).
193 Macpherson, 'Liberal-Democracy and Property', above n 108, 199.

partnership arrangements, which continue to play a role in modern corporate life. In the words of Berle and Means:

> At the bottom is the physical property itself, still immobile, still there, still demanding the service of human beings, managers, and operators. Related to this is a set of tokens, passing from hand to hand, liquid to a degree, requiring little or no human attention, which attain actual value in exchange or market price only in part dependent upon the underlying property.[194]

IV FIGHTING THE TIDE OF MAJORITY RULE

A *Value Judgments, Assumptions and Justifications*

Most of this article has been concerned with defining what (if anything) constitutes the proprietary core of a share in a modern corporation. The debate on this question arose from the vexing discussion of the proprietary nature of a share in *Gambotto*. A close reading of that case suggests that the discussion of proprietary rights disguises the case's real message. *Gambotto* draws the 'contemporary' line beyond which majority shareholders cannot affect the rights of minority shareholders by alteration of corporate articles. That line reflects a value judgment that the majority shareholders in public corporations need to take greater account of minority shareholder interests.[195] Part IV explains why the High Court's endeavours in that regard are unlikely to be successful.

B *Value Judgments*

Both judgments in *Gambotto* reflect value judgments about the conduct of majority shareholders. The High Court majority stressed the need to prevent the expropriation of shares for the 'purpose of aggrandizing the majority'.[196] 'Aggrandizing' describes actions which increase the power, wealth or prestige of the majority shareholder.[197] Other comments portrayed the majority shareholders in WCP as acting for personal gain,[198] and for reasons of commercial expediency.[199] It did not help WCP's case that the main benefit flowing from the proposed expropriation was a taxation advantage.[200] The same characterisation of majority shareholders is evident, albeit in a more subtle form in the judgment of McHugh J.[201] The reverse characterisation applies by implication to minority shareholders. They are burdened, disempowered, uninformed and vulnerable to exploitation by majority shareholders. The greatest exploitation that minority

194 Berle and Means, above n 3, 250–1.
195 This view reflects the sentiments of Jacobs J in *Crumpton v Morrine Hall Pty Ltd* [1965] NSWR 240, 244.
196 (1995) 182 CLR 432, 445.
197 J Sykes (ed), *The Concise Oxford Dictionary of Current English* (1982).
198 *Gambotto* (1995) 182 CLR 432, 446.
199 Ibid 447.
200 Ibid 448.
201 Ibid 456.

shareholders suffer is the expropriation of their shares by the majority purely out of self-interest. Viewed in this light, the High Court's reformulation of the doctrine of fraud on the minority can be viewed as an attempt to re-draw the balance of power between majority and minority shareholders.

C *Shareholder Self-Interest*

Part I explained how the re-assertion of the proprietary nature of share entitlements is central to the High Court's reformulation of the doctrine of fraud on the minority. It is also central to the reason why the reformulated doctrine is unlikely to achieve its desired effect. The proprietary status of shares affords special privileges. An incident of property, such as the right to vote, may be enjoyed and exercised by shareholders for their own personal advantage.[202] Shareholders occupy no fiduciary position in the exercise of their right to vote. Of the right to vote, Jessel MR observed:

> There is, if I may say so, no obligation on a shareholder of a company to give his vote merely with a view to what other persons may consider the interests of the company at large. He has a right, if he thinks fit, to give his vote from motives or promptings of what he considers his own individual interest.[203]

The right to vote attaching to shares expressly permits and encourages majority shareholders to engage in behaviour promoting their own self-interest, the very behaviour abhorred by the High Court.[204] With one vote per share, the majority shareholder controls shareholder meetings of a public corporation. The minority must accept majority rule subject to restraint by the doctrine of fraud on the minority and the protections provided by the *Corporations Law*, discussed in Part I. Voting power also gives majority shareholders control of the board of directors and in turn, the company. The articles of association of a corporation typically vest management of a corporation in the board of directors.[205] The election of directors takes place at a general meeting of shareholders.[206] As the majority controls the general meeting, so too it controls the election of directors. The *Corporations Law* and the Listing Rules of the Australian Stock Exchange increase the number of management decisions for which approval of the general meeting is required.[207] This increases the power of the majority at general meeting.

202 Ibid

203 *Pender v Lushington* (1877) 6 Ch D 70, 75–6. The authors of *Ford's Principles of Corporations Law* imply that this is an extreme view of a shareholder's voting rights: Ford, Austin and Ramsay, above n 19, 485–6.

204 *Gambotto* (1995) 182 CLR 432

205 *Corporations Law*, sch 1, table A, reg 66(1).

206 *Corporations Law* s 225.

207 *Corporations Law* ss 172, 176, 190, 195, 197–9 and pt 3.2A; Australian Stock Exchange, *Listing Rules* 7.1, 7.2, 7.3, 7.4, 10, 11.1, 11.2, 11.3.

Judicial reluctance to intervene in general management and internal affairs of a corporation also facilitates majority rule. The rule in *Foss v Harbottle*[208] justifies a strong tradition in the courts against interference in corporate internal affairs on the basis that the corporation is the proper plaintiff to bring actions in relation to wrongs committed against it. The doctrine of fraud on the minority and s 260 of the *Corporations Law* are exceptions to that rule. Liberal interpretations of the exceptions to the rule against *Foss v Harbottle* were recently checked by a decision of the New South Wales Supreme Court, which casts doubt on the availability of the statutory exceptions to the proper plaintiff rule in certain cases.[209]

D *Majority–Minority Relations*

The High Court's reassertion of the proprietary nature of a share offers conflicting, not reassuring signals, for relations between minority and majority shareholders in public corporations. All shares, whether majority or minority, possess the same proprietary qualities and privileges. The High Court's analysis requires consideration be given to the minority's right to own, use and enjoy their shares as they wish, at the expense of the majority's rights. The majority's rights include the right to exercise their vote in their own self-interest. How can distinctions on the basis of majority self-interest be made, at least without acknowledging all self-interest? Is the minority shareholder not acting in self-interest by wanting to remain a shareholder of the company?[210]

McHugh J objected to the expropriation of shares on the ground that it interfered with the autonomy of minority shareholders.[211] Yet, majority shareholders enjoy the same rights of autonomy as minority shareholders. Proprietary rights simply do not provide a legitimate ground for discriminating between majority and minority share entitlements. They respond awkwardly to attempts to curtail conflicting interests and have the curious effect of encouraging minority shareholders to actively pursue their own interests, while sanctioning the majority for doing much the same. Further, they do not encourage a co-operative endeavour between the two groups. Rather, they reinforce the prevailing philosophy of self-interest and in turn, exacerbate the existing tensions between minority and majority shareholders.

208 *Foss v Harbottle* (1843) 2 Hare 461; 67 ER 189.

209 *Mesenberg v Cord Industrial Recruiters Pty Ltd* (1996) 19 ACSR 483 (Young J) ('*Mesenberg*') *Mesenberg* was not followed in the subsequent cases of *Airpeak Pty Ltd v Jetstream Aircraft* (1997) 23 ACSR 715 and *Emlen Pty Ltd v St Barbara Mines Ltd* (1997) 24 ACSR 303. For a critique of *Mesenberg* see Helen Bird, 'A Spanner in the Works The Impact of *Mesenberg v Cord Industrial Recruiters* on Enforcement Rights under the Corporations Law' (1997) 25 *Australian Business Law Review* 179.

210 Whincop, 'An Economic Analysis of *Gambotto*', above n 10, 105.

211 *Gambotto* (1995) 182 CLR 432, 456

E *Another Solution?*

How might corporate law force majorities to pay greater attention to minority interests generally? McHugh J pressed the need for the majority to act fairly in expropriating the shares of a minority.[212] He cited the leading United States case of *Weinberger v UOP, Inc*,[213] in support of this proposition. The obligation of fair dealing arises in the United States context because the majority shareholder owes a fiduciary obligation to minority shareholders in a merger transaction.[214] Perhaps the solution lies in the imposition of such a duty for expropriations in the Australian corporate context. A duty of loyalty may well force the desired conduct from majority shareholders. However, Finn suggests that fiduciary law is the antithesis of the self-interest philosophy promoted by property law doctrines. He argues that modern fiduciary law promotes a philosophy of welfarism.[215]

Other commentators have traversed fiduciary law, its application to US merger transactions or its possible application to the Australian corporate context.[216] The writer does not suggest that the concerns identified by the High Court would be completely solved by the imposition of a fiduciary duty on the majority in relation to expropriations of the minority. United States commentary reveals that such an approach is not without its problems.[217] It is interesting to speculate why McHugh J discounted a fiduciary duty between majority and minority shareholders in his judgment. These issues await further debate.

CONCLUSION

This critique has sought to expose some of the inconsistencies and contradictions which infect the values, assumptions and justifications relied upon to assert the proprietary nature of shares in modern public corporations. Part I explained why corporate shares are proprietary rights in name only. In Part II, the jurisprudential sub-text of the alternate approaches to defining property taken by this article, the High Court and Spender, were addressed. Part III contrasted the traditional values and expectations of shareholders in joint stock companies with those of minority shareholders in modern public corporations and Part IV questioned the success of the proprietary model as a mechanism for resolving conflicting interests between minority and majority shareholders in public corporations.

212 Ibid 457.

213 457 A2d 701 (Del, 1983).

214 Ibid.

215 Paul Finn, 'The Fiduciary Principle' in Timothy Youdan (ed), *Equity, Fiduciaries and Trusts* (1989) 1.

216 DeMott, above n 9; Mitchell, 'The US Approach', above n 9.

217 Victor Brudney and Marvin Chirlstein, 'A Restatement of Corporate Freezeouts' (1978) 87 *Yale Law Journal* 1354; Elliott Weiss, 'The Law of Take Out Mergers: A Historical Perspective' (1981) 56 *New York University Law Review* 624; Hideki Kanda and Saul Levmore, 'The Appraisal Remedy and the Goals of Corporate Law' (1985) 32 *University of California Los Angeles Law Review* 429; William Carney, 'The ALI's Corporate Governance Project: The Death of Property Rights?' (1993) 61 *George Washington Law Review* 898; Robert Thompson, 'Exit, Liquidity and Majority Rule: Appraisal's Role in Corporate Law' (1995) 84 *Georgetown Law Journal* 1, DeMott, above n 9; Mitchell, 'The US Approach', above n 9, 293–4.

Australian corporate law is in need of a touch of realism. It is time to recognise that a share in a modern public corporation is proprietary in name only. It has become a token valued by reference to the dividend stream it promises the token-holder. *Gambotto* does not stem this tide of decline. The High Court has not stopped share expropriations per se, but merely increased the checks and balances regulating them. Relationships between majority and minority shareholders may be the real concern of *Gambotto* but the case cannot be hailed as the saviour of minority shareholder rights. It has not radically altered the balance of power within corporate Australia. Rather it has reinforced existing tensions between majority and minority shareholders. It hints at the need for a change in the philosophy governing their relations but fails to implement one.