

Case Note

What's in a Name? History, Language and 'Preference Shares' in *Beck v Weinstock*

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Abstract

In *Beck v Weinstock*, the High Court considered the meaning of a 'preference share' under equivalent provisions of the *Companies Act 1961* (NSW) and the *Corporations Act 2001* (Cth). Rejecting a historical interpretation in favour of a more commercial approach, the Court held that private companies may issue preference shares even if they have not issued — and do not ever issue — any ordinary shares. Although unanimous in outcome, the High Court's three separate judgments contain striking differences in statutory interpretation and legal reasoning. This case note assesses the practical significance of these differences. Further, and more critically, it considers whether *Beck's* contrasting judgments might flow from fundamentally diverging assumptions as to what constitutes a modern corporation.

I Introduction

*Beck v Weinstock*¹ addresses a 'short, though difficult and significant, point of corporations law'.² Lacking a clear definition or prior authority, the High Court was required to consider the meaning of a 'preference share' under the *Companies Act 1961* (NSW) and equivalent provisions of the *Corporations Act 2001* (Cth). Rejecting a restrictive historical interpretation in favour of a more commercial approach, the Court held that private companies may issue preference shares even if they have not issued — and do not ever issue — any ordinary shares. In reaching this conclusion, the Court considered the variety of modern corporate architectures and emphasised the freedom of private companies to define their own capital and governance structures, subject to certain statutory safeguards.

Although unanimous in outcome, the High Court's three separate judgments contain striking differences in statutory interpretation and general legal reasoning. These fault lines can be traced through earlier phases of adjudication — at trial³ and in the Court of Appeal's split decision.⁴ This case note examines key

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¹ (2013) 297 ALR 21 ('*Beck*').

² As noted by Young JA in the earlier decision of the NSW Court of Appeal: *Weinstock v Beck* (2011) 252 FLR 462, 463 ('*Beck NSWCA*').

³ *Beck v Weinstock* (2010) 241 FLR 235 ('*Beck Trial*').

⁴ *Beck NSWCA* (2011) 252 FLR 462 (Handley AJA, Giles JA agreeing, Young JA dissenting).

differences and assesses their practical significance. Further, and more critically, it considers whether *Beck's* contrasting judgments might flow from fundamentally different assumptions as to what constitutes a modern corporation.⁵

II Background

A *Relevant Facts*

Beck stems from a complex, and extensively litigated,⁶ family dispute. Relevant events began with the incorporation of LW Furniture Consolidated (Aust) Pty Ltd ('LWF') in 1971. LWF was established by Leo Weinstock, who became a founding director along with his wife, Hedy Weinstock. LWF's articles set an authorised capital of \$20 000, divided into 20 000 shares of one dollar each. The articles specified 14 share classes, including four preferential classes: '5 "A" 5% Convertible Preference Shares, 5 "B" Redeemable Preference Shares, 10 "C" Redeemable Preference Shares, 10 "D" Redeemable Preference Shares.'⁷ The remaining classes 'E' to 'N' were each to contain 1997 'ordinary shares'.

The envisaged structure was never fully realised. Leo initially subscribed for four 'A' shares, with the fifth held on trust by a solicitor. Eight 'C' shares were issued to Hedy, and one each to Amiram Weinstock and Tamar Beck (the couple's children). Two 'D' shares were issued to a company associated with Amiram. No other shares of any class were ever issued. In the event of a general meeting, no-one would have been entitled to vote.

LWF's 'very odd'⁸ ownership structure — described as an incomplete Robertson scheme⁹ — was apparently designed to minimise the family's exposure to death and estate duties. Although the mechanism is unclear, it seems that Leo's controlling 'A' shares were intended to lapse prior to his death, so that their value would accrue to other shareholders rather than form part of the deceased estate.

Whether due to family tension or legal inattention, the scheme went awry. Leo died in 2003, without having converted his shares. Hedy died on 6 July 2004, while Leo's estate was being administered. On 29 July 2004, acting as the sole

⁵ For a thoughtful sketch of the different theoretical positions, see William T Allen, 'Our Schizophrenic Conception of the Business Corporation' (1992) 14 *Cardozo Law Review* 261. For a previous application of these theories to Australian case law, see: Jennifer Hill, 'Corporate Rights and Accountability — the Privilege against Self-Incrimination and the Implications of *Environment Protection Authority v Caltex Refining Co Pty Ltd*' (1994) 7 *Corporate and Business Law Journal* 127.

⁶ Including a related High Court case: *Weinstock v Beck* (2013) 297 ALR 1. See also: *Re Henley* [2013] NSWSC 975 (22 July 2013); *Beck v LW Furniture Consolidated (Aust) Pty Ltd* (2012) 265 FLR 60; *Beck v LW Furniture Consolidated (Aust) Pty Ltd* [2011] NSWSC 235 (1 April 2011).

⁷ As stated in art 3 of the company articles, extracted in *Beck* (2013) 297 ALR 21, 23 [4]. Note that the preference shares conferred priority rights to capital and dividends, but did not carry a right to vote or to participate in surplus profits. The specific rights and duties of the C shares are set out in art 30.4 of the company articles, extracted in *Beck Trial* (2010) 241 FLR 235, 236–7 [10].

⁸ *Beck NSWCA* (2011) 252 FLR 462, 466 [31] (Young JA).

⁹ *Ibid* 474 [106] (Handley AJA), referring to *Robertson v Federal Commissioner of Taxation* (1952) 86 CLR 463.

directors of LWF,¹⁰ Amiram and his wife Helen purported to redeem the eight ‘C’ shares held by Hedy’s estate, at one dollar per share. This action was financially significant, because the shares were potentially worth over \$7 million.¹¹ If left unredeemed, a significant portion of this value may have flowed to Tamar (now estranged from Amiram) through Hedy’s estate.

B Procedural History

Tamar challenged the validity of the share redemption in the New South Wales Supreme Court (Equity Division). She sought a declaration that Hedy’s eight ‘C’ shares were not validly defined as ‘preference shares’ under the *Corporations Act 2001* (Cth), and thus could not be redeemed.¹² Invoking legal history and public policy, Tamar submitted that preferential rights could not be granted — and would have no meaning — in the absence of ordinary shareholders. The respondents (Amiram, Helen and LWF) favoured a more literal and permissive interpretation.

Hamilton AJ upheld Tamar’s claim, declared the redemption void and ordered rectification of LWF’s register.¹³ His Honour relied on the ‘ingrained’¹⁴ principle that preference shareholders must enjoy some real preference and ‘juxtaposition’¹⁵ when compared with ordinary shareholders.

The trial decision was overturned in the Court of Appeal. The majority held that the ‘C’ shares were validly issued and redeemed.¹⁶ Taking a literal approach reminiscent of *Salomon’s Case*,¹⁷ their Honours saw no reason to import historical or policy limitations not expressly stated in the legislation. The majority also relied on a fine distinction between the formal conferral of preferential rights and the actual enjoyment of such rights. Since LWF’s articles permitted the issuing of new shares *at any time*, their Honours reasoned that the ‘C’ shares were properly classified due to their clear ‘potential’ rights over any future ordinary shareholders.¹⁸

Young JA delivered a strong dissent. Finding minimal relevant authority, his Honour returned to first principles and held that it ‘logically follow[ed]’¹⁹ that if a share is defined by its preferential rights over something else, then ‘that something else must actually exist’.²⁰ His Honour also reasoned that, since

¹⁰ The related High Court case of *Weinstock v Beck* (2013) 297 ALR 1 considers whether Amiram and Helen were formally or effectively directors of LWF (given certain omissions and procedural irregularities surrounding their appointment). Their status as directors was not at issue in the present case.

¹¹ As claimed by Tamar, but not admitted: *Beck NSWCA* (2011) 252 FLR 462, 464.

¹² The relevant parts of Tamar’s statement of claim are extracted in *Beck Trial* (2010) 241 FLR 235, 236 [2].

¹³ *Ibid* 240–1 [30]–[34].

¹⁴ *Ibid* 240 [28], citing R P Austin, I M Ramsay and H A J Ford, *Ford’s Principles of Corporations Law* (Butterworths, 14th ed, 2009).

¹⁵ *Ibid* 239 [26], applying *Re Capel Finance Ltd* (2005) 52 ACSR 601, 605 (Barrett J).

¹⁶ *Beck NSWCA* (2011) 252 FLR 462, 478 [146]–[148] (Handley AJA, Giles JA agreeing).

¹⁷ *Salomon v A Salomon & Co Ltd* [1897] AC 22.

¹⁸ *Beck NSWCA* (2011) 252 FLR 462, 478 [148]–[149].

¹⁹ *Ibid* 471 [75].

²⁰ *Ibid* 472 [83].

preference shares give the shareholder a ‘special privilege’ to reclaim their capital investment, it is ‘not surprising that strict conditions would be put on such shares’.²¹ In voicing these policy concerns, his Honour appeared to conceive of the corporation as a real ‘organic’ entity with public significance,²² rather than merely an atomistic agglomeration of private contracts.²³

Tamar Beck was granted leave to appeal to the High Court.²⁴ The matter was heard in November 2012. Judgment was delivered in May 2013. Although unanimous in dismissing the appeal, the High Court’s three separate judgments raised a number of interesting questions.

III Which Statute Applies, and How?

The *Beck* decision turned on the statutory definition of a ‘preference share’ and, more specifically, a ‘redeemable preference share’. To address this question, the Court first needed to determine which statute — or statutes — to apply. Remarkably, the three judgments varied in choosing the *Companies Act 1961* (NSW) (‘1961 Act’),²⁵ the *Corporations Act 2001* (Cth) (‘2001 Act’), or a combination of both.

The joint judgment (Hayne, Crennan and Kiefel JJ) focused on the *1961 Act*. Their Honours framed the relevant question as whether Hedy’s ‘C’ shares, *at the time of their issue*, were properly described as preference shares liable to be redeemed.²⁶ Their Honours viewed ss 61²⁷ and 66(1)²⁸ as granting LWF broad freedom to issue preference shares — in whatever desired form — with almost no explicit or implicit statutory restrictions and subject only to the company’s constitution.²⁹ This finding has interesting theoretical implications. In emphasising privately drafted articles as the key source of corporate governance, the majority appeared to regard the closely held corporation as a utilitarian, shareholder-centred ‘nexus of contracts’,³⁰ rather than an organic entity³¹ or a regulated ‘creature of statute’.³²

²¹ *Ibid* 473 [92].

²² See, eg, Morton J Horwitz, *The Transformation of American Law 1870–1960: The Crisis of Legal Orthodoxy* (Oxford University Press, 1992) 100–7. For a more vivid example of corporate personification, see *HL Bolton (Engineering) Co Ltd v TJ Graham and Sons Ltd* [1957] 1 QB 159, 172 (Lord Denning).

²³ See, eg, William W Bratton, ‘The “Nexus of Contracts” Corporation: A Critical Appraisal’ (1989) 74 *Cornell Law Review* 407.

²⁴ Transcript of Proceedings, *Beck v Weinstock* [2012] HCATrans 34 (10 February 2012).

²⁵ Excluded from application by the *Companies (Application of Laws) Act 1981* (NSW).

²⁶ *Beck* (2013) 297 ALR 21, 35–6 [59]–[60]. The 1971 date of issue was presumed by both parties: *Beck Trial* (2010) 241 FLR 235, 237 [13].

²⁷ *1961 Act* s 61(1) provided that a company may ‘if so authorised by its articles ... issue preference shares which are, or at the option of the company are liable to be redeemed.’

²⁸ *Ibid* s 66(1) required preferential class rights (relating to repayment of capital, dividends, voting and other such matters) to be specified in a company’s memorandum or articles.

²⁹ *Beck* (2013) 297 ALR 21, 36–7 [64], 38 [70]. For a rare (early) commentary on the constitutional ‘share contract’ as the primary source of a preference share’s legal attributes, see Richard M Buxbaum, ‘Preferred Stock — Law and Draftsmanship’ (1954) 42 *California Law Review* 243.

³⁰ See, eg, Bratton, above n 23; Melvin A Eisenberg, ‘The Conception that the Corporation is a Nexus of Contracts, and the Dual Nature of the Firm’ (1999) 24 *Journal of Corporation Law* 819. For the

French CJ took a subtly different approach, identifying *two* relevant dates: LWF's incorporation in 1971 (to which he applied the *1961 Act*) and the share redemption in 2004 (to which he applied the *2001 Act*). Like the joint judgment, French CJ viewed the *2001 Act* as establishing a 'generic' platform rather than constraining rules for preference shares.³³ His Honour held that s 254J of the *2001 Act* (requiring companies to redeem shares on the terms on which they are issued) was equally permissive.³⁴ However, unlike the joint judgment, French CJ justified these interpretations with reference to a more organic corporate model. By having regard to the overall arrangement of company capital and the variety of purposes for which it may be raised, his Honour appeared to consider preference shares as a public concern and as a device for shaping the overall corporate entity, rather than as a bare expression of the particular contract existing between LWF (the company) and Hedy (the individual shareholder).³⁵

In further contrast, Gageler J focused solely on the *2001 Act* and barely mentioned the *1961 Act*. His Honour identified the 'date of putative redemption' as the single relevant date, and framed the core issue as: 'whether those shares were on that date "redeemable preference shares" liable to redemption and cancellation by LWC under s 254J(1) of the 2001 Act'.³⁶

In distilling this question, Gageler J seems to have assumed that the 'C' shares were validly issued under earlier legislation. Alternatively, his Honour may have intended to judge the validity of share issuance according to current law rather than the law operating in 1971.

Despite his different (and, with respect, confusing) choice of statute, Gageler J shared the joint judgment's strongly 'contractual' approach to corporate theory. In finding that preference shares could exist independently of ordinary shares, his Honour emphasised: 'The rights attaching to preference shares under the company's constitution *take effect in contract* between the company and the holders of those preference shares immediately on issue.'³⁷

Gageler J held that LWF was free to grant such contractual rights at any time, even if such rights could not be fully enjoyed unless ordinary shares were issued.³⁸ This notion of 'potential' preferential rights (in contract) substantially reflects the majority's reasoning in the Court of Appeal.³⁹ It also constitutes the

origin of the phrase, see Michael C Jensen and William H Meckling, 'Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure' (1976) 3 *Journal of Financial Economics* 305.

³¹ Horwitz, above n 22, 100; Allen, above n 5, 264.

³² See, eg, Frank B Cross and Roger LeRoy Miller, *West's Legal Environment of Business: Text and Cases: Ethical, Regulatory, International and E-Commerce Issues* (Thomson, 6th ed, 2007) 430.

³³ *Beck* (2013) 297 ALR 21, 30–1 [35]–[36].

³⁴ *Ibid* 32 [41] quoting *2001 Act* s 254J(1).

³⁵ *Ibid* 30–1 [33]–[36].

³⁶ *Ibid* 40 [78].

³⁷ *Ibid* 42 [92] (emphasis added).

³⁸ *Ibid* 42 [91]–[92].

³⁹ Especially regarding the potential rights/actual enjoyment distinction (discussed in Part II B above): *Beck NSWCA* (2011) 252 FLR 462, 478 [148]–[149].

most direct challenge to Young JA's notion that preference and ordinary shares are intrinsically connected components of a cohesive corporate entity.

IV Does History Matter?

Whether focusing on the *1961 Act* or the *2001 Act*, each High Court judgment reached a core legal question on which there was minimal, conflicting authority. As judicially noted,⁴⁰ neither statute contained a substantive definition of 'preference share'. In searching for a workable construction, the Court had to decide whether to take account of the complex history of the Anglo-American corporate form (as Tamar submitted), or whether to confine its analysis to modern commerce and express statutory wording (as the respondents submitted). As indicated below, the polarity of the Court's answers to this question may foreshadow further judicial disputes over the relevance of historical analysis to modern statutory interpretation.

French CJ favoured a historical approach. Like Young JA in the Court of Appeal,⁴¹ his Honour embarked on a lengthy discussion of 18th–20th century practices and common law authorities, as a means of deciding whether ordinary shares were an essential pre-condition to preference shares. While acknowledging that preference shares were *originally* used as an emergency device to raise subsequent capital,⁴² French CJ noted a progressive widening in their use, to encompass a plurality of purposes and circumstances.⁴³ Given such variety, his Honour was unwilling to adopt a restrictive construction of s 66 of the *1961 Act* or s 245A of the *2001 Act*.⁴⁴ While noting that (superseded) English provisions once prohibited the issuance of redeemable shares without non-redeemable shares,⁴⁵ French CJ found no equivalent Australian authority, and held that longstanding historical concerns over the 'protection of the capital of a company' were adequately mitigated by existing provisions governing the circumstances of share redemption.⁴⁶

While reaching the same ultimate conclusion, the joint judgment took a different route to that of French CJ, stating:

Neither the legislative history concerning statutory provisions for redeemable preference shares nor any wider historical examination of the

⁴⁰ See, eg, *Beck Trial* (2010) 241 FLR 235, 238 [20] (Hamilton AJ); *Beck NSWCA* (2011) 252 FLR 462, 469–71 [56]–[75] (Young JA); *Beck* (2013) 297 ALR 21, 42 [89] (Gageler J).

⁴¹ Note, however, that Young JA's historical analysis led to a different conclusion: *Beck NSWCA* (2011) 252 FLR 462, 471 [75].

⁴² *Beck* (2013) 297 ALR 21, 27 [23] citing George Evans, *British Corporation Finance 1775–1850: A Study of Preference Shares* (John Hopkins Press, 1936) 150.

⁴³ Such as the raising of initial capital, the retirement of debt, and the distribution of control through voting rights: see *Beck* (2013) 297 ALR 21, 27–8 [24]–[27] citing, eg, Sir Francis Beaufort Palmer, *Conveyancing and other Forms and Precedents Relating to Companies* (Stevens, 1877) 252–9; *Re Floating Dock Co of St Thomas Ltd* [1895] 1 Ch 691 (Chitty J); *Rofe v Campbell* (1931) 45 CLR 82, 90.

⁴⁴ *Ibid* 29 [31].

⁴⁵ *Ibid* 30 [35] referring to *Companies Act 1981* (UK) c 62, s 45(2).

⁴⁶ *Ibid* 32 [42] citing *2001 Act* s 254K, which requires redemption to be funded out of profits or the proceeds of new shares issued for the purpose of redemption.

commercial use of preference shares as a means of raising capital sheds any light on the central issue in this appeal.⁴⁷

Their Honours construed the *1961 Act* as clearly empowering companies to define their own classes of preference shares, on their own constitutionally specified terms, leaving no space for extraneous historical limitations.⁴⁸

Gageler J was similarly emphatic in rejecting the relevance of corporate legal history, declaring:

Questions of contemporary corporate finance are not readily determined by implications drawn from practices of past centuries. Tamar's argument is to be rejected because it finds no toe-hold in the text of the 2001 Act.⁴⁹

In both the joint judgment of Hayne, Crennan and Kiefel JJ and in the judgment of Gageler J, there was a reluctance to imply restrictions based on historical concern for the 'maintenance of capital'. While admitting that a company comprised solely of 'redeemable' shares could theoretically be left with diminished share capital (or in the extreme case, with no shareholders whatsoever), their Honours regarded the existing matrix of statutory safeguards,⁵⁰ directors' duties⁵¹ and winding up procedures⁵² as sufficiently protective of creditors' and other investors' interests.

The ahistorical approach favoured by a clear majority of the Court has interesting implications. From a technical perspective, the joint judgment and Gageler J appear to have regarded the Acts' lack of prescriptive definitions as an *empowering* factor (creating a broad permissive basis for companies to 'contract' with shareholders), rather than a *restricting* factor (inviting the implication of further restrictions from corporate history and the common law). Overall, the judgments signify a robust commercial approach to interpretation and a reluctance unnecessarily to fetter creativity in corporate structuring.

For commercial practitioners and company directors, two points are immediately significant. First, while ASX-listed companies must always have ordinary shares, *Beck* grants private companies greater flexibility in defining their corporate structure. In cases where companies are created for very specific purposes, or are centred on precise social hierarchies or family groups, directors may wish to consider whether there are commercial or logistical advantages to issuing only preference shares. Second, if adopting such structures, companies must ensure that share redemptions are only funded through profits or the proceeds of a new share issue.⁵³

⁴⁷ Ibid 39 [74].

⁴⁸ Ibid.

⁴⁹ Ibid 40 [80].

⁵⁰ Ibid 36 [62] (Hayne, Crennan and Kiefel JJ, citing *1961 Act* ss 61(3), (5)), 43 [94] (Gageler J, citing *2001 Act* s 254K).

⁵¹ Ibid 39 [72] (Hayne, Crennan and Kiefel JJ).

⁵² Ibid 39 [72] (Hayne, Crennan and Kiefel JJ), 43 [93] (Gageler J, citing *2001 Act* s 461(1)(d)).

⁵³ *2001 Act* s 254K, as emphasised by French CJ in *Beck* (2013) 297 ALR 21, 32 [41].

V Conclusion

The *Beck* decision addresses a novel and interesting point of corporate law. The High Court's conclusion that preference shares can exist without ordinary shares is legally rational and commercially sensible, if, in some respects, counterintuitive. While unanimous in outcome, the Court's three separate judgments reveal latent tensions in statutory interpretation that are likely to resurface in future disputes regarding the *Corporations Act 2001* and other commercial legislation. As this case note illustrates, such developments and divergences are of significant interest to practitioners and commentators.

Although it has many useful aspects, the *Beck* decision also invites some critical remarks. While the High Court offered solid answers to the narrow issues pleaded on appeal, it arguably missed a valuable opportunity to comment on more fundamental questions of how shareholder rights actually operate in close family situations. Aside from initial fact summaries, the Court's reasons tended to be stated in the abstract, with little acknowledgment of the deep and complex family relationships that formed the bedrock of LWF and were crucial to understanding the broader dispute. The joint judgment and Gageler J, in particular, seemed to use a rational 'nexus of contracts' model to define the relations between Leo, Hedy, Tamar, Amiram and LWF. In several cases, a more organic view may have proved useful — for example, in order to comprehend how the company had functioned, in practice, for decades without voting rights, general meetings or properly appointed directors.

Finally, while this point was not argued, *Beck's* family relationships could conceivably have supported an 'unfair prejudice' claim under Part 2F.1 of the *2001 Act*.⁵⁴ Drawing an analogy to the equitable 'quasi-partnership' rights recognised in *Ebrahimi v Westbourne Galleries Ltd*,⁵⁵ Tamar might have argued that her sibling relationship with Amiram (and their shared position as heirs to their parents) had generated a 'legitimate expectation' that LWF's articles would not be used against her. Although such logic would not apply to commercial shareholders acting at arm's length, it might find traction in future scenarios where — as in *Beck* — the family unit and the corporate form are virtually co-extensive.

⁵⁴ *2001 Act* ss 232–5, as applied in *Wayde v New South Wales Rugby League Ltd* (1985) 180 CLR 459, 468–72. For a more recent commentary, see Matthew Berkahn, 'Unfair Prejudice: Who Has It Right, Economically Speaking?' (2008) 1 *Journal of the Australasian Law Teachers Association* 55, 58–9.

⁵⁵ *Ebrahimi v Westbourne Galleries Ltd* [1973] AC 360 (in which the House of Lords held the breakdown of a relationship of trust and confidence to be just and equitable grounds for winding up the company).