the company had been formed and the shareholders' liability was limited to the par value of their shares. Whilst the six may have been trustees for Mr Salomon, as it was their names which stood upon the register, they were, for the purposes of the Act and the company, subscribers.

The growth in use of nominees was assisted by the effect of the concept of separate legal personality combined with non-recognition of trusts. The law would not look behind a registered legal owner to identify any beneficial interest. Through the development of these principles, use of nominees for secrecy or concealment became more attractive. Firstly, a company was not to take notice of a trust and thus its existence could not be easily determined. Secondly, even where a trust relationship could be determined, the nature of that relationship was irrelevant for the purposes of company law. It would take a number of years before exceptions to such principles were created to assist in identification of controllers of securities.[22]

DIFFERING USES OF NOMINEES

There are a number of different types of nominees, the most common form being a proprietary company. Generally speaking, there are five reasons for using nominee companies.[23]

(1) As Subsidiaries of Banking or Financial Institutions

Subsidiaries of banking or financial institutions can operate in two spheres: one being to hold the financial institution's own investments, or as a trustee of investment trusts, and the other to hold shares on behalf of a beneficial owner. There has been substantial growth in this form of nominee shareholder. As Farrar and Russell described it:

> The greatest change has occurred since 1945 with the increased volume of contractual savings mainly in the hands of insurance companies and pension funds.... It has been estimated that combined institutional investors increased their equity market share from 17.9% in 1957 to 54.1% in 1981 and are acquiring about 2% of the United Kingdom equity market each year. They represent about half of all equity trading. It is estimated that they will hold 69–84% by the year 2000.[24]

22 The creation of these exceptions is discussed in chapter two.

23 There may well be others but, for the purposes of this book, these are the most relevant. For a more extensive review see Blue, 'Nominee Shareholders' (1973–76) 5 *Adel LR* 188.

24 See Farrar and Russell, 'The Impact of Instiututional Investment on Company Law' (1984) 5 *Co Law* 107.

This dramatic growth is due to the ability of these organisations to undertake management activities required by the beneficiary. These nominees may be used by other financial institutions, in particular, overseas institutions. These institutions are aware that they can participate solely as investors, and not as shareholders with an interest in ongoing activities of companies.[25] As these institutions may be involved in hundreds, if not thousands, of investment transactions on a weekly basis, it is not appropriate for them to receive documentation and reports on a company. Indeed, they would rather not receive such information so that need for administrative convenience has replaced direct holding by these institutions.

The other side to use of nominees by financial institutions is most likely to be tax-driven, particularly if investment is not their main area of business.[26] For example, whilst investment in securities is a substantial area of activities for banks, banking would be said to be their main area of business. To localise the investment nature of their business, separate companies, nominees, are formed. In addition though, these nominees will hold large numbers of securities.[27] Often individual nominee companies hold as much as 5 or 6% of the total issued capital of a corporation.[28] This makes it possible for a person to use a nominee to hold up to 1 or 2% of shares without this being reflected in a noticeable change to a company's share register.

It is important also to note the comment by Farrar and Russell on the effect of the size of the holdings in the market place:

> The increasing use of financial institutions as intermediaries, however, is having the effect of regrouping diverse holdings so that in some companies single institutions are, if not controlling shareholders, at least substantial minority shareholders. In many quoted companies, institutions in the aggregate hold legal or de facto control.... Adolf Berle Jr in subsequent writings drew attention to the phenomenon of institutional investment and the power which it created.[29]

For example, if a nominee company, A Ltd, did not hold any shares in company X as at 1 June, but increased its holding to say 4.9% by 1 December, such a movement of shares to A Ltd would, doubtless,

25 Indeed, it would be unusual for these institutions to become involved in the activities of the company.

26 Farrar and Russell, 'The Impact of Institutional Investment on Company Law' (1984) 5 *Co Law* 107 at 108.

27 Farrar and Russell, 'The Impact of Institutional Investment on Company Law' (1984) 5 *Co Law* 107.

28 See Farrar, Furey and Hannigan *Farrar's Company Law*, at 576–82: Nyman and Silberston, 'The Ownership and Control in Industry' (1978) 30 *Oxford Economic Papers* 74.

29 Farrar and Russell 'The Impact of Institutional Investment on Company Law' (1984) 5 *Co Law* 107. The validity of these comments is demonstrated in the tables represented on pp 29–30.

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that the use of nominee shareholders has significantly increased. Nearly 35% of all issued shares of the relevant companies held by the top twenty shareholders were held by nominee shareholders.[67]

Whilst it is not possible to identify particular instances of use for an improper purpose,[68] there is evidence that these exist. Many of the holdings set out in the list in Table 1[69] are those of superannuation funds or insurance companies. Those holdings represent an important investment for a large part of the Australian community. The increase in the holdings of corporate nominees reduces the possibility that the improper use will be discovered, whilst increasing the need for an informed market to protect investors.

In Hong Kong the emergence of the family 'firm' into a listed company spawned the dramatic corporate growth of the sixties through to the most recent times. It has also had a dramatic effect on the shareholding structure of the listed company. Whilst on the one hand, this has resulted in less takeover activity, it can be imagined that it has also resulted in a greater number of instances of market manipulation or insider dealing. It has also had the somewhat curious effect of leading a call for the abolition of laws on market manipulation and insider dealing. These arise out of the fact that the market strength of some of the market's major players is so significant, that almost any move on their part will have some effect on the market.

However, the increasing importance of international institutional investors has changed the approach to regulation as these investors are clearly interested in maintaining a 'clean' market. By way of contrast though, the very fact that these investors have joined the market has probably increased the need for regulation as they now hold substantial numbers of shares.

Examples of Concealment: Re North Broken Hill Holdings Ltd[70]

This was an Australian case which dealt with use of nominees to conceal the identity of the real owner. It concerned a notice of motion by North Broken Hill Holdings Ltd (NBH) pursuant to s 261A(1) of the (Aus) Companies Code (Vic). The motion sought orders that a number of fully and partly paid shares be vested in the National Companies and Securities Commission (NCSC) and that, among other

67 This is in line with American increases.

68 For a number of reasons, there is simply no way to import the UK statistics on improper use into the Australian surveys. In the first instance, there is no information as to how the clearing banks identified these holdings as being for concealment and secondly, it would be inappropriate to directly apply statistics from a different securities market.

69 At pp 19–20.

70 (1987) 10 ACLR 270, SC (Vic).

matters, the NCSC should sell the shares. The ultimate beneficial interest was held by Crosley Ltd (Crosley).

Crosley was incorporated in the Cook Islands. It was a wholly owned subsidiary of Tabali Pty Ltd which was, in turn, a wholly owned subsidiary of Industrial Equity Ltd (IEL). IEL had established an elaborate system of nominee companies to prevent identification of its interest. The case is analysed in more detail in chapter four. However, the comments of Fullagar J are relevant to discussion on the need for disclosure. His Honour said:

> IEL went to a very great deal of trouble and expense to conceal matters from NBH and its shareholders, and thus from the stock market generally. (The Court) is not ready to presume that IEL did so for reasons other than that of substantial profit or gain or advantage to itself. Its intention in the end is likely to have been to buy NBH shares for less than their intrinsically and potential worth, or to sell them later on for more than present price or both. If its identity had been disclosed to the market generally, people in the market would have divined these intentions at once and without difficulty, and they would have thereupon become materially informed dealers and potential dealers in the shares coveted by IEL instead of being materially uninformed.[71]

It is clear that Fullagar J regarded the behaviour of IEL as improper. The elaborate arrangements were intended to profit IEL at the expense of other investors. This profit was obtained through ignorance of the market as to IEL's identity. The behaviour was improper because it was intended to misinform the market as to the identity of the purchaser of the shares. The potential to mislead which arises out of improper use of nominees confirms the need for disclosure. Moreover, this improper use could not have been discovered without the tracing provisions, a fact which would reinforce the argument for regulation.

Warehousing

Warehousing occurs where a number of parties act in undisclosed concert to each acquire an interest in shares of a company. The acquisition of the shares is made through nominees. Each of the separate interests acquired is below the threshold level for mandatory disclosure of holdings. The aim of parties may be either to influence a company's policy or, alternatively, to build up a substantial holding in a company prior to making a takeover bid. In 1973, the United Kingdom Department of Trade and Industry published a report on company law reform (the Board of Trade Report)[72] which identified the following ways by which warehousing could be reduced:

71 Ibid at 303.

72 The Department of Trade and Industry, Company Law Reform, Cmnd 5391 of 1973.

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thereafter acquiring control of the company'. The expression 'capable of being controlled', it was argued, was satisfied by 'a possibility or a potentiality of being controlled', and did not 'require an existing amenability to control'.[119] This, it was argued, arose out of an historical analysis of the provision.

Under the earlier provisions, a company was deemed to be under the control of any persons where 'the majority of the shares was held by those persons or nominees of those persons, or where control was, by any other means whatever, in the hands of those persons'.[120] These words had been considered by the High Court in *Adelaide Motors Ltd v FCT*[121] and *FCT v West Australian Tanners & Fellmongers Ltd*.[122] The High Court had held that the words applied where a group held the major portion of the voting power of a company or the majority of the shares. In addition, the Court had required an 'actual control of the company'. Such control was only present when one group held the major portion of the voting power or the majority of the shares.[123] In 1948, the Act was amended so as to remove the need for actual control.[124] Further amendments in 1951[125] and in 1952[126] led to a 'fuller development' of the section.[127] The High Court was not, however, prepared to accept the Commissioner's argument:

> The truth is that 'capable of being controlled' connotes the existence of either one person whose enforceable and immediately exercisable rights enable him to control, or a number of persons whose enforceable and immediately exercisable rights enable them, if they act in concert, to control.'[128]

The concept of control referred to by the High Court was the ability to exercise the power over the majority of voting shares.[129] The view of the High Court was supported by the decision of Taylor J in *Adelaide Stevedoring Co Ltd v FCT*.[130] Taylor J distinguished the more limited decisions of the High Court in *Adelaide Motors Ltd v*

119 Ibid.
120 Ibid at 86.
121 (1942) 66 CLR 436, HCA.
122 (1945) 70 CLR 623, HCA.
123 Ibid at 630.
124 (Aus) Income Tax and Social Services Contribution Assessment Act (Cth) 1936–1948 (No 44 of 1948).
125 (Aus) Income Tax and Social Services Contribution Assessment Act (Cth) 1936–1951 (No 44 of 1951).
126 As above fn 114.
127 As above fn 115 at 87.
128 Ibid.
129 Ibid.
130 (1961) 106 CLR 658, HCA.

FCT[131] and *FCT v West Australian Tanners & Fellmongers Ltd*.[132] The *Himley Estates case*[133] was cited by counsel for the Commissioner but the court did make reference to it.

These cases demonstrate the difficulty faced by both the legislature, and the courts, when dealing with the concept of control. The courts were uncomfortable with the wide language necessary to cover many types of control. The legislature, conscious of attempts to avoid the provisions, resorted to even wider language. However, the experience which had been obtained from the national security and revenue legislation, must have greatly benefited drafters of the legislation which sought to obtain disclosure of the identity of company controllers.

Control by the Board of Directors and Control Over Subsidiaries

At the time of the Cohen Committee, there was both legislation and case law on the question of control. The case law indicated that:

(a) control was linked to power to control voting shares;[134]
(b) the power to control voting shares need only be a bare majority;[135]
(c) interests were not to be disregarded simply because they were beneficial and not legal;[136]
(d) control was linked to the control by the board of directors over the company's activities;[137]
(e) control included power to appoint or remove directors of a company;[138]
(f) the ability to exercise control could be direct or indirect.[139]

The Cohen Committee did not rely so heavily on the concept of control as it did on beneficial ownership.[140] It did, however, make reference to control in relation to: (i) the question of when a company

131 As above fn 121.
132 As above fn 122.
133 As above fn 107.
134 *CIR v Bibby* [1945] 1 All ER 667, HL; *British American Tobacco v CIR* [1943] AC 335, HL.
135 Ibid. This was also the view taken by courts in respect of the nature of control required to come under the 'fifth' exception to the rule in *Foss v Harbottle* (1843) 2 Hare 461. See Ford and Austin *Principles of Company Law* (6th edn, 1992) Butterworths para 1733, p 619.
136 Ibid.
137 *Daimler Co Ltd v Continental Tyre and Rubber* [1916] 2 AC 307 at 339–40 per Lord Parker, HL.
138 Ibid.
139 *CIR v LB (Holdings)* (1946) 175 LT 54, HL; *CIR v Tring Investments* [1939] 2 All ER 105, HL.
140 As above fn 4 at pp 39–43.

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purposes not be inconvenienced, that illegitimate purposes were to be allowed, in relative terms, to continue unimpeded. This dilemma still exists. It should be noted that there is, and was, no suggestion that these legitimate uses would ever be eliminated. The fact that the major proportion of users of the service used it for legitimate purposes, indicates that they would continue to use it even if the legislation were amended.

'Ownership'

The banks suggested that difficulties would arise out of legislation designed to require disclosure of beneficial ownership.[173] Any legislation designed to reveal true 'ownership' would need to take into account underlying interests. As such, how would it deal with interest of life tenants, joint holders and beneficiaries under a will? In addition, they argued that it was doubtful whether any scheme could be effective unless 'agreements, oral arrangements, and even mere understandings between individuals are brought within its ambit'.[174] They complained of the complexity and ramifications resulting from an attempt to cover such agreements, arrangements or understandings. Such a legislative scheme is, of course, now in place in Division 1 of the (Aus) Corporations Law.

The stumbling block in introducing any scheme, the banks argued, was the inability to adequately define 'ownership'. For example, a mortgage normally carries with it the right of the mortgagee to exercise voting rights. Depending on the definition of owner and beneficial owner both the mortgagor and mortgagee could be treated as owner. If a mortgagor is not to be treated as the owner, then the provisions of any scheme could be easily evaded. This would be done by the mortgagor mortgaging its shares for a purely nominal sum. It could also be evaded by the owner transferring the shares to a nominee for a consideration which would not be paid but would be secured by a mortgage of the shares.

However, disclosure of both mortgagor and mortgagee identifies an absence of control over the shares by the registered owner. Moreover, the significance attached to the descriptive terms of 'owner' and 'beneficial owner' is minor. The law relating to disclosure would not impute a greater legal right to the shares merely because of the terms of ownership used. It identifies those who can control shares. The purpose of the legislation was served by the information being made public.

173 As above fn 165.
174 Ibid.

The banks referred to the administrative difficulties of ascertaining if a person had sufficient shares to trigger the disclosure requirements. The concern was that the banks may find themselves in breach of the Act because they were not able to aggregate a person's holdings. For them to be in a position to do so, they would have to make investigations of their own to determine the client's holding. However, it should be recognised that the banks acted as nominees on a commercial basis. They could have implemented the necessary procedures for the computation of holdings and charged for any additional administration expense incurred. In the case of an individual shareholder, it is inconceivable that, having reached a level of shareholding which required disclosure, and used such large sums of money as would be necessary, the owner would not be aware of its holding.

Perhaps out of self interest, the banks also suggested that penalties for non-compliance should not be too severe. The complexity involved in the provisions was the touted justification for leniency.[175] This submission was not accepted. The banks' final submission was that there was no reason why the (UK) Companies Act 1948 ss 172–5 should be amended. The banks believed that it was:

> ... impossible to formulate any scheme which could be made intelligible to the man in the street, watertight to catch the person who is prepared to practise deliberate evasion, and which would not inflict upon companies and the public a vast amount of work out of all proportion to any practical beneficial result likely to be achieved.[176]

The Board of Trade's Investigative Powers

The argument for enactment of disclosure provisions was further supported by failure of the Board of Trade to use the investigatory powers to identify share ownership. Following the recommendation of the Cohen Committee, the Board of Trade[177] was given a number of specific powers of investigation into ownership of shares in a company. The investigation could have taken place in one of two circumstances:

(a) if it appeared that there was good reason to do so;[178] and
(b) if a certain number of the shareholders had applied to the Board and the application was not vexatious.[179]

175 By virtue of there being an increased possibility of innocent breach.
176 As above fn 165.
177 In Australia, for example, this role was filled by an Inspector under s 168 of the Companies Act (Vic). The power to appoint an inspector rested in the Minister. See chapter four for a more detailed discussion.
178 S 172(1); see also discussion of the Cohen Committee on pp 26–8.
179 S 172(3); see also discussion at pp 26–8.

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Hong Kong has never been particularly proactive in its approach to legislation. Generally, the relevant authorities[228] have been content to follow legislation in the United Kingdom although some time after the United Kingdom legislation was enacted.[229] The crash of the securities market in Hong Kong in 1987 and its chaotic aftermath forced the Hong Kong authorities to review the Hong Kong regulatory position. The Securities Review Committee (the Hay Davidson Committee) was established under the chairmanship of Ian Hay-Davidson. The Hay Davidson report called for sweeping changes to the securities markets in Hong Kong. In particular, the report called for a restructuring of the office of the Commissioner of Securities Trading. The result was the establishment of the Securities and Futures Commission (the SFC). Since the creation of the SFC there has been a significant amount of activity by both regulators and the legislature alike. In the first instance, the (HK) Securities (Disclosure of Interests) Ordinance was enacted in 1988. However, the provisions of that Ordinance (which is discussed in more detail in chapter 5) were amended by the (HK) Securities (Disclosure of Interests) Ordinance 1991. In addition, amendments were made to the (HK) Securities Ordinance and a new enactment was created, the (HK) Securities and Futures Commission Ordinance.

THE AUSTRALIAN LEGISLATION

The amendments to the (UK) Companies Act 1948 were not adopted by Australian states for some time, although each of the states had its own Companies Act[230] which reflected the substance of most British company law reform. For this reason, the preceding parts of the book have dealt mostly with the UK legislation. In the absence of a uniform approach to company legislation in Australia, the UK legislation represented in many ways, the collective Australian approach to company law reform.

The provisions relating to substantial shareholders were only adopted in Australia following discussion of the topic by the Eggleston Committee on Law Reform.[231] It is hardly surprising, though, that Australian legislators should rely so greatly on advances to the law from England. The market for commercial securities in the city of London was one

228 That is the Legislation Council.
229 See, for example, the Companies Ordinance.
230 And their own Law Reform Commissions.
231 Standing Committee of State and Commonwealth Attorney-Generals (Aust), Company Law Advisory Committee, Interim Report No 2 on Disclosure of Substantial Shareholders and Take-overs (1969).

of the world's largest and most sophisticated. As a consequence, issues relating to reform and possible abuse of otherwise legitimate legal mechanisms would arise earlier where the commercial benefit would be the greatest.

Substantial Shareholders

Substantial shareholders provisions were first enacted[232] in the (Aus) Uniform Companies Acts (UCA).[233] The provisions only applied to listed securities and this was a specific recommendation of the Eggleston Committee.[234] The provisions[235] came into operation when the holding of the substantial shareholder reached 10%.

The Company's Role: Keeping Registers and Tracing Provisions

As the substantial shareholders provisions only operated once an interest reached 10%, a new investigative provision was needed to monitor those substantial holdings of shares which constituted less than 10%. This new provision would, for the first time, use companies to help identify beneficial owners of their shares.

The trend, towards such matters being the responsibility of a company, emerged with the requirement to keep registers. Initially, it was the Register of Directors Holdings in 1943 and, later, the Register of Substantial Holdings.[236] This focus on a company's role represented a subtle, yet, important change in thinking. Disclosure was to ensure that the public was informed as to who controlled shares in public companies. Giving the power to investigate, to companies, created the possibility of manipulation.[237] This arose because the notices a company was entitled to send, could be used to identify potential takeover bids.[238]

Under the provisions, a company was entitled to investigate the beneficial ownership of certain of its shares. Used improperly, this device placed valuable information in the hands of incumbent directors who were hostile to any takeover offer.[239]

232 Following the Eggleston Committee's recommendations; see the more detailed discussion of the historical basis of the substantial shareholding provisions, including the provisions in the NSW Companies Act, in chapter three at p 58.
233 (Aus) Companies Act 1971.
234 As above fn 231.
235 As above fn 233, ss 136–44.
236 As above fn 199.
237 For what would, in itself, be an improper purpose.
238 See (1992) ASC Policy Statement 28: 'Power to Obtain Information-Beneficial Ownership of Company Shares'.
239 Note there is no penalty for vexatious or improper use of notices.

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opposition and was not adopted. Following the report of the Jenkins Committee,[5] and as a consequence of the success of the register of directors' holdings,[6] the provisions relating to substantial shareholdings were enacted in the United Kingdom in 1967.[7]

In Australia, provisions relating to substantial shareholders were enacted in 1971,[8] based primarily on recommendations of the Eggleston Committee.[9] The provisions have remained in substantially the same form. The concept of 'relevant interest' was first introduced in New South Wales[10] on the recommendation of the legal committee of the New South Wales Legislative Council.[11]

The provisions suggested by the Eggleston Committee, however, were based on those contained in ss 28 and 33 of the (UK) Companies Act 1967[12] which were, in turn, derived from recommendations of the Jenkins Committee.[13]

The scope of the substantial shareholder provisions has been expanded by the introduction of the concept of the 'associate'. Under this concept, the holdings of any one individual or corporation will be added to those of its associates. The essential element of an association is a relationship between associates to exercise control over voting shares,[14] whether together or, in concert with others. This is one of the features of the provisions relating to relevant interests and associates: the apparent similarity between the types of relationship identified by the provisions and the occasional overlap between them, as a consequence of which one of the concepts may appear irrelevant.

The combination of these concepts is the basis upon which the substantial shareholder provisions operate.[15] The concepts were introduced to broaden the scope of the disclosure provisions[16] and thereby reduce the possibility of avoidance. Together they are important, not merely

5 Great Britain, The Committee on Company Law Reform, Cmnd 1749 of 1962.
6 Ibid at paras 88 and 91, 141–7.
7 In the (UK) Companies Act 1967 (c 81).
8 In the (Aus) Companies Act (NSW) 1961.
9 Standing Committee of State and Commonwealth Attorney-Generals (Aus), Company Law Advisory Committee, 'Interim Report No 2 on Disclosure of Substantial Shareholders and Take-overs (1969)'.
10 As s 6A of the (NSW) Companies Act 1961, NSW Act No 61, 1971, s 3(c).
11 It is said that the drafts were apparently 'with the concurrence' of Mr Justice Eggleston: see Fuller, NSW Legislative Council, Parliamentary Debates, 29 September 1971, p 1569. For a more thorough discussion of the legislative history of the NSW provisions see Hartnell, 'Relevant Interests: "Control" in the Eighties' (1988) 6 C & *SLJ* 169.
12 As above fn 7.
13 As above fn 5.
14 This includes the control over the disposition of the voting shares.
15 *TVW Enterprises v Queensland Press & Ors* (1983) 1 ACLC 874, SC (Qld).
16 The reason for aggregating relevant interests of the primary person and his or her associates is to deal with the practice of warehousing: see Ford and Austin *Principles of Company Law* (6th edn, 1992) Butterworths para 2017 at p 712.

to the substantial shareholder provisions, but also to the takeover provisions found in the (Aus) Corporations Law.

This feature was discussed by O'Bryan J in *TVW Enterprises v Queensland Press & Ors*[17] the first case on the substantial shareholder provisions when the court said:

> The definitions of 'relevant interest' and 'associate' in the Companies Code are very wide and comprehend a variety of arrangements in the context of the 'Substantial Shareholding' provisions in the Code (Pt IV Div 4).
>
> The Substantial Shareholding provisions were introduced to deal with the mischief disclosed by the Eggleston Committee. The provisions are obviously designed to safeguard a prospective investor, shareholders and employees in a company by requiring persons who might have the capacity to control the destiny of the company to give notice of that fact.[18]

The substantial shareholder provisions are, themselves, schematically organised and the information to be disclosed by a substantial shareholder is the last part of the process established by the scheme. Two issues arise:

(i) whether the process is too complex and difficult to be carried through; and
(ii) whether the information disclosed at the end of the process is practically useful in any event.

To determine whether the process is too complex requires an analysis of the terms 'associate' and 'relevant interest', as well as the way in which the courts have interpreted them.

'ASSOCIATE'

The legislation is very widely drafted to identify the number of forms which the exercise of control may take. Many of the relationships covered may, as a consequence, seem innocuous or trivial.[19] The inconvenience of an obligation to report such relationships caused in certain circumstances is outweighed by the possibility that a form of control will otherwise go undetected.

Some associations may arise by virtue of a person's office within a corporation[20] whereas others may be through the operation of some external factor, such as an agreement or an arrangement to create a relation.[21] This chapter will examine, in some detail, the ways in which an association will arise.

17 (1983) 1 ACLC 874, SC (Qld).
18 Ibid at 884.
19 This was the point of the London Committee of Clearing Banks in their submission to the Jenkins Committee see pp 45–7.
20 S 11.
21 S 9.

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for such silence is the fact that those persons who participate in the activities regulated by the Code rarely would be expected not to have such 'professional advertence'.

It has even been suggested that prospective purchasers of shares 'may seek and gain information, even indications, which assist their strategies and decisions' without necessarily forming a relevant association.[64] Such enquiries though were no longer acceptable when any arrangements or understandings were entered into.[65] The case in question involved discussions held by rival camps in a takeover battle with various shareholders during which advisers to the offerors suggested that certain prices might be offerred for shares which were a variation on the public offer under the takeover document.

An association will arise, through one of the requisite forms of arrangement identified above, where the associate or the person may exercise, directly or indirectly control the exercise of, or may substantially influence the exercise of any voting power attached to a share.[66] Thus the legislation also covers the possibility of substantially influencing (not even controlling) the exercise (by another person) of a voting share by virtue of an arrangement. This provision appears to try to ensure that the section is not read down by requiring some form of absolute control – a substantial influence is enough. Accordingly, the term is to be read very widely, subject only to the evidentiary limitations discussed above.

What constitutes control is a question which has given rise to a great deal of legal writing. Farrar says:

> There is ambiguity between power to control, actual exercise of control, the probability that a command with a specific content will be obeyed and looser forms of control such as domination or constraint.[67]

In the (US) Federal Securities Code, control is defined as:

> the power, directly or indirectly, to exercise a controlling influence over the management or policies of a company or the activities of a natural person (either alone or pursuant to an arrangement or understanding with one or more persons), whether through the ownership of voting securities, through one or more intermediary persons, by contract, or otherwise.

Farrar says that to state that control is obtained through power to exercise a controlling interest is tautologous. He feels it would be better to refer to a dominating influence. He also makes reference

64 *Corebell Pty Ltd v The New Zealand Insurance Co Ltd* (1988) 13 ACLR 349, SC (Vic).
65 Ibid at 355. See also the discussion by Renard, as above fn 32, at 49.
66 S 12(1)(d).
67 Farrar, 'Ownership and Control of Listed Public Companies: revising or rejecting the Concept of Control', in Pettit (edn) *Company Law in Change* (1987) Stevens at p 39.

to 'significant influence' which is the term used in the Australian Accounting Standards.

CONTROL OVER DISPOSITION OF SHARES

The issue of control over disposition of shares, which also arises under s 12, has created a number of problems in relation to the takeover provisions. In *Darvall v North Sydney Brick & Tile Company Ltd*,[68] the company's articles of association contained so called 'pre-emptive' provisions. These provisions limited the ability of a shareholder to transfer its shares unless it complied with the procedure set out in the articles of association. Darvall made a takeover bid for the company which did not comply with the provisions of the CASA. It was argued that Darvall was not required to comply with the CASA as he had already obtained a relevant interest in all of the shares as a result of the existence of the preemptive rights provisions.[69]

The court held that a relevant interest did indeed exist in all of the shares. The pre-emptive provisions were enforceable by all of the shareholders. The ability of the shareholders to enforce the articles gave each of them power to exercise control over the disposal of all of the company's shares: that is, they had a relevant interest in those shares, or, in the terms of the (Aus) Corporations Law s 12(1)(f), they had power to exercise control over the disposal of another person's shares, and were associates. It was not important that this control was negative and was capable of being exercised only in limited circumstances, provided that those circumstances were not merely minor or peripheral.[70]

At page 844 Mahoney J said:

> It may be that there are things which the owner of a share may be prevented from doing in this regard or limitations may be imposed upon the doing of it, which would be minor or peripheral, to the extent that to impose them would not be to control the doing of the thing. It is not necessary to express a concluded view upon this matter in the present case. The articles control some but not all of the transfers which an owner may effect of his shares ... But a power to insist that, if shares are to be transferred to a person other than another shareholder, the holder of them must do what [the articles] require is not minor or peripheral in this sense. The articles apply only to transfer but that, if it be only a species of 'disposal' within s 9(1)(b), is such a substantial species of it that the restriction or prevention of that would, I think, fall within the concept of control.

68 (1986) 10 ACLR 837, CA (NSW).
69 Although the case did not deal directly with the equivalent of s 12(1)(f) under the CASA, the same principles are applicable to the terminology under s 12(1)(f) as the section is very similar to s 9 under the CASA.
70 (1986) 10 ACLR 837.

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quite clear. The beneficial owner will usually have power to control the right to vote and dispose of shares. Such power will normally be covered in the nominee arrangement. The nominee will also have power to exercise the right to vote and to dispose of shares, even though that power is subject to the directions of the beneficial owner as to the manner in which it will be exercised.

As to the requirement to disclose, the position of a nominee may be protected to a certain extent, as s 39 of the (Aus) Corporations Law states that the relevant interest of a nominee may be disregarded, where it is a bare trustee. In *Corporate Affairs Commission v Orlit*[116] the court found that the nominee was a 'bare trustee'[117] and, although this did not prevent the nominee from having breached the provisions of the (Aus) Companies Code (SA), the court did not exercise its powers.[118]

(b) Options

There are two types of options under which a relevant interest can arise: put options and call options. These options may exist in separate documents or alternatively be contained within the same document. In the case of a call option, the person in whose favour the call option operates (A), obtains a relevant interest in the shares of the grantor of the option (P). That interest is limited to those of P's shares that are the subject of the call option. That was not the case under the (Aus) Companies Code. In Release No 335: 'Substantial Shareholder Requirements – Companies Act and Codes Part IV Div 4', the NCSC took the view that A would obtain an a relevant interest in the number of shares even where P had not yet acquired any shares in the company. The view taken by the NCSC was seen doubted and it is clear that such a view would have even less force under the provisions of the (Aus) Corporations Law, which refers to an option 'with respect to an issued share in which the other person has a relevant interest'.

It is not necessary to identify the particular shares which will be used for the option: in *Yaramin Pty Ltd v Augold NL*,[119] it was argued that CASA s 9(6)[120] should be read down and that its operation could

116 (1983) 8 ACLR 164, SC (SA).
117 An explanation of the nature of a 'bare trustee' is contained in chapter one but, in general, the use of a nominee shareholder has been said to create a 'simple, bare or naked trust' which arises when the trustee (the nominee) holds the trust property (the shares) for a single beneficiary absolutely: Maudsley & Martin *Hanbury and Maudsley Modern Equity* p 175.
118 This case is discussed more fully at p 91.
119 (1987) 11 ACLR 439, Full SC (Qld).
120 The predecessor to the (Aus) Corporations Law s 34.

be confined 'to agreements with respect to particularly designated shares or parcels of shares'.[121] The court, however, did not see any reason to give the provision such a narrow construction and relied on the literal construction of the section.

The comments set out above apply equally to put options. Under a put option, the grantee has the right to 'put' or sell the number of shares specified in the option to the grantor. The grantor will have a relevant interest in the grantee's shares because upon the exercise of the option, the grantor will have to acquire the shares.[122]

(c) Proxies

The appointment of a person as another's proxy for a shareholders' meeting clearly gives the proxy a relevant interest in shares of the shareholder. However, s 41 of the (Aus) Corporations Law (as well as s 16) provides that the relevant interest of the proxy is to be disregarded, unless valuable consideration has been provided for the grant of the proxy. The NCSC considered the limits of the exemption under the CASA.[123] It took the view that a proxy given to a person for two or more meetings of members, would not fall within the exception as the proxy was not for a 'particular meeting'. The word 'particular' does not appear in s 41 of the (Aus) Corporations Law. The ASC has similarly issued a practice note[124] where it stated that the omission of the word 'particular' qualifying 'meeting' did not detract from the view the NCSC had taken in Release 329.[125]

The only difference between the two notes, is that Practice Note 6 states that a relevant interest will not be disregarded when a proxy is expressed to be valid where a meeting is stood over. This is because the proxy will allow the holder of the proxy to vote in a particular matter at more than one meeting, rather than at 'a meeting'.

The provisions of CASA, and, by virtue of the similarity, those in the Corporations Law have been criticised.[126] This criticism stems from the decision of Beach J in *Re Kornblum*.[127] That case dealt with an agent who was appointed on behalf of a group of shareholders. The court held that the agent had a relevant interest in the shares because it had a power to restrain shareholders from disposing of their shares. The court then refused to disregard the relevant interest. The court held that the section:

121 As above fn 119 at 442.
122 (1986) NCSC Release No 335: 'Substantial Shareholder Requirements – Companies Act and Codes Part IV Div 4' at para 39.
123 (1984) NCSC Release No 329: 'Companies (Acquisition of Shares) Act and Codes: Paragraph 9(8)(e): Relevant Interest in Shares'.
124 (1990) ASC Practice Note 6: 'Relevant Interests arising from Proxies'.
125 Ibid at para 8.
126 See *Hartnell*, as above fn 72, at 239.
127 As above fn 102.

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background of the holder, including issues such as residence and citizenship.[197] It is arguable though that this information is not relevant to this legislation and would be more properly dealt with by legislation such as the (Aus) Foreign Takeovers Act.

Particulars Regarding the Voting Shares in Which the Person Has an Interest

These are contained in Form 603 of the Regulations. These details include the total number of shares, as well as the names of the associates, or nominees, in whose name any of the shares are registered. In addition, the holder is required to set out details of each acquisition within the previous 12 months including the price or consideration paid. Only a limited amount of information is provided by disclosure of such particulars. The most important is probably the price at which an acquisition was made.

Particulars of Each Interest

The holder is to outline the nature of the relevant interest as well as the reason why any person is identified as an associate. In addition, they are to separately identify and give details of any agreement through which the holder acquired the interest. The regulations do not give specific directions on what details are to be provided. A copy of any such agreement is to be annexed to the form.[198] The particulars to be provided under the regulations are clearly the most important. The connection between the holder and the associate may be a technical one or it may involve serious issues of control. If this is to be ascertained, it will be from the information disclosed under these particulars. Moreover, the holder is to provide details of any qualification of power of any person, who is identified in the notice, to exercise control over the shares.

REGISTERS OF SUBSTANTIAL SHAREHOLDERS: PUBLIC AWARENESS

In addition to giving a notice to the company, s 713 requires that notices given pursuant to ss 709, 710 and 711 must also be served on the Australian Stock Exchange on the same day. This ensures that the acquisition or entitlement of a person to a substantial number of shares in a company will be given some additional publicity.

197 See discussion of the extensive United States provisions in chapter seven.
198 That is, the agreement through which they acquired the interest.

A company is required to keep a register of substantial shareholders pursuant to s 715. That register is open to the public and any member of the company.[199] Copies of the register may be taken upon payment of a prescribed fee.[200]

PENALTIES

A civil remedy for failure to comply with ss 709, 710 and 711 is set out in s 716. This makes a person liable to those who have suffered loss or damage as a result of the person's contravention of the provisions of ss 709, 710 or 711. It is a defence to any action that contravention took place due to inadvertence or mistake.

Whilst the ability exists to take action under s 716, there has been no record of the section having been used.[201] The section is not limited to any particular group of persons though, and there is no reason why a competitor of the person, or a large financial institution, could not take action if losses justified doing so. The lack of reported proceedings under s 716 may be attributable to the difficulty in establishing that the loss or damage arose 'as a result of the contravention'.[202]

The power of a court to deal with contraventions of ss 709, 710 and 711 are set out in ss 741, 743 and 744. The penalty for an offence is $2,500 or six months' imprisonment or both.[203] The provisions of the (Aus) Corporations Law ss 741, 743 and 744 are somewhat different from those under the (Aus) Companies Code.[204] The provisions relating to offences under the (Aus) Companies Code were set out in s 146. It is apparent that because many of the powers granted to courts under the (Aus) Companies Code were similar in relation to contravention of both substantial shareholder[205] and tracing provisions,[206] the legislature decided to combine the penalties under Part 6.10. The effect of this is that, with the exception of s 742 which applies only to tracing provisions, the same powers are granted to courts in respect of those provisions which require disclosure of beneficial or controlling interests.

In addition, the legislature has removed the list of matters upon which a court had power to make directions under the former provisions.[207] These covered matters such as orders directing a company

199 S 715.
200 S 715(2)(b).
201 Either under the (Aus) Corporations Law or the previous legislation.
202 S 716.
203 As set out in sch 3.
204 (Aus) Companies Act 1981.
205 Ss 136–139.
206 S 261.
207 That is, s 146 and s 261A.

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In general, the provisions relating to all investigations under the (UK) Companies Act 1948 applied, with the following modifications:

(a) the provisions applied to all persons who were or had been, or whom an inspector had reasonable cause to believe were or had been, financially interested in the success or failure of a company;[61]
(b) the provisions applied to all persons who were able to control or materially influence the policy of a company, including persons 'concerned only on behalf of others';[62]
(c) the Board of Trade was not required to provide a company, or any other person, with a copy of an inspector's report or any part of a report, if the Board was satisfied that there was a 'good reason' for not divulging the contents of a report;[63] and
(d) the expenses of an investigation into share ownership were to be paid for out of moneys provided for by Parliament.[64]

The Board of Trade also had power to require a person to give the Board of Trade information on the person's knowledge of past and present interests in shares.[65] This included information which that person had, or could have reasonably been expected to obtain.[66] This power arose where the Board of Trade had reasonable cause to believe that a person was or had been interested in the shares, or was acting or had acted in relation to the shares as solicitor or agent for some other person.[67]

The expanded power to examine witnesses was intended to assist in the conduct of investigations. By contrast to 'investigations' under the (Aus) Corporations Law, the powers under the (UK) Companies Act 1948, were far wider. The change in the nature of an 'investigation' is dealt with later in the chapter.

'Interest' in Shares

Whereas the Cohen Committee had referred to the concept of beneficial ownership, the (UK) Companies Act 1948 used the term 'interest'. A person was deemed to have an interest in a share if:

61 S 177(5).
62 Ibid.
63 Ibid.
64 S 177(6). Later evidence to the Jenkins Committee disclosed that this was an important factor, as lack of resources led to failure of the Board of Trade to order more than three to four investigations per year.
65 S 178(1).
66 Ibid. This power enabled an inspector greater access to information regarding share ownership. Under the previous Act, the information to be produced was limited to that in the person's 'custody or possession', and the person in question was an officer of the company.
67 S 178(1); Provided, of course, that the information was not subject to legal professional privilege although it would have been necessary for the parties to establish that the privilege existed.

(a) the person had a right to acquire or dispose of the share or any interest therein;[68]
(b) the person had the right to vote in respect of the share;[69]
(c) the person was required to give his or her consent before any of the rights of other persons in the share could be exercised;[70]
(d) if other persons could be required or were accustomed to exercising their rights in accordance with the person's instructions.[71]

The breadth of the term 'interest' has been considered in previous chapters. The scope of an investigation would have increased significantly as a consequence of the expanded concept of ownership.

Penalties

The ability of an inspector to carry out an investigation was assisted by the power to impose penalties. For example, a penalty of up to six months' imprisonment, or £500, or both, could be imposed on any person who: (i) failed to give information; (ii) when giving information made a statement which the person knew to be false in a material particular; or (iii) recklessly made a statement which was false in a material particular.[72]

Restrictions on Shares

The most significant penalty which could be imposed was the freezing order. The Board of Trade could impose restrictions on shares where there was difficulty in ascertaining their ownership[73] through the unwillingness of certain persons to assist the investigation. The Board of Trade had power to direct that:

(a) a transfer of the shares was void;
(b) a transfer of options over unissued shares was void;
(c) no voting rights attached to shares were exercisable;
(d) no bonus shares would be issued in respect of the shares; and
(e) except in a liquidation, no payment would be made by the company in respect of the shares.[74]

68 S 178(2).
69 Ibid.
70 Ibid.
71 Ibid.
72 S 178(3).
73 In the wider sense of beneficial ownership.
74 S 179(1). They did not go so far as to require that the owner be dispossessed of the shares but the restrictions effectively denied the owner the use of the (shares) which is one of the characteristics of property ownership. The restriction on the 'payment of any sum' was also contained in the (UK) Companies Act 1976 and was considered by Templeman J in *Re Ashbourne Investments Ltd* [1978] 2 All ER 418. The court held that payment of sums to the owner of the frozen shares under compulsory acquisition provisions could themselves be frozen. This enabled the company and the offeror (who were innocent parties) to comply with their legal obligations.

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itself'.[121] Moreover, this use was at the expense of other shareholders' interests.[122]

For these reasons, it was felt that power to initiate and pursue an enquiry should be left with the ASC who were perceived as the least partial and most expert participant in the enquiry.[123] However, notwithstanding this view, a company may still initiate an enquiry. A member of a company can also seek to make enquiries although the request must be reviewed by the ASC, prior to it being undertaken. The criteria for this review are similar to those imposed under the (UK) Companies Acts of 1929 and 1948.

The tracing provisions may only be used in respect of voting shares held in publicly listed corporations.[124] The apparent rationale is that there is little value in pursuing information in companies where membership is not broadly spread.[125] There are three ways in which a notice[126] may be sent:

(i) by the ASC of its own volition;[127]
(ii) by a company of its own volition,[128] or
(iii) by the ASC upon request of either a company, or a member.[129]

Where the ASC is requested to issue a notice, a fee must be paid by the company, or the member, to the ASC.[130]

The Sending of a Primary Notice by the ASC

The ASC is obliged to send a notice following a request unless it considers that, in all the circumstances, it would be 'unreasonable'[131]

121 Ibid.
122 Ibid.
123 Ibid.
124 This is because the definition of a company for the purposes of the provisions under Part 6.8 is limited under s 717 to listed companies.
125 In a smaller company of a private nature, there is more likely to be a closer relationship between the members with a corresponding reduction in the possibility of concealment. Such a view is subject to criticism though, as there may be a number of companies where, although not listed on a stock exchange, there is a large membership. The minister has the power to gazette that the provisions will apply to a particular company, but this is such a cumbersome method that it may not be efficient. Another method would be to use the capitalisation of a company as the basis for it being subject to Part 6.8.
126 Described, depending on the circumstances, as a primary or secondary notice.
127 S 718(1).
128 S 718(4).
129 Through a combination of s 718(1) and 718(2).
130 S 718(3).
131 The term 'unreasonable' is a progression from the terminology used in the earlier Acts. In the (UK) Companies Act 1929, it was 'for good reason' and not actuated by malice. Whilst there no longer needs to be a 'good reason', the ability to seek punishment of offenders is still subject to the requirement that the original request not be 'frivolous' or 'vexatious', terms of a wider ambit than maliciousness.

to do so.[132] If the ASC decides that it would be unreasonable to send a notice, there exists a right to have the decision reviewed by the Administrative Appeals Tribunal. There is also no period within which a decision must be made by the ASC.[133] The ASC has stated, however, that it will make a decision within a reasonable time of receiving a request.[134] Where a company or a member wishes to issue a primary notice to more than one member, the ASC will require separate requests and payments of the fee.[135]

A member, or a company, may withdraw its request for a notice to be sent.[136] There does not appear to be any risk of loss or punishment to the person[137] in the face of continuing with a request. Moreover, the withdrawal of the request does not, of itself, require the ASC to cease its investigation: it is simply not obliged to continue with it.[138] It is not clear whether, as a matter of policy, the ASC could go on and seek a prosecution against the recipient for failure to respond to such a notice, should that occur. There is nothing in the legislation, however, to stop it doing so.

Where the ASC receives information pursuant to a notice, issued at the request of a member, it must provide the information to the member unless it considers it unreasonable to do so.[139] In the case of a company, the ASC has a discretion as to whether it provides the information. Where it is felt that information is sought by a

132 S 718(3). These provisions differ from the previous legislation in that under the Companies Code, a member of the company holding more than 5% of the voting shares and the NCSC could request the company to issue a notice. The previous provisions were considered in *Re Brunswick NL; Blossomtree Pty Ltd v Brunswick NL* (1991) 9 ACLC 625, SC (WA) affirmed *Brunswick NL v Blossomtree Pty Ltd* (1992) 10 ACLC 658, Full SC (WA). In that case, the company refused to send a notice. The company had argued that the conduct of the applicant was pertinent in determining whether the company should be forced to send the notice. The court held that it was not. The principles of the case are not directly applicable to the (Aus) Corporations Law because the direction that the company send the notice was mandatory.
133 Although it is relatively clear that a decision must be made. It is not clear, however, whether, in the face of delay the ASC, the requester could not take some administrative action to force the ASC to reach a conclusion.
134 ASC Policy Statement 28: Power to obtain information – Beneficial Ownership of Company Shares (13 July 1992), para 7.
135 Ibid at para 8. The ASC also explained that multiple requests may be contained in the same application letter.
136 S 719A.
137 Or, the corporation, as the case may be.
138 One consequence of this may be that the person is not entitled to any of the information to be provided under s 720. Indeed, whether a withdrawal would give any weight to a claim by the recipient of a notice, that the information required under the notice should not be disclosed under s 721, is not clear. Both of these issues would appear to be, at the very least, disincentives to withdrawal.
139 S 720(b).

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invalidity of a primary or secondary notice, is not, of itself, sufficient grounds for a certificate. The only recourse to a recipient of a notice, which may be invalid, is not to respond to the notice and 'obtain similar ancillary orders in appropriate declaratory proceedings'.[174] Alternatively, it could ignore the notice on the assumption that it would not be possible for the applicant to obtain orders against it.[175] That choice, the court said, rests entirely with a recipient and its advisers.[176]

Under the (Aus) Corporations Law s 727(d), a recipient is not in breach of s 722 or s 723 nor liable under s 726, if the giving of the notice was frivolous or vexatious. It could also plead, in any action by a company or the ASC, that the notice, which gave rise to the apparent breach of s 722, was not valid.

On appeal, the Full Court of the Supreme Court of South Australia upheld the judgment of O'Loughlin J[177] although on a different basis. It held that the NCSC was not able to reach a determination under the (Aus) Companies Code (SA) s 261(5) [CA s 721] as to the validity of the notice, because the jurisdiction of the NCSC under the (Aus) Companies Code (SA) s 261(5) [CA s 721] only arose where there was a valid notice. It said that the appellant had asked the NCSC to say that circumstances amounted to special reasons on which the NCSC could grant a certificate, and yet the existence of those circumstances deprived the NCSC of the power and jurisdiction to issue a certificate. If the invalidity of the notices themselves could not amount to special reasons, then the existence of a dispute as to the validity and existence of legal proceedings relating to the dispute, could not do so either.

The Secondary Notice

Where the response given by a recipient to a primary notice discloses that another person has an interest in the shares, or is in a position to give 'relevant instructions', the ASC or the company may send a notice to that other person.[178] The new notice is defined as a 'secondary notice'.[179]

In *Re Henderson's Industries Ltd*,[180] Ormiston J dealt with the nature of secondary notices. In the process of sending a primary notice, an officer of the company had a telephone conversation with

174 Ibid.
175 Ibid.
176 Ibid.
177 (1987) 5 ACLC 987, Full SC (SA).
178 S 719(1) & (3).
179 S 717.
180 (1986) 13 ACLR 506, SC (Vic).

an officer of the registered holder of the shares. This conversation revealed that the shares had been sold to a member or members of a group of companies. The company issued a secondary notice to the group. The issue which arose was whether the information which had come from a telephone conversation could be used to send a secondary notice. Ormiston J held:

(a) the information 'pursuant to' which a secondary notice can be issued, must come from a response to a primary notice;[181]
(b) when information is received, the information which will enable the company to issue a secondary notice, is information that a person 'has' an interest in shares; an indication that a person may have an interest is not sufficient;[182]
(c) there is no room for the notice to be vaguely worded: the ground upon which the notice is based must be precisely stated and applicable;[183]
(d) the section requires 'receipt of information' that a person has an interest; 'mere speculation or suspicion is not enough.[184]

The effect of the decision is to require a higher level of precision in the use of the investigatory powers under the section. The following matters may have affected the court's view:

(a) The fact that the provisions should be read strictly because of the consequences of enforcement upon failure to respond.[185]
(b) The proper accumulation of evidence or information had not been made in the investigation prior to the issue of the notice.[186]
(c) The acquisition of the shares did not involve any concealment for an improper purpose, being made on behalf of some 45 or 46 pension funds, not a corporate raider.[187]

The court held that the information had to come in response to a notice, and not by reason of any other communication.[188] The decision highlights the change in the nature of the investigation of beneficial ownership. The provisions do not allow a general enquiry to be made but a company must be in possession of information before it issues any notice. This requirement, whilst valid, may delay the process of enquiry and reduce its effectiveness.

181 Ibid at 519.
182 As above fn 180 at 510.
183 Ibid.
184 Ibid.
185 As above fn 180 at 509. The court was referring to the power of disenfranchisement, it said that the section contained a 'fearsome range of penalties'.
186 Ibid.
187 Ibid.
188 Ibid.

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of concerns. This involved whether or not a bank's nominee company would qualify as a bare trustee for the purposes of the exemption contained in the Bill. It was submitted that it is [and is] common practice in Hong Kong for a nominee company, in the absence of written instructions from its customer, to have no duty other than to hold the property to the beneficiary's order but to reserve power to vote in whichever way it considers to be in its beneficiary's or its customer's best interests. The Financial Secretary took legal advice to the effect that such a discretionary voting power does not prevent a company which is otherwise a bare trustee or nominee from being a bare trustee or nominee.[44]

The Financial Secretary explained the Hong Kong Government's position vis-à-vis the Bank's:

> It is not our intention that nominee companies, whether of a bank or otherwise, should be caught by the disclosure requirements. It would place an unreasonable burden upon such companies and there are adequate safeguards against abuse. The beneficial owner remains under an obligation to disclose a notifiable interest and also remains under an obligation to comply with the provisions designed to expose concert parties. Furthermore, where a listed company wishes to enquire into the ownership of its shares, it may require the nominee to disclose the beneficiaries involved.[45]

Warrants

The last issue dealt with the question of warrants and whether or not they were covered by the Bill. The Financial Secretary explained that they were not:[46]

> Warrants are most commonly rights or options to subscribe for future shares at a particular price within a fixed period. As such, they do not confer voting rights on the warrant holder until that right or option is exercised. However, once the right or option is exercised, the disclosure obligations then arise. The position regarding directors and chief executives

44 Ibid.

45 Ibid. In Australia, similar exemptions are provided under s 16, where in certain instances, relevant interests will also be disregarded in the following circumstances:

(a) where the relevant interest arises in relation to or out of the exercise of security for a loan, provided that the lender's ordinary business includes lending of money, and the transaction was entered into in the ordinary course of business in connection with lending of money and is not a transaction entered into with an associated person;

(b) where a dealer in securities acquires a relevant interest by reason of instructions given on behalf of another person to dispose of a share, provided that the instructions arise in the ordinary course of business of dealing in securities;

(c) where the relevant interest which arises is that of a person who obtains it only by virtue of his or her holding of a prescribed office.

46 Ibid.

is, generally speaking, the same. They must, however, notify certain information about warrants granted to them by the listed company or by its associated companies.[47]

Legislative Council Discussion

A number of comments were made and queries raised by the Legislative Council at the second reading of the Bill.[48] First, as an international financial centre, it was felt that Hong Kong should aim at making its disclosure requirements 'compatible with that adopted by the international financial community such as in United Kingdom and the USA'.[49] As such the ad hoc group was not particularly satisfied with the level of disclosure and requested the administration to undertake to reduce the level of notifiable interests from 10 to 5% in two to three years' time. The speaker continued:

> However, the Administration declines to make a commitment to reduce the notifiable percentage at this stage, but indicated that it is their firm intention to do so when the time is ripe. The ad hoc group is therefore requesting the Financial Secretary to make a firm statement on the intention

47 Ibid. Contrast these statements with the Australian position. Where two types of options under which a relevant interest can arise: put options and call options. These options may exist in separate documents or alternatively be contained within the same document. In the case of a call option, the person in whose favour the call option operates (A), obtains a relevant interest in the shares of the grantor of the option (P). That interest is limited to those of P's shares that are the subject of the call option. Moreover, it is not necessary to identify the particular shares which will be used for the option: in *Yaramin Pty Ltd v Augold NL* (1987) 11 ACLR 439, it was argued that CASA s 9(6) should be read down and that its operation could be confined 'to agreements with respect to particularly designated shares or parcels of shares'. The court, however, did not see any reason to give the provision such a narrow construction and relied on the literal construction of the section.The comments set out above apply equally to put options. Under a put option, the grantee has the right to 'put' or sell the number of shares specified in the option to the grantor. The grantor will have a relevant interest in the grantee's shares because upon the exercise of the option, the grantor will have to acquire the shares.

48 HK Legislative Council Papers, 13 July 1988 at pp 1810–18.

49 One Legco member, Mr Peter Poon at p 1818, went on to note:

> 'As one of the important financial centres in the world, Hong Kong lags behind a long way in disclosure requirements of interests of directors and major shareholders in listed companies. The United Kingdom introduced the relevant requirements in the (UK) Companies Act 1948. USA, Australia and Canada also have had such legislation for a long time. In the second report of the Companies Law Review Committee published in 1973, when our own (HK) Companies Ordinance was more or less based on the (UK) Companies Act 1929 model, it was reported that there were detailed discussions on disclosure requirements and despite the very strong minority dissent, the said committee decided against recommending any introduction of such laws at that time for a variety of reasons, which in today's environment would certainly not be valid justifications.'

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Ltd) in contravention of the CASA. The defendants argued that a distinction should be drawn between a power to control something and a mere potentiality to obtain such power to control.[127]

The court held, applying the decision in *Equiticorp Industries Ltd v ACI International Ltd*,[128] that there was a distinction between power to control, and a potentiality to obtain power to control. However, this distinction did not exclude the possibility that a person may have at the same time both a potentiality to obtain power to control, and an immediate factual power to control, based on understandings or arrangements. Moreover, the words under CASA were wider than those contained in the *Foreign Takeovers Act*[129] as: (i) there was no reference to breach of, or revocation of, agreements,[130] and (ii) the words of CASA suggested that a person may have a present power even where that power had an element of futurity.[131]

In relation to two apparent breaks in the chain, the court said that 'the absence of any independent commercial interest at these points is clear'.[132] This absence assisted in the finding of the court that a factual control could be inferred.[133] Accordingly, the court held that the relevant interest of BIL had been established and CASA had been breached.[134]

The provisions allow an interest to be traced through interposed companies, to those who exercise control further down the chain. They operate so that if A has control over B, and B has a relevant

127 Ibid at 187.
128 (1985) 5 ACLC 237, Full SC (Vic).
129 With which the decision in *Equiticorp* was concerned.
130 Under s 30(4) which states as follows:

> 'A reference to power or control includes a reference to power or control that is direct or indirect or is, or can be, exercised as a result of, or by means of, in breach of, or by revocation of, trusts, relevant agreements and practices, or any of them, whether or not they are enforceable.'

131 In this regard, the court could also have referred to the provisions under s 34 which refers to a relevant interest arising even though the agreement which gives rise to a relevant interest has yet to be performed.
132 As above fn 126 at 189.
133 The absence of an independent commission interest was based on fairly strong inferences about the ability of persons to appoint directors and control the companies. The persons in whose hands direct control appeared to be vested were generally nominee directors or shareholders. It would seem that the court was also influenced by the fact that one company who had the power to appoint the directors of Diatribe (a company called Setar Five), had its annual return filed by R Ltd, another interposed company (as above fn 126 at 190).
134 Ford points out that the contravention occurred by virtue of a deemed holding flowing through a shareholding of just over 20%. There was no suggestion that BIL actually controlled nearly 40% of W Ltd. In addition, had R Ltd been listed on the Australian Stock Exchange, the effect of what was then s 12(k) would have exempted an acquisition of shares in W Ltd because of the acquisition of shares in R Ltd. (Ford, as above fn 120, para 2019 at 727.)

interest in C's shares, then A will be deemed to have the same interest as B in C's shares.[135] This will occur where A has a controlling interest in B or if B's directors are accustomed to act at A's directions. Where Z has a controlling interest in A, or A's directors are accustomed to act at Z's directions, then Z will also be deemed to have a relevant interest in C's shares. The process continues so long as there are additional controllers down the chain of interposed companies and will apply no matter how many companies are interposed.

Moreover, s 33 deems A to have the same relevant interests as B in C's shares where A, or its associates, have a relevant interest in not less than 20% of B's shares even if that holding does not in fact constitute control over B. However, this deeming of interest is limited to the second interposed company and Z would not be deemed to have the same relevant interest as B, unless Z has a controlling interest in A.

In addition, the scope of the provisions relating to interposition of companies is extended by the (Aus) Corporations Law.[136] This extension operates as follows:

(i) P, together with its associates, controls at least 20% of B.
(ii) B has a relevant interest in another company, C.
(iii) Under CASA, P would have had a relevant interest in the shares which B has in C. However, under the (Aus) Corporations Law, P will have all the relevant interests in the shares of C held by B and all of B's associates.[137]

This is a significant expansion of the deemed relevant interest concept and has been the subject of some criticism.[138] In Australia recently, the Legal Committee of the Companies and Securities Advisory Committee, issued a discussion paper which called for amendment to s 33.[139] It was said that the additional words create artificially broad relevant interests and are an unnecessary impediment to commercial transactions. Moreover, the artificial interests which result from the additional words could lead to avoidance of the takeovers provisions in certain circumstances.[140] For these reasons, the Committee called for the removal of the extension of the provisions by deletion of the words 'or an associate of the body corporate'.[141] Given the potential

135 S 32.
136 Through s 33.
137 Ford, as above fn 120, para 2019 at 728.
138 Ibid.
139 Legal Committee of the Companies and Securities Advisory Committee, Discussion Paper 'Anomalies in the Takeovers Provisions of the Corporations Law' January 1993, Part 1, pp 1–2. This paper has now resulted in some firm proposals as disclosed in The Australian, 14 March 1994.
140 Ibid at p 2.
141 Ibid, Proposal 1.

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(3) Accordingly, any such interest of the party to the agreement (apart from the agreement) includes for the purposes referred to in subsection (1) any interest which he is taken to have under section 8 or by the application of section 9 and this section in relation to any other agreement with respect to shares in the target company to which he is a party.

(4) A notification with respect to his interest in shares in the target company made to that company and to the Exchange Company under this Part by a person who is for the time being a party to an agreement to which section 9 applies shall—
(Amended 45 of 1990 s. 6)

(*a*) state that the person making the notification is a party to such an agreement;

(*b*) include the names and (so far as known to him) the addresses of the other parties to the agreement, identifying them as such; and

(*c*) state whether or not any of the shares to which the notification relates are shares in which he is interested by virtue of section 9 and this section and, if so, the number of those shares.

(5) Where a person makes a notification to a listed company and to the Exchange Company under this Part in consequence of ceasing to be interested in any shares of that company by virtue of the fact that he or any other person has ceased to be a party to an agreement to which section 9 applies, the notification shall include a statement that he or that other person has ceased to be a party to the agreement (as the case may require) and also (in the latter case) the name and (if known to him) the address of that other. *(Amended 45 of 1990 s. 6)*

[*cf. 1985 c. 6 s. 205 U.K.*]

11. Duty of persons acting together to keep each other informed

(1) A person who is a party to an agreement to which section 9 applies is subject to the requirements of this section at any time when—

(*a*) the target company is a listed company, and he knows it to be so;

(*b*) the shares in that company to which the agreement relates consist of or include shares comprised in relevant share capital of the company, and he knows that to be the case; and

(*c*) he knows the facts which make the agreement one to which section 9 applies.

(2) A person who is subject to the requirements of this section is under a duty to notify every other party to the agreement, in writing, of the relevant particulars of his interest (if any) apart from the agreement, in shares comprised in relevant share capital of the target company—

(*a*) on his first becoming subject to the requirements of this section; and

(*b*) on each occurrence after that time while he is still subject to those requirements of any event or circumstances within section 3(1) (as it applies to his case otherwise than by reference to interests which he is taken to have under section 10 as applying to that agreement).

(3) The relevant particulars to be notified under subsection (2) are—

(*a*) the number of shares (if any) comprised in the target company's relevant share capital in which the person giving the notification would be required to state his interest if he were under the duty of disclosure with respect to that interest (apart from the agreement) immediately after the time when the duty to give notification under subsection (2) arose; and

(*b*) the relevant particulars with respect to the registered ownership of those shares, so far as known to him at the date of the notification.

(4) A person who is subject to the requirements of this section is also under a duty to notify every other party to the agreement, in writing—

(*a*) of any relevant particulars with respect to the registered ownership of any shares comprised in relevant share capital of the target company in which he is interested apart from the agreement; and

(*b*) of any change in those particulars,

of which in either case he becomes aware at any time after any interest notification date and before the first occasion following that date on which he becomes subject to any further duty to give a notification under subsection (2) with respect to his interest in shares comprised in that share capital.

(5) The reference in subsection (4) to an interest notification date, in relation to a person's interest in shares comprised in the target company's relevant share capital, is to—

(*a*) the date of any notification given by him with respect to his interest under subsection (2); or

(*b*) where he has failed to give that notification, the date on which the period allowed by this section for giving the notification came to an end.

(6) A person who is a party to an agreement to which section 9 applies is under a duty to notify every other party to the agreement, in writing, of his current address—

(*a*) on his first becoming subject to the requirements of this section; and

(*b*) on any change in his address occurring after that time and while he is still subject to those requirements.

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