The meaning of "relevant interest"

AJ van Schie* and CM Peters**

For various reasons persons who control substantial blocks of shares in public companies have traditionally kept their identity shrouded by the use of nominees, trustees, holding companies and a variety of contractual arrangements. Through such means control of substantial portions of a company could be held or shifted without the knowledge of the company or its shareholders. The legislation which is discussed below is an attempt to uncover the controllers by imposing on them the obligation to notify the extent and nature of their interests. Inevitably, the legislation has caught many interests which in practical terms may give no control in any true sense. Meanwhile, those who are reluctant to reveal themselves will continue to create the structures which give them every argument to avoid disclosure. What follows is not a criticism of the legislation or the policy behind it, rather it is an attempt to provide some guidance as to what interests may have to be disclosed and why.

I INTRODUCTION

In 1982 the Securities Commission produced a report entitled "Nominee Shareholdings in Public Companies - A review of the law and practice with a proposal for reform". The reforms it recommended were eventually enacted in Part II of the Securities Amendment Act 1988 which deals with disclosure of interests of substantial security holders in public issuers.

The report on which the legislation is based was prepared against a background of "dawn-raids" and furtive acquisitions of control to effect rapid and unopposed takeovers. The report makes clear that it is important that public issuers are aware of aggregations of interest and shifts of interest in the holdings of their shares. The legislation consequently focuses on providing the public issuer with information. The public interest in such information is also an important consideration.

The interests which require disclosure under the Act are those which are "relevant interests" as defined in s 5. It is the definition of relevant interest which the writers propose to explore in this paper. Central to the "relevant interest" definition is the concept of control of voting securities. The definition is very widely drafted and capable in parts of alternative interpretations. Therefore, when considering whether a particular interest is a relevant one it is useful to consider the extent to which any interest can effectively be used to shift or gain control. To give the definition the widest possible meaning will not necessarily serve the legislative purpose best.[1]

---

* LLB (Hons) B.Comm.
** LLB.

1 See discussion in text beginning at 315.

A further consideration when looking at s 5 is the significance of the definition in other legislation. It is likely that the s 5 definition of relevant interest will be used in the proposed New Zealand take-over legislation. Interpreters of s 5 should bear in mind the possible impact of their interpretations in situations arising under that legislation.[2] In this regard we note that in Australia an identical definition is used both in the disclosure legislation[3] and in the take-over legislation.[4] Interpretations of this definition in case law have been held to be applicable to either statute.[5] Much of the discussion below revolves around the Australian provisions as they provide the only real source of precedent in this area.[6]

II THE LEGISLATION

A Section 5(1)(a)

Section 5(1)(a) confers a relevant interest in a voting security on any person who is *a beneficial owner* of that security.

There is no Australian counterpart to this sub-paragraph and indeed there is no reference to beneficial ownership anywhere in the Australian disclosure legislation. Notwithstanding this, the expressions "beneficial ownership" and "beneficial interest" are used frequently and interchangeably in Australian case-law to describe persons at whom the legislation is aimed.

It has been suggested to us that "beneficial ownership" in this context is an all-embracing expression intended to include not only those specific interests delineated in subparagraphs 5(1)(b) to (f) but also many others. It is said that our legislation's purpose is to uncover the ultimate beneficial owner of, or those with beneficial interests in, shares. While these terms are loosely used to encompass many different forms of control or interest we do not think they are sufficiently expansive to form the exclusive basis of disclosure requirements. We prefer to think that the beneficial owner referred to

---

2 Company Take-overs Report to the Minister of Justice by the Securities Commission, October 1988 Volume II, 207.

3 S 8, Companies Code.

4 S 9, Companies (Acquisition of Shares) Code.

5 *TVW Enterprises Ltd* v *Queensland Press Limited (No 2)* (1983) ACLC, 874. References in the discussion of Australian cases below are to s 9 of the Companies (Acquisition of Shares) Code. The reader should be aware that cases referred to might at first glance appear not to deal with the topic under discussion in that they refer to identical provisions which appear in other statutes.

6 The writers consider Australia an appropriate comparative jurisdiction because it has a similar commercial and legislative regime, and, consistent with the desire for harmonisation in company and commercial law, our legislation has been loosely based on theirs, with many of the key words in operative sections having counterparts in the Australian provisions. For discussion of the Australian legislation see Hartnell "Relevant Interests - 'Control' in the Eighties" (1988) 6 Company and Securities L J 169.

in s 5(l)(a) is of the classic type. That is, a person on whose behalf another person holds legal or nominal title to property, for example a trustee or nominee arrangement.

Some argue that the reference to *a* beneficial owner indicates that numerous persons are capable of description as beneficial owners. We think that the reference to *a* rather than *the* is merely recognition that ownership can be joint and each joint owner will have an interest in all securities jointly held.

The Commission's report[7] discusses an American case where a mutual fund manager was held to be the beneficial owner of shares held by the fund. That finding could not possibly be based on a traditional view of what beneficial ownership entails. The finding arises out of the fact that the American legislation specifically defines beneficial ownership for disclosure purposes and does so very widely. American authority on what constitutes beneficial ownership for disclosure purposes is therefore not useful for defining the parameters of s 5(1)(a).

What of the term "beneficial interest"? We note in s 4 of the Act that beneficial interest is used there in a definition which essentially paraphrases s 5(1). Are the terms "beneficial interest" and "beneficial ownership" interchangeable?

In the decision *The Securities Commission* v *Gulf Resources and Chemical Corporation & Ors*,[8] McGechan J came to the conclusion when considering whether a relevant interest arises under s 5(1)(a) that "Gulf did not acquire a beneficial *interest* in (the relevant securities)". Notwithstanding that s 5(1)(a) requires the learned Judge to come to the conclusion that Gulf was not a beneficial *owner* of the securities the use of beneficial *interest* indicates that in the mind of McGechan J at least there is no meaningful distinction between the two terms. Does this influence the meaning to be given to the expression "beneficial ownership" for the purposes of s 5(1)(a)? McGechan J gives some credence to the contention that the term might appropriately be given an extended meaning when he finds that a beneficial interest was not acquired[9] "whether in a trustee beneficiary sense or a wider benefit sense". Unfortunately he gives no indication of what wider benefit sense means.

The Australian case *CAC* v *Orlit Holdings Limited*[10] provides some analysis of these concepts. The Judge makes no distinction between "beneficial ownership" and "beneficial interest" and talks about beneficial owners as being all persons "behind" the nominal owner. As to exactly where beneficial ownership is to be found, the Judge

---

7 At 47 para 6.10.
8 (1990) 5 NZCLC 66324.
9 Above n 8, 66334.
10 (1983) 1 ACLC 1038.

directs us to follow the chain of corporations until we run out of bare trustees. He states:[11]

> Cantrade has no beneficial interest in the shares: the beneficial interest is in its shadowy principal or in those even shadowier persons behind its principal and the legal title to the shares is in the two Nominee companies. Eventually in the chain there must be someone who is not a bare trustee, there must be a beneficial owner or owners.

It is not certain whether the Judge anticipates that there are a number of persons who might properly be regarded as "beneficial owners", being all persons who are not bare trustees but with interests in the property. While we can envisage situations where a large number of different persons might be said to have "interests" in property there will, in the classic sense, only be one beneficial owner. The question is whether or not it is intended that the term "beneficial owner" when used in s 5(1)(a) be given a wider meaning than it might otherwise have.

It is submitted that it is the subsequent paragraphs of s 5(1) which are intended to apply to interests outside that of traditional beneficial ownership and therefore a traditional interpretation of s 5(1)(a) is appropriate.

Support for this view is to be found in the report from which the legislation sprang:[12]

> Everyone who made submissions to us addressed themselves to the question of disclosure of beneficial ownerships. It is evident that such a confined approach takes too simple a view of the problem. The complications that have emerged can be illustrated in a sentence. If I have 2% of the shares in a company registered in my name, plus beneficial ownership of a further 2% registered in my secretary's name as my nominee, plus a proxy from another shareholder enabling me to vote his shares which carry 2% of the voting power, plus control of a private company that holds another 2% of the shares, what do my relevant interests aggregate? If the law is confined to beneficial ownership, the answer is 4%, but if all the interests mentioned are aggregated, my relevant interests are 8%.

It was the view of the Commission that beneficial ownership was only one of a number of interests and many other types of interest warrant disclosure.

Relevant interests may be found to exist alongside those of beneficial ownership but they will arise by virtue of a relationship with the beneficial owner or the nominee and the requirement to disclose such interests arises out of the further provisions of s 5 and not s 5(1)(a).

---

11 Above n 10, 1048.

12 *Nominee Shareholdings in Public Companies: A Review of the Law and Practice with a Proposal for Reform* (Securities Commission, Wellington, 1982), 3.

Beneficial ownership is included in a separate category because a beneficial owner may not in fact have any of the relevant interests described in ss 5(1)(b) to (f).[13]

B Sections 5(1)(b) to (e)

Paragraphs (b) and (d) of subsection 5(1) apply to persons who have :

- the power to exercise the right to vote attached to the voting security;
- the power to acquire or dispose of the voting security.

The immediate power to exercise the right to vote vests in the registered holder of a voting security. Similarly, the power to acquire or dispose of a voting security vests in the registered holder since only the registered holder can transfer the legal title.

Paragraphs (c) and (e) of subsection 5(1) extend the concept of relevant interest to a second tier of persons who:

- have the power to control the exercise of the right to vote attached to the voting security
- have the power to control the acquisition or disposition of the voting security.

The essence of these provisions are the twin concepts of "power" and "control". The judicial interpretation of these two words will be pivotal in determining the existence of a relevant interest. The New Zealand courts will have the benefit of the many Australian decisions handed down in recent years.

C Control

The concept of control has been considered in a number of Australian cases. The first two decisions discussed below, *Re Kornblums Furnishings Limited*[14] and *TVW Enterprises Ltd* v *Queensland Press Ltd & Ors (No 2)*[15] concerned pre-emptive rights created by shareholder agreements.

The *Kornblums* case concerned an agreement between shareholders holding a majority of shares between them. Under the agreement a shareholder could only sell shares to another shareholder who was a party to the agreement or to a person who consented to become a party to the agreement. The applicants sought a declaration from the Court that the parties had not acquired a relevant interest in each others shares pursuant to the agreement.

The Court considered whether the agreement gave any party the power to exercise control over the disposal of the shares covered by the agreement. The applicants argued that it was necessary to show that the person possessing the power did not "merely have

---

13 Ie the beneficiary of a trust.
14 [1981] ACLC 33186.
15 (1983) 1 ACLC 874.

partial control or a measure of control over the disposal of the shares but had substantial or even absolute control over their disposition, being able to control their disposition in all circumstances."[16]

The applicants sought to rely on the decision in *Mendes* v *Commissioner of Probate Duties (Victoria)*.[17] In that case the issue was whether a company was controlled by the deceased for the purposes of the Victorian Probate Duty Act 1962. The deceased had predominant voting power on all matters except reduction of capital, sale of the company's main undertaking and the winding up of the company (the deceased's son held predominant voting power in respect of those matters).

The Court said that while control of a company vests in the majority, the deceased did not control the company if he did not control a majority of the voting rights at general meetings in relation to all matters dealt with:

> If in the general meeting one person has the majority of votes on some subjects and another has the majority of votes on other subjects, neither can truly be said to control the company. The control is divided between them.

The applicants in *Kornblums* argued, by analogy, that they had no control over a disposition by a shareholder which was in accordance with the terms of the agreement. Since they only controlled some but not all dispositions they did not have substantial or absolute control.

Beach J held that the decision in the *Mendes* case was not applicable to the facts before him. He considered the relevant words in the Companies Act required a different interpretation from the words of s 7(2) (c) of the Probate Duty Act. His Honour said:[18]

> In the Probate Duty Act the words in question were "where a company which was controlled by the deceased had" etc. In the Companies Act the relevant words are "has power... to exercise control over the disposal of that share". I can find no justification for holding that the "to exercise control" means "to exercise substantial or absolute control .... In my opinion if a person has power to exercise *some true or actual measure of control over the disposal of voting shares in a company* then that person has a relevant interest within the meaning of subsection (1)(a)(ii).

The Court concluded that the agreement gave the applicants power to exercise some true or actual measure of control over the disposal of the subject shares because the practical effect of the agreement was that the applicants could restrain other parties to the agreement from selling their shares on the open market without approval from 75% of the parties to the agreement.

---

16 Above n 14, 33193.
17 (1967) 122 CLR 152.
18 Above n 14, 33194.

In the course of his judgment in *Kornblums*, his Honour made some observations about the way the Australian provision is worded. He said:[19]

> Had the legislature intended only to cover a situation where a person has substantial or absolute control, subsection (1)(a)(ii) should surely have read *"to dispose of or to control the disposal of that share"*.

His Honour's comments are particularly pertinent in the New Zealand context because the alternative wording is similar to that in our s 5(1)(c). Thus the decision in *Kornblums* leaves it open to argue that "control" in the New Zealand definition means absolute or substantial control.

The test for control set out in *Kornblums* was applied by the Supreme Court of Victoria in *TVW Enterprises*.[20] That case concerned an exchange of letters between two companies in relation to their respective holdings in The Herald and Weekly Times Limited. Each company stated that it had certain objectives in the Herald and that it wished to protect its investment. One of the letters contained a draft agreement which conferred a right of pre-emption in favour of each company and proposed that each company would, at the request of the other, execute and deliver the draft agreement.

The issue before the Court was whether the effect of the exchange of letters was to create in each person a relevant interest in the subject shares. Counsel for the applicants submitted that the *Kornblums* decision was not correct. They contended that on the proper construction of s 9(1) a person does not have a "relevant interest" unless that person has complete power to exercise the vote or complete "control" over the exercise of that vote.[21]

After weighing up the arguments the Judge followed the decision in *Kornblums* stating:[22]

> I agree in the words of Beach J that "some true or actual measure of control over either, the right to vote attached to a share or, over the disposal of that share gives rise to a "relevant interest". Such a conclusion is consistent with the ordinary meaning of "control" and is not unduly restrictive.

The Court went on to consider whether the exchange of correspondence gave the parties the power "to exercise some true or actual measure of control" over either, the exercise of the right to vote attached to the shares or the disposal of the shares. The Court implied a term that each party was obliged not to dispose of the Herald shares until an opportunity had been given to the other to request the former to execute the agreement. Moreover, the Court accepted the proposition that equity would probably come to the aid of the parties to the agreement, if circumstances arose calling for injunctive relief.

---

19 Above n 14, 33194.
20 Above n 15.
21 Above n 15, 885.
22 Above n 15, 886.

The tests developed in *Kornblums* and *TVW Enterprises* were adopted by the New South Wales Court of Appeal in *North Sydney Brick & Tile Co Ltd* v *Darvall & Anor*.[23] However, the pre-emptive rights in this case arose out of the company's Articles of Association rather than contract. The appellant, the target of a takeover bid, argued that the Part A statement[24] it had received did not comply with the Code pursuant to which it was given. The respondent submitted that it did not have to comply with the Code because the Code only applied to a person who has or proposes to acquire a relevant interest in more than 20% but less than 90% of the shares in the target. The respondent argued that by virtue of the pre-emptive rights conferred by the Articles in favour of shareholders of the target, it had a relevant interest in 100% of the shares in the target company.

His Honour, Mahoney J considered whether the Articles gave the respondent the power to exercise control over the disposal of any share in the company. He considered the meaning of control:[25]

> In its essential meaning in this context, it looks to the doing of something, viz, the disposition of a share; to the ways or circumstances in which, unhindered, that could be done or could occur; and to the power which another person has to restrict or prevent the doing of it in some or all of those ways or circumstances. In this sense it looks to two things: the things which may be done by way of restriction or prevention; and the part which the person in question played in the doing of them.

His Honour then considered, in relation to the first aspect of control, the issues that arose in the *Kornblums* case.

> I shall, consider first the aspect of "control" which is concerned with what may be done to restrict or prevent the doing of the relevant things. The terms may mean, or comprehend, the power to prohibit or stop something absolutely: see *The Queen* v *Koydon and Norwood Tramways (1886)* 18 QBD, 39 at p 42, per Lindley L J; with the exercise of the power to give or refuse consent to the way in which the thing is proposed to be done . . . Lord Esher MR in *Dixon J and Bank of New South Wales* v *The Commonwealth* at page 385, suggested that it means "something weaker than restraint, something equivalent to regulating." As the present articles, if they operate relevantly, operate by way of restriction rather than absolute prohibition, it is not necessary to determine whether "control" may include a simple prohibition.

Mahoney J's approach to the issue is entirely different from that of the Courts in earlier decisions. He considered the term "control" meant "operate by way of restriction", and that a wider interpretation of control would be required to encompass the concept of absolute prohibition. In the earlier decisions it was accepted that control included absolute prohibition with the issue being whether it extended to situations where there was only partial control.

---

23 (1986) 4 ACLC 523.

24 A statement required under Part A of the Schedule to the Companies (Acquisition of Shares) Code to be given to the target of a takeover bid.

25 Above n 23, 529.

His Honour considered whether minor restrictions imposed on shareholders by a company's Articles would amount to control. He found that the power to prevent the transfer of a share other than to members was neither minor nor peripheral and accordingly held that the pre-emptive rights in this case gave rise to a relevant interest:[26]

> It may be that there are things which the owner of a share may be prevented from doing in this regard or limitations which 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... But a power to insist that, if the shares are to be transferred to a person other than another shareholder, the holder of them must do what Articles 24A to F require, is not minor or peripheral in this sense.

In relation to the second aspect of control, the fact that the shareholder played a negative part in enforcing the restriction, that is, that a shareholder may only prevent another shareholder disposing of shares otherwise than in accordance with the Articles, was considered immaterial.[27]

The principles which emerge from the three cases discussed above may be summarised as follows:

1 The concept of control is not confined to substantial or absolute control. Rather some true or actual measure of control over either the right to vote attached to a share or, over the disposal of that share, gives rise to a relevant interest.[28]

2 The alternative wording which the Court in *Kornblums* suggests would support a narrow interpretation of control is similar to the wording of the New Zealand legislation.

3 A right of pre-emption pursuant to a shareholders agreement gives the parties control over the disposition of shares the subject of the agreement.

4 The negative control conferred by a company's Articles of Association, to insist that if shares are to be transferred to non-members the transferor must do what the Articles require, constitutes control over the disposition of shares.

5 Minor restrictions imposed on the owner of shares may not constitute control. A pre-emptive right conferred by the Articles of Association of a company is not a minor or peripheral restriction.

The Supreme Court of Western Australia in *Foodland Associated Ltd* v *Garina Pty Ltd & Ors (No 2)*[29] canvassed the principles stated above. The situation was similar to

---

26 Above n 23, 529.

27 Above n 23, 530.

28 However, by contrast, the Court in *TVW Enterprises Limited* suggested that the concept of control may not include absolute control but only applies to circumstances where things may be done to restrict or prevent the doing of relevant things.

29 (1989) 7 ACLC 866.

that in *North Sydney Brick*. The target of a takeover offer, Foodland Associated Limited ("FAL"), claimed that Garina Pty Limited was, among other things, in breach of the Take-overs Code. Garina argued that it was not required to comply because the Articles of FAL conferred upon it (and every other member of FAL) a relevant interest in 100% of the voting shares in FAL.

The Articles of FAL only permitted shares to be transferred to:

(a) Any other member selected by the transferor; or
(b) In connection with the sale of the business, any purchaser; or
(c) On the transferors retirement, any person approved by the directors; or
(d) Any person (having an interest in a business of retailing goods of the relevant type) selected by the directors within 8 months, who is willing to purchase the same at fair value, otherwise to any person.

Commissioner Murray QC referred to the decisions in *Kornblum* and *North Sydney Brick* and held that *North Sydney Brick*, although correctly decided, could be distinguished on its facts because the Articles of FAL did not as he saw it give rise to a pre-emptive right. He states:[30]

> ... unlike the relevant Article in the *North Sydney Brick & Tile* case, there is a power to transfer shares to any member selected by the transferor or to any purchaser of the acceptable type of business upon its sale or to any person approved by the directors if the shareholder is in the process of retiring from participating in a business of the relevant character. Clearly, in those circumstances, no member or class of members has the primary or pre-emptive right to require that the shares desired to be sold should first be offered to that person or class. The power to sell effectively to any member or any person approved by the directors, gives rise to no right of control in anybody... In my view, that is not a set of provisions which may realistically be described as giving rise to any pre-emptive right in any individual or class which could constitute a relevant negative control of the right to dispose of the shares...

The writers find it difficult to see how a shareholder in FAL is in a materially different position from a shareholder in North Sydney Brick. In each case a shareholder has power to insist that, if shares are to be transferred, the intending transferor must comply with the procedure set out in the Articles.

One view of the decision in *Foodland* is that it represents an attempt to avoid the extreme consequences that might flow from a technical determination of relevant interest. Commissioner Murray QC states:[31]

> I am fortified in that conclusion by the fact that it enables the avoidance of some of the more absurd results which were adverted to in argument. For example, it avoids the conclusion that in the case of FAL the Take-overs Code could have no application to the acquisition of shares by any member whereas the acquisition of a mere single share would have the effect of conferring upon the new shareholder a relevant interest in

---

30 Above n 29, 887.
31 Above n 29, 887.

> 100% of the shares so as to require that shareholder under s 57 of the Code to obtain from the NCSC a formal written exemption from compliance with the Code which is to be published in the Government Gazette.

The contention that a wide interpretation of the concept of control could defeat the purposes of the takeover legislation had previously been considered in *North Sydney Brick*. Glass J's short judgment deals with precisely this point:[32]

> During the hearing I was attracted by the argument that some restriction ought to be placed upon the meaning of "control" in s 9(1) to avoid certain consequences which would otherwise ensue and which could be described as absurd. These were consequences flowing from the combined operation of ss 7 (3), 9(1) and 11(1), the construction of control adopted below and Art. 24A-G. The first consequence was that each as shareholder in the company would be entitled to 100% of the voting shares in the company within the meaning of s 11(1) and each other shareholder would be simultaneously entitled to the same percentage. Another consequence depending on the Article and those sections as well as a disputed construction of s 7(1) was that no person could acquire a single share in the company except by following the take-over procedure prescribed by s 16. The argument described these consequences as absurd and such as could not have been intended by the legislature. They could be obviated by adopting a limited construction of "control over the disposal of a share" in s 9(1) which excluded negative control or excluded control based on the Articles and vested in all shareholders as such. But upon reflection I am satisfied that it would be wrong to impute to the legislature an intention to avoid these consequences on the assumption that the impact of the Code in all its ramifications had been fully appreciated. To exclude them in the process of construction by imputing to the legislature foresight of such consequences and an intention to avoid them would not in my opinion be warranted.

His Honour Mahoney J came to the same conclusion on the matter.[33] The absurd results which arise under the Australian legislation are in some part due to the fact that proprietary companies are subject to their legislation.[34] The provisions of the New Zealand legislation impact principally on public listed companies. These companies by their nature are unlikely to contain in their Articles the types of restrictive provision which we have seen discussed in the above cases.

---

32 Above n 23, 530.

33 Above n 23, 530.

34 Some reform of this aspect was suggested by Mahoney J in *North Sydney Brick*, above n 23, 530.

D Power

Power is also a key word within the relevant interest definition. Sections 5(4), (5) and (6) extend the meaning of "power" by providing:

> (4) A person who has, or may have, a power referred to in any of paragraphs (b) to (f) of subsection (1) of this section, has a relevant interest in a voting security regardless of whether the power: -
>
> (a) Is expressed or implied:
>
> (b) Is direct or indirect:
>
> (c) Is legally enforceable or not:
>
> (d) Is related to a particular voting security or not:
>
> (e) Is subject to restraint or restriction or is capable of being made subject to restraint or restriction:
>
> (f) Is exercisable presently or in the future:
>
> (g) Is exercisable only on the fulfilment of a condition:
>
> (h) Is exercisable alone or jointly with another person or persons.
>
> (5) A power referred to in subsection (1) of this section exercisable jointly with another person or persons is deemed to be exercisable by either or any of those persons.
>
> (6) A reference to a power includes a reference to a power that arises from, or is capable of being exercised as the result of, a breach of any trust, agreement, arrangement, or understanding, or any of them, whether or not it is legally enforceable.

The Australian legislation similarly defines power in very wide terms in ss 9(2) and (3) of the Companies (Acquisition of Shares) Code.

An issue that has arisen in several Australian cases is whether the power to obtain the power to control voting rights, or the acquisition or disposition of shares, is itself a power under ss 9(2) and (3). The approach adopted in *Equiticorp Industries Ltd* v *ACI International Ltd*,[35] is that the power to obtain the power to control does not give rise to a relevant interest. However, this approach was not followed in either *TVW Enterprises* or *NCSC* v *Brierley Investments Ltd & Ors*.[36]

---

35 (1987) 5 ACLC 237.
36 (1988) 6 ACLC 995.

In *Equiticorp*, the issue arose under the Foreign Takeovers Act 1975 which prohibits a foreign person having a substantial interest in more than 15% of the issued shares of an Australian company. It was argued that two New Zealand companies, through their various holdings of convertible notes and options were "in a position to" (that is had the power to) control 15% of the voting shares in ACI International Limited. The Court held that it was necessary to establish the existence of[37]

> an enforceable and presently and immediately existing right enabling the voting power to be controlled. It must be more than control in certain eventualities.

This finding was consistent with the decisions in *WP Keighery Pty Ltd* v *FC of T*[38] and *FC of T* v *Sydney Williams Holdings Ltd.*[39] In those cases the question was whether, for the purposes of the Income Tax Social Services Contribution Assessment Act 1936-1952, a company was "capable of being controlled by any means whatever by one person or by persons not more than seven in number". In *Keighery*, Mr and Mrs Keighery held four ordinary shares in the company and were directors of the company. Twenty other persons held redeemable preference shares. The preference shares had voting rights in general meeting and were redeemable at seven days notice.

The Commissioner argued that a company was capable of being controlled by persons if those persons had the potential to obtain control by redemption of the preference shares. Their Honours Dixon CJ, Kitto and Taylor JJ said:[40]

> 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.

Sydney Williams Holdings involved almost identical facts to *Keighery*. The Court followed the reasoning in *Keighery* holding that:

> The absence of an immediate right of conversion is enough by itself to make para (f) inapplicable to the case. If it cannot be said of a company on the last day of the year of income that seven persons (or fewer) are presently able to control the company, in the sense of securing the passing of a resolution at a general meeting, the company cannot be described as capable on that day of being controlled by one person or by persons not more than seven in number.

This issue arose in *TVW Enterprises*,[41] namely, whether an exchange of undertakings to enter into a draft agreement conferred upon either party the power to control the disposition of the voting securities of the other party. Counsel for the respondent argued that it was not enough to have the means of obtaining the power but

---

37 Above n 35, 572.
38 (1957) 100 CLR 66.
39 (1957) 100 CLR 95.
40 Above n 38, 87.
41 Above n 15.

that it must be a power actually possessed and existing, and that consequently the giving of undertakings did not give rise to a relevant interest. However, the Court implied a term into the agreement created by the exchange of letters that neither party would sell their shares in the company before giving the other party the opportunity to request the execution of the draft agreement. Thus on the Court's analysis of the facts power vested from the time the letters were exchanged.[42]

In *Brierley* the Court declined to follow the approach in *Equiticorp*. The Court had to determine whether the acquisition by Brierley Investments Limited (BIL) in excess of 20% of the capital of Rainbow Corporation Ltd was in breach of the New South Wales takeover legislation[43] because BIL became, by virtue of that acquisition, "entitled" to just under 40% of the voting shares in Woolworths. Rainbow was said to have a relevant interest in the shares in Woolworths held by Stanley Park Limited even though there were no less than five companies interposed between Rainbow and Stanley Park. Stanley Park was wholly owned by Turaro Pty Limited which was wholly owned by Redgate. Diatribe Investments Limited had a call option over the shares in Redgate. Diatribe was owned by two subsidiaries of Rainbow, Conference Projects Limited and Progen Investments Limited.

In reliance on the decision in *Equiticorp*, counsel for the respondent said that while Rainbow might have the potential to control Woolworth's shares, it did not have any existing power to control the shares. Further, he said that even the potential to obtain power was disrupted at two points in the chain. First, the call option held by Diatribe over the Redgate shares was subject to the restrictions of the Foreign Takeovers Act. Second, the shareholders in Diatribe did not control the appointment of its directors and so could not control the exercise of whatever rights Diatribe had. The rights to appoint directors were held by Setar Five Limited, the shareholders of which were two New Zealand solicitors, Messrs Darvell and Young.

Hodgson J distinguished *Equiticorp* on two grounds. First he said that that case did not exclude the possibility that a person may, as a matter of legal entitlement have only the potential to obtain power, but may at the same time have an immediate factual power to control, based on understandings or arrangements, and supported in fact by the legal entitlement. Second he said that the provisions of ss 9(2) and (3) (of which there was no equivalent in the Foreign Take-overs Act[44]) extended the meaning of power in such a way as to permit a finding of an existing power even when there was an element of futurity in the power.

Applying this reasoning, Hodgson J inferred, from the absence of any "independent commercial interest" in the chain between Rainbow and Stanley Park, that Rainbow, as a matter of fact, had the power to control Stanley Park. He found that the shareholders in Redgate (being accountants or solicitors or of some other profession) had no independent commercial interest, and would act on the instructions of Diatribe or those

---

42 Above n 15, 887.

43 Section 11 Companies (Acquisition of Shares) (New South Wales) Code.

44 The legislation at issue in the *Equiticorp* case.

who controlled Diatribe. Moreover, they were bound by the call option to transfer the shares in Redgate (which were of considerable value) to Diatribe for nominal consideration. Turning to the apparent lack of control of the appointment of directors to Diatribe, Hodgson J noted that this could be changed by shareholders resolution. His Honour also noted that the annual return of Setar Five had been lodged by Rainbow, evidence of de facto control.

Determining whether a person represents an "independent commercial interest" is not a simple matter. In the recent New Zealand decision *Gulf Resources*[45] the Securities Commission claimed that Gulf (a United States incorporated entity of which little was known in New Zealand) had a relevant interest in the shares in City Realties Limited ("CRL") which it had failed to disclose. Gulf, assisted by two accountants, was engaged in the acquisition of properties. CRL was a property company and in October 1989 Gulf approached the majority shareholder of CRL offering to purchase its shares. Gulf withdrew from the deal before it was executed. Subsequently, Zelas Enterprises Limited, a $100 company formed by the two accountants on 13 October 1989, purchased the CRL shares on 16 October 1989. Gulf then re-entered the picture to fund Zelas' acquisition and disclosed a relevant interest under s 5(1)(f). The central issue was whether Zelas was a nominee, acting on the basis of some arrangement or understanding with Gulf, when it acquired the shares on 16 October 1989.

McGechan J accepted the evidence of Gulf executives that Gulf had withdrawn from the transaction in October and that Zelas was not a nominee for Gulf but was acting in its own right. Despite the insubstantial nature of Zelas, and the relationship between Zelas shareholders and Gulf, the Court found that there were no reasonable grounds to suspect non-compliance by Gulf. Throughout the transaction, and despite appearances to the contrary, Zelas was a commercial interest independent from that of Gulf.

The other proposition advanced by the Court in *Brierley*, that shareholders have the power to control by virtue of their power to change the Articles, was addressed by the Court in *Zytan Nominees Pty Ltd v Laverton*.[46] There his Honour Malcolm C J clearly doubted that shareholders in a company would have a relevant interest in shares held by that company by virtue of their of their power to convene a general meeting and thus exercise control of the company's holdings. He said:[47]

> The question whether in any particular case a person has a power "exercisable alone or jointly with other person or persons" is a question of mixed fact and law. So far as it is a question of fact it must be decided on the basis of existing facts and circumstances. In my opinion it cannot be decided on the basis of theoretical or possible facts which may or may not occur. Thus, a power which will exist only contingent upon there being a sufficient number of like minded persons to constitute a majority in relation to a particular issue would not be sufficient. Hence, absent a provision in the articles such as that in *North Sydney Brick and Tile* the existence of a mere possibility that a shareholder could, if he acted jointly with other shareholders constituting a majority,

---

45 Above n 8.
46 (1988) 7 ACLC 153.
47 Above n 46, 161.

> bring about an alteration of the articles to impose a restriction on the disposal of shares by directors does not have the result that such a shareholder should be regarded as having an existing power for the purposes of s 9(1) of the Acquisition of Shares Code or s 8(1) of the Companies Code.

However, Malcolm J's comments do suggest that there may be some additional circumstances from which the court can infer that shareholders will act jointly to amend the Articles.[48]

In both *TVW Enterprises* and *Brierley* the Court rejected arguments that the mere potential to obtain the power to control was not a power. In both cases the Court found that the circumstances gave rise to "an immediate factual power" even though as a matter of legal entitlement there was only the potential to obtain power. The decision in *Zytan Nominees* is consistent with this approach. There it is suggested that if the facts proved that shareholders constituting a majority would act jointly, either to bring about a change in the articles restricting the disposal of shares by directors, or, as in the case of *Brierley*, to assume control of the Board, then each shareholder may be regarded as having an existing power and therefore a relevant interest in respect of the company' shares. These cases demonstrate the Courts desire to look at the facts in a given situation to determine whether a person has the power to control the exercise of voting rights or the disposition of shares. The Courts will not confine their examination to, or base their decision on, an analysis of strict legal rights.

In many of the cases discussed above the Australian courts have given liberal interpretations to enable them to find a power to exist in situations where strictly there is only the potential to obtain a power. This is a reflection of the fact that their legislation does not deal particularly well with powers arising in the future. Our legislation may not require that "power" be interpreted as widely as in the above decisions because we have s 5(1)(f) which directly addresses the issue of future powers. A New Zealand court assessing a power to control which exists as a matter of fact rather than legal entitlement could take an Australian type interpretation of power and find a relevant interest to exist under s 5(1)(b) to (e). Alternatively, without resorting to Australian authority, use could be made of s 5(1)(f). Section 5(1)(f) is discussed below.

E Section 5(1)(f)

This section provides that a person will have a relevant interest in a voting security where that person:

> Under, or by virtue of, any trust, agreement, arrangement, or understanding relating to the voting security (whether or not that person is a party to it) -
>
> (i) May at any time have the power to control the exercise of any right to vote attached to the voting security; or

---

48 For a general discussion on the position of shareholders and directors see text at 331.

(ii) May at any time have the power to control the exercise of any right to vote attached to the voting security; or

(iii) May at any time have the power to acquire or dispose of, the voting security; or

(iv) May at any time have the power to control the acquisition or disposition of the voting security by another person.

The Australian legislation has in s 9(6) a provision which is in some respects similar to 5(1)(f). That provision reads as follows:

[Deemed relevant interest] Where a person -

(a) has entered into an agreement with respect to an issued share;

(b) has a right relating to an issued share, whether the right is enforceable presently or in the future and whether on the fulfilment of a condition or not; or

(c) has an option with respect to an issued share,

and, on performance of the agreement, enforcement of the right or exercise of the option, as the case may be, that person would have a relevant interest in the share, he shall, for the purposes of this section, be deemed to have that relevant interest in the share.

This provision is considerably narrower than s 5(1)(f) in that it only concerns agreements, rights and options. Tacit arrangements and de facto controls are not included. Those concepts are imported into the meanings of "power" and "control" by s 9(3) but neither of those words is used in s 9(6). There has been some discussion as to whether in s 9(6)(b) the reference to rights includes rights which do not arise until some future time or event.[49] Our legislation is more definite on this point and clearly covers both presently existing powers that may be exercised in the future (s 5(4)(c)) and powers that arise in the future (s 5(1)(f)).

Because of the extensive definition of power set out in sub-section 5(4), (particularly paragraphs (f), (g) and (h)) many arrangements will give rise to a power to control sufficient to establish a relevant interest under ss 5(1)(b)-(e) and 5(1)(f). What situations then are captured exclusively by s 5(1)(f)? The words "may at any time" indicate that the intention was that 5(1)(f) be applicable to situations where no immediate "power to control" arises but parties may obtain a right to acquire control on the occurrence of some apparently contingent event. The power is not exercisable presently nor may it, on the face of the arrangement, ever be. The arrangement creates only a latent power to control. The power in question therefore might still fall outside the broad s 5(4) definition but the arrangement is caught within paragraph 5(1)(f).

---

49 *Nicholas* v *Wade* (1982) 1 ACLC 459 per Marks J at 465.

The key to interpreting paragraph 5(1)(f) lies in the expression "under, or by virtue of" and "may at any time". The power to which the paragraph refers must be got "under, or by virtue of" the arrangement (not merely as a result of its performance). The power must arise directly out of the arrangement.

The expression "may at any time" is capable of a variety of interpretations. The word "may" could be interpreted in the sense that it conveys an absolute discretion. It is therefore possible to suggest that these words necessitate that the arrangement confers a complete discretion on the person in question to use the "power" referred to at any time. In other words, the arrangement has to give a person *the right at any time of their choosing* to use the relevant power before it could be said to be one by virtue of which a person *may at any time* have power. It is obvious that such an interpretation would frustrate completely the purpose of the paragraph and that the word "may" is used as an alternative to "might" to reinforce the applicability of the paragraph to contingency-based arrangements. We therefore prefer to think that "may at any time" interprets as "irrespective of when" or "might at some time". The arrangement therefore need only be one by virtue which a person *might at some time* have power. A contingent or latent power is created by the arrangement.

III SPECIFIC ARRANGEMENTS

A Puts/Calls

A put option is an agreement whereby one person (the grantor) grants to another person the right to *put* securities to the grantor, ie compel the grantor to purchase those securities. A call option is an agreement whereby one person (the grantor) grants to another person the right to *call* for securities from the grantor, ie compel the grantor to sell the securities.

The grantor of a call option will be either the legal or beneficial owner of the subject securities and so will either be registered as holder or will have a relevant interest under s 5(1)(a). The grantee of a call option will have a power to acquire the subject securities and so will have a relevant interest under s 5(1)(d).

The grantee of a put option will presumably be (or anticipate being) the legal or beneficial owner of the subject securities, otherwise there would be no rationale for having entered into the put option. The grantees relevant interest will arise under s 5(1)(a).

This leaves for consideration the position of the grantor of a put option. This person neither holds the securities nor has an option in respect of them. The grantor has no relevant interest under s 5(1)(a) nor does it appear that on granting the option a grantor could in the ordinary sense be said to have any power to acquire or to control the acquisition of the voting securities. There is therefore no relevant interest under s 5(1)(b)-(e). Does the grantor, a person who might at another person's absolute discretion be obliged to purchase securities have a relevant interest in those securities under s 5(1)(f)? Under Australian law grantors of put options have a relevant interest in the subject securities. The Australian provision which has given rise to that relevant

interest is s 9(6). This provision has no strict equivalent in our legislation. However, the decisions made in relation to these arrangements do give some insight as to how a New Zealand court might view them.

In *Re Adelaide Holdings Limited*[50] and *Yaramin Pty Limited* v *Augold NL*[51] the Australian courts found that a grantor of a put option had a relevant interest in the subject securities by virtue of s 9(6)(a). That provision deems a relevant interest in a share to be held by a party to an agreement which *if performed* would result in that party having a relevant interest in that share. Because the result of the performance of a put option would be to effect a transfer of shares to the grantor, the entry into the put option gives the grantor a relevant interest in those shares.

However, our legislation has no provision such as s 9(6). The question in New Zealand is not whether performance would result in a relevant interest being acquired but whether a put option is an agreement relating to voting securities *under, or by virtue of which* the grantor may *at any time* have any of the powers set out in 5(1)(f)(i)-(iv) in respect of those securities. To answer this question requires consideration of the precise nature of an option contract.

In *Nicholas* v *Wade*[52] the Australian courts considered whether a put option gave rise to a relevant interest under s 9(6)(b). This section is quite different from s 9(6)(a) (which looks solely to the result of performance) in that it deems a relevant interest where a person has a *right* (conditional or otherwise) which on enforcement would result in a relevant interest being acquired. To decide whether the grantor of a put option had a right relating to the securities an analysis was made of the nature of options generally.

The Judge took the view that a put option conferred on its grantor a right to the shares enforceable on fulfilment of a condition, the condition being the service of a put notice on the grantor. The grantor therefore has the right to acquire once the grantee has exercised its right to require acquisition. The writers think this construction is, to say the least, a little strained. The grantor of a put option has, on receipt of a put notice, an *obligation* to buy rather than any right, there being no discretion in the grantor as to whether to acquire or not. Put simply, the grantee has the right to sell and the grantor has the obligation to buy. However, the Judge was not inclined to such a simple view and found that because a put option was a conditional contract of sale (as opposed to an irrevocable offer to buy), the sale contract must give rights in respect of the shares to the potential purchaser.

The authorities relied on in *Nicholas* v *Wade* relate to options to purchase rather than options to sell but the Judge sees this as no impediment to his finding. The writers would respectfully suggest that there is a significant distinction between these two types of option in that, while an option to purchase creates a right in favour of the potential purchaser, binding the vendor in a manner which might be said to create a conditional

---

50 (1982) 1 ACLC 542.
51 (1987) 5 ACLC 783.
52 Above n 49.

sale, an option to sell creates no obligation on a potential vendor and hence confers no corresponding right on the grantor of the option. The grantor of an option to sell does not obtain in any legal sense an interest in the property and the grantee is not bound to have regard to the grantor in dealing with the property. By contrast, property which is the subject of an option to purchase cannot be freely dealt with.

The Judge in *Nicholas* v *Wade*, rather than imposing a strained construction on the interpretation of s 9(6)(b) and the nature of options, would have been better to recognise that the put options were simply a form of security for a party who was warehousing shares for the grantor.[53] On the basis of that and the other factual circumstances he might have found that the grantor had effective power to control acquisition of the shares. If the *Nicholas* v *Wade* analysis is followed in New Zealand, it would mean grantors of puts would have relevant interests under s 5(1)(d) with the "power to acquire" being one which is exercisable on the fulfilment of the condition of receipt of a put notice.

The writers incline to the view that arrangements of the sort arising in *Nicholas* v *Wade* might require disclosure because as an inference from the factual circumstances the grantor has power to control the securities. However, a simple put option does not of itself create a relevant interest for its grantor because the grantor does not in any real sense have a power, conditional or otherwise, to acquire the subject securities.

Does the grantor to a put option have a relevant interest arising out of s 5(1)(f)? One would argue that the grantor obtains no power to control *under* or *by virtue of* the agreement. The agreement does not in any true sense give the grantor the power to acquire (conditional or otherwise). This presumes that a New Zealand court would reject the approach in *Nicholas* v *Wade*. It has been suggested that because, as a result of the put being enforced, the grantor will become the owner of the securities and thereby have power to control them, a put option gives rise to a relevant interest under s 5(l)(f). We do not think that the power to control which may vest in a grantor following performance can be said to arise *under or by virtue of the agreement*. The power to control after performance of the put option arises out of the grantor's legal ownership of the securities.

The legislation is aimed at informing the market of persons amassing de facto control of large shareholdings or acquiring the ability to amass large holdings quickly without going to the public market. Grantors of simple put options are not normally in this category and in the absence of other circumstances surrounding their relationship with the grantee there seems to be no compelling reason for the public issuer to be informed of their presence.

B Carousels

In *Nicholas* v *Wade* Mid-East Minerals NL sought to acquire a controlling stake in Metals Exploration Limited and instructed a broker to commence acquisitions on their

---

53 For a synopsis of the facts see text at 331.

behalf "until further notice". When the holdings of the parties approached disclosure level Mid-East sold shares to A who by put option could compel their sale to B who could in turn compel their sale to Mid-East. A and B received a money market interest rate on their investment in the shares upon exercise of the two put options. The substance of the arrangements was that A and B were warehousing shares for Mid-East, effectively holding them as Mid-East's nominee. However, because the arrangement demanded that the nominee/principal relationship not be recognised, the de facto nominee required some security to ensure it was not left holding the shares. This security took the form of a series of put options which were given the nomenclature of "carousel agreement".

C Directors and Members of Relevant Interest Holders

Problems arise when dealing with small groups of persons who together, through a corporate entity or a series or group of corporate entities, control a significant portion of voting securities in a public issuer. The beneficial ownership or the direct power to control the voting securities will lie with the corporate entity (or entities). The question becomes to what extent do the members and directors of a corporate entity have the relevant interests of that entity? Because the definition of power includes a power that is indirect and exercisable jointly it is arguable that every shareholder and every director of a company has an indirect power exercisable jointly with the other shareholders/directors in respect of that company's holdings. In the case of a large public company if each of its shareholders was deemed to have the interests of the company the result would be ludicrous. The results of a literal interpretation of s 5(4)(b) and (h) in these circumstances preclude such an interpretation both in the case of shareholders and directors. This was the view of Malcolm CJ who in *Zytan Nominees*[54] refused to find that a director of a company had the interest of that company simply on the basis of:

> a theoretical possibility that one director, being a member of a board of two or more directors acting jointly with others who with him constitute a majority of the directors, would have the power to exercise or control the exercise of the disposal of shares.

Malcolm CJ stated that he could only make such a finding if the facts showed that on a balance of probability the directors would act jointly.

This decision is in direct conflict with the earlier decision of Neasy J in *Clements Marshall Consolidated Limited* v *ENT Limited*[55] where each director on the board of a company was held individually to have the power that company had in respect of a certain shareholding. Clearly the Australian authorities are mixed.

The words in s 5(4) are certainly capable of yielding an interpretation similar to that in the *Clements* case no matter how potentially ludicrous the results. We must look for other indications as to what is the intention of the legislation.

---

54 Above n 46.
55 (1988) 6 ACLC 389.

The Securities Commission Report states at 120 -

> If it is desired to discover the identity of those controlling voting power, then it is necessary to go past the registered holder and consider all the variety of means whereby the exercise of the votes attaching to shares can be controlled... Finally, if the registered holder is a company, a search may need to be instituted through a chain of companies to identify the individuals who, at the end of the chain, have the power of decision.

This would seem to support the *Clements* view that those who control the company are those whose disclosure the legislation is seeking. However, it would not necessary be inconsistent to suggest that power is not to be automatically attributed to each director but rather it is a mixed question of fact and law as to whether any single director does indeed have power in the particular circumstances. That is the approach in *Zytan*.

What is the position with shareholders? The legislation itself gives us some indication as to when persons are to be attributed the relevant interests of companies in which they hold shares. Paragraphs 5(2)(b) to (e) provide a 20% control threshold before shareholders will be held to have the relevant interests of their companies. The mere existence of these paragraphs suggests that a 20% holding of itself would not otherwise give rise to an interest notwithstanding the width of the definition of power. Further, if a 20% holding in a company gave a relevant interest under both ss 5(1)(b) to (e) and ss 5(2)(b) to (e) this would not only mean that the provisions of s 5(2)(b) to (e) were superfluous but also the effect of subs 23(2) would be frustrated. The authors are therefore of the view that a shareholder does not, by virtue of shareholding alone, have the power to control a company's holdings unless that shareholder individually controls at least 50% of that company's shares.

It ts not submitted that directors, or shareholders of less than 50% of a company, will *never* have the relevant interests of that company, merely that they will not have those interests by virtue of their directorship or shareholding alone. Control will not be presumed to rest with shareholders and directors simply because the width of s 5(4) allows it to, but control may be inferred from the factual circumstances surrounding the directorship/shareholding.

D Concert Parties

Where a small group of persons each have relevant interests in their own right and together own and direct holding companies with relevant interests difficulties might arise. If, for example, three individuals each own 4% of a public issuer and each own a 19% shareholding in, and are directors of, two holding companies which each have a relevant interest in 4% of that issuer, those persons and the companies might successfully avoid disclosing that between them they control 20% of the issuer. Each director would argue on the basis set out above that he does not have the relevant interests of the holding companies. The holding companies are each below the disclosure threshold and because they are not related in terms of s 5(7) they would not have each others interests as provided by s 5(3). The directors would not have their holding companies' interests by virtue of s 5(2)(a) because none of the directors

individually is a person in accordance with whose directions the holding companies act. Section 5(2)(b) to (e) would not apply.

This type of situation has been dealt with in other jurisdictions using the concept of a concert party. There is no such concept embodied in our legislation. In ***Brook Investments Limited (In voluntary liquidation)*** v ***Paladin Limited***[56] this situation was handled easily by Sinclair J. He states:[57]

> At the time the proceedings were commenced, and probably even now, the plaintiff was still unaware of the precise holdings of the individual parties comprising the Laisee group. For the purposes of Part II of the statute, they constituted a person because they acted in concert and were therefore an unincorporated body of persons within the definition of the term "person" in s 2 of the statute.

The writers are uncertain whether this approach is a suitable solution to the concert party problem.

E Holding Companies and Related Persons

Problems may also arise out of s 23(2) in that it will often be the persons (corporate or otherwise) behind holding companies that a public issuer wishes to identify. These persons may only have a relevant interest by virtue of s 5(2)(b) to (e) and therefore will avoid disclosure requirements upon the holding company giving notice. With a New Zealand registered company this may not be of concern as the shareholding and directorship of the company will be matters of public record in any case. However, by using entities incorporated in other jurisdictions secrecy might easily be achieved.

Similar problems may arise with s 23(3). The provision refers to persons who are related but unfortunately there is no definition in the Act of related persons. However, related bodies corporate are defined in s 5(7) and presumably s 23(3) applies at least to those persons. It may well be argued that s 23(3) extends to relationships outside those delineated in s 5(7). Groups of related bodies corporate may structure their shareholdings so that the body corporate which directly holds the relevant interest and gives the notice cannot, by reference to public records alone, be affiliated with a party seeking to keep its identity concealed.

F Trusts

The relevant interests of a bare trustee of voting securities are to be disregarded (s 6(1)(f)). A bare trustee is one who holds the property according to a strict trust with no discretion of any sort vesting in the trustee. In such an arrangement there will be a clear beneficial ownership which will require to be disclosed. What is more interesting is the "discretionary trust". This is a trust where the selection of the beneficiaries, the extent

---

56 Unreported, 21 October 1989, High Court, Auckland Registry M1581/89,per Sinclair J.

57 Above n 56, 11.

of their entitlement in the trust estate and even the time of disbursement of the trust assets are matters to be determined by the trustee at the trustee's discretion. Clearly such a trustee does not have the benefit of s 6(1)(f) and will be required to make an appropriate disclosure. What is not clear is whether there are in fact any beneficiaries who would be required to give a notice. Depending upon the exact structure of the relevant trust it may be that the persons for whose benefit the trust was intended are not sufficiently well identified so as to give them a relevant interest and so it would seem they are able to remain undisclosed.

IV CONCLUSION

The above gives some guidance as to the boundaries of the definition of "relevant interest" and the extent to which a court may be prepared to stretch those boundaries in any given circumstances. The definition has its imperfections and undoubtedly many crucial interests will continue to go undisclosed while other disclosures baffle the public issuers that receive them. What has been achieved by the legislation is to give to public issuers a level of information which was not previously available to them and that must be regarded as valuable. To a great extent the attitude of the courts in interpreting and enforcing the legislation will determine what that level is and whether or not further legislative reform might be required to ultimately ensure adequate disclosure of relevant information regarding shareholdings.