THE REGULATION OF CORPORATE GROUPS IN AUSTRALIA

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I. INTRODUCTION

Businessmen, accountants and investors all think about corporate groups rather than individual companies as the main focus of their activities. Only lawyers and legislators - and with them the new Australian *Corporations Law* - cling to the tradition that individual companies are the only proper focus of attention and that corporate groups are no more than simple or complex combinations of individual companies.

This is not to say that corporate lawyers do not understand as well as or better than businessmen, accountants and investors the true nature of corporate groups. Since it is often lawyers who are instrumental in creating or reorganising corporate groups of all kinds, they clearly understand very well the intricacies of group structures and the purposes which they are designed to fulfil. They are well paid for doing so. The point is rather that lawyers, as so often, are lagging behind the realities of the business world. The group rather than its individual constituent companies is the significant entity for managerial,

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accounting and investment purposes. But the law is still focused almost exclusively on the individual company. It is consequently increasingly difficult paid for doing so. The point is rather that lawyers, as so often, are lagging behind the realities of the business world. The group rather than its individual constituent companies is the significant entity for managerial, accounting and investment purposes. But the law is still focused almost exclusively on the individual company. It is consequently increasingly difficult to apply in practice. The traditional rules on the duties of the directors and officers of individual companies make little sense within corporate groups. There are no clear rules on the liability of the group for the obligations of its constituent companies. And there is virtually no legal control at all on the complexity of the group structures which may be established with a view to concealing the true state of affairs within a complex group. The only major recognition of the existence of the group has been the requirement for the consolidation of group accounts, though as will be seen the established rules have not proved particularly effective. All this makes it too easy for complex corporate groups to be used to confuse or defraud the business or investment communities. The fact that most of the spectacular corporate failures and frauds in recent years both in Australia and elsewhere have been carried out within or by means of complex corporate groups is in itself an indication of the need for more effective regulation.

Lawyers may claim some justification for their traditional stance from the fact that company legislators likewise maintain and perpetuate the fiction that individual companies must be the primary focus of legal regulation. In almost every jurisdiction company legislation deals with the formation, management and liquidation of individual companies and the duties of their directors and officers in excruciating detail. The existence of corporate groups is frequently taken into account, notably in respect of the regulation of consolidated group accounts and of potentially self-interested transactions by companies and their directors. But the provisions on corporate groups typically constitute the exception rather than the rule. This is reflected in company law textbooks in which the provisions relating to corporate groups are typically dealt with as additions or exceptions to the general rules for individual companies and their directors.

The *Corporations Law* is no exception to these general tendencies. It follows closely established legislative practice in other common law jurisdictions, both in its basic approach to corporate groups and in some of its most significant amendments and reforms. Most of its provisions with respect to corporate groups are by way of additions or exceptions to general rules on such matters as loans to directors and other potentially suspect transactions and relevant interests in the context of take-over bids. The exception is the major change with respect to corporate group accounts which has been introduced in the aftermath of the Adsteam affair and which closely parallels the broader definition of groups for accounting purposes within the European Community.

To that extent it is unfair to single out the new Law for its failure to adopt any radical new approach in this sphere. A new Code is nonetheless an opportunity to bring the law up to date; and there are few areas of company law in which such an updating is more necessary, not least in respect of the structure and governance of corporate groups, their obligations to minority interests and their liabilities in cases of failure and fraud. This account of the provisions of the *Corporations Law* which deal with corporate groups is therefore as much concerned with the underlying inadequacy of the law, both old and new, as with the amendments and reforms which it incorporates.

II. GROUP STRUCTURES IN AUSTRALIA AND ELSEWHERE

An essential prerequisite to an assessment of the new *Corporations Law* from this perspective is a clear understanding of the nature and purpose of corporate groups in the modern business world. It may be useful in this context to identify some significant patterns of development in corporate group structures in Australia and elsewhere.

For larger public companies Chandler and others have distinguished three major developments.[1] The initial impetus in Britain and the United States appears to have been a desire to create larger structures for cooperation between established companies. In most cases these combinations developed into more or less unified economic entities, whether from the external pressure of anti-trust legislation or from internal managerial forces. These groups then typically expanded in two related ways: first by establishing new sales and production subsidiaries in new areas of operation, often in other jurisdictions; and secondly by acquiring other established companies or groups in the same sphere of business activity by agreement or take-over. The result was the creation of increasingly complex national and multinational groups of companies with hundreds of subsidiaries, most of which were typically wholly-owned and wholly controlled by the group holding company.[2] Most of these groups are now in a state of perpetual flux as new subsidiaries are created, acquired or disposed of and as new management structures are superimposed on existing corporate entities within it.

There are nonetheless some distinctive features of group structures in various leading jurisdictions. In groups based in the United States and the United Kingdom it is usual for the group to be composed almost exclusively of wholly-owned subsidiaries, and for partial ownership to be restricted to joint ventures with other groups and those foreign subsidiaries in which there is a requirement of local shareholding.[3] This approach and the resulting limitation of external shareholding to the principal holding company permits group managers a high

1 A Chandler *Scale and Scope: The Dynamics of Industrial Capitalism* (1990).
2 MZ Brooke and L Remmers *The Strategy of Multinational Enterprise* (1978).
3 T Hadden *The Control of Corporate Groups* (1983).

degree of freedom to integrate their operations and finances without having to concern themselves with minority interests. In some other jurisdictions, of which Australia and Canada are good examples, it is more common for major groups to be structured in a more complex manner, with interlocking webs of majority and minority holdings which make it more difficult to assess accurately the profitability and solvency either of the group as a whole or of its constituent companies or to identify those who are formally responsible for their operations.[4] In a few jurisdictions, of which Japan is the leading example, external public shareholding at all levels of the group appears to be actively encouraged as a means of securing additional equity finance.[5]

Group structures at the lower level of private and proprietary companies are also increasingly common in most jurisdictions. In some cases these private or family groups have been developed with a view to taking advantage of limited liability for new ventures, for example by establishing a new company for each new business location. In others they have been created to take advantage of tax planning opportunities. In most, the group is allowed to develop without much thought being given to issues of control or responsibility.

III. SYSTEMATIC INFRINGEMENTS AND SERIOUS ABUSES

Whatever the reasons for their development it is clear that the corporate group is now the typical form of business organisation at all but the lowest level of small proprietary companies. It is also clear that in almost every case the operation of a corporate group involves some systematic infringements of the traditional principles of company law and that in a few cases these infringements may involve or lead to much more serious abuses.

The systematic infringements of traditional principles stem from the fact that the management and finances of the individual companies within a group are typically integrated in and therefore subordinated to those of the group as a whole. Financial integration is likely to involve occasional or regular transactions by individual companies within a group which are not in the best interests of that company, such as loans or guarantees to other companies in the group or the sale or transfer of goods or property at less than the optimal price, in order to produce the most advantageous level of profit or loss in particular companies. Managerial integration is likely to involve the issuing of orders to the directors of individual subsidiaries by group managers and the appointment of representatives of the group on the boards of those subsidiaries to ensure that all relevant information is passed on to group headquarters. Such practices may often be justified as necessary or desirable in the long term interests of the group as a whole, or at least as being unobjectionable in cases where there are

4 T Hadden, R Forbes, R Simmonds *Canadian Business Organisations Law* (1986) ch 9.

5 M Hayakawa and M Kojo, private communications; T Hadden, "Regulating Corporate Groups: An International Perspective" in S Piciotto et al (eds) *Corporate Control and Accountability* (forthcoming).

no minority interests. But they clearly constitute an infringement of the basic principle that the affairs of every company must be conducted in the interests of that company alone, that its directors must always act only in the interests of their own company and that they must not accept instructions from or disclose corporate information or opportunities to others. If these rules were strictly enforced - if each individual company within the group was actually treated as an entirely separate entity as the law requires - there would be little point in establishing a group or maintaining any managerial or financial control at group level.

In most cases these infringements are largely technical and are generally accepted as unavoidable or unobjectionable within a corporate group. As will be seen, some have been expressly authorised or tacitly recognised in company legislation. In some cases, however, they may involve or result in more serious abuses. Six broad categories of manipulation and abuse, whether of the techniques of group control and integrated financing or of group structures in themselves, may be identified:

(i) the techniques of group control, notably those involving interlocking shareholdings and directorships, may be used to entrench the positions of incumbent managers against any possible threat from external shareholders;

(ii) the techniques of integrated financing, notably the freedom to pass assets and liabilities from company to company within the group, and the creation of complex group structures may be used to conceal the true financial position of individual companies or of the group as a whole from their shareholders or creditors;

(iii) both techniques may be used to ensure that the interests of shareholders and directors of the group are preferred to those of minority shareholders in subsidiaries and to conceal that this has been done;

(iv) the techniques of integrated financing may be used to avoid taxation by ensuring that maximum profit is generated in forms or in jurisdictions which attract low levels of tax;

(v) the creation of separate companies for particular operations, supplemented by the techniques of integrated financing, may be used to avoid liability to external creditors by relying on the limited liability of each constituent company within the group;

(vi) more or less complex group structures may be used to avoid the impact of regulatory measures on a wide range of matters, such as monopolies and mergers legislation, health and safety provisions, employee participation and planning requirements.

Many of these forms of manipulation and abuse may be exemplified in recent Australian experience. The complex structure of the Adelaide Steamship/David Jones group built up during the 1980s, as illustrated in Chart 1 on the following page, is a striking example of the first two heads: the creation of a network of cross-holdings of shares between the leading group companies together with some relatively small personal holdings by the leading directors gave effective control over the whole group - and protection from take-over bids - to those directors; in addition by keeping those cross-holdings just below the 50 per cent level the group was able to avoid the obligation to publish consolidated accounts and thus to report higher levels of apparent profitability than might otherwise have been possible, notably by the payment of substantial dividends between the linked companies each of which was partially funded by corresponding intra-group dividends.[6] There was a similar degree of complexity in the corporate structures of the Bond/Bell Resources group which likewise made it difficult for all but the most astute observers to assess the true financial position of the group as a whole or of its constituent companies.[7] In both these cases the interests of external minority shareholders in non-wholly owned subsidiaries and associated companies were clearly subordinated to those of the group as a whole. The confidentiality of most tax assessments and penalties makes it difficult to give precise examples of that form of group manipulation.[8] But there have been a number of striking examples of problems over other forms of group liability. In the aftermath of the collapse of the Qintex group of companies the courts had great difficulty in deciding which of a number of group companies had undertaken certain foreign exchange contacts involving a loss of $1.4m, since the brokers had regarded the identification of the particular subsidiary as of minor significance given their established trading relationship with what they regarded as the group as a whole.[9] In the *Qintex* case Rogers CJ made the following comments:

> There is today a tension between the realities of commercial life and the applicable law.... In the everyday rush and bustle of commercial life in the last decade it was seldom that participants to transactions involving conglomerates with a large number of subsidaries paused to consider which of the subsidiaries should become the contracting party.... On the other hand in *Industrial Equity Ltd v Blackburn* (1977) 137 CLR 567 the High Court of Australia confirmed the need to preserve, as a matter of law, a rigid demarcation between wholly owned subsidiaries in the same group of companies, as well as their holding company.... It may be desirable for parliament to consider whether this distinction between the law and commercial practice should be maintained. This is especially the case today when the many collapses of conglomerates occasion many disputes. Regularly, liquidators of subsidiaries, or of the holding company, come to court to argue as to which of their charges bears the liability.... There is a great deal to be said for the suggestion.... that assets and liabilities of the parent and the subsidiaries should be aggregated. It may be argued that there is justification for

6 J Parker "Taking Adsteam Apart" *Australian Business* (25 July 1990); T Sykes "The Verdict on Spalvins" *Australian Business* (10 April 1991).

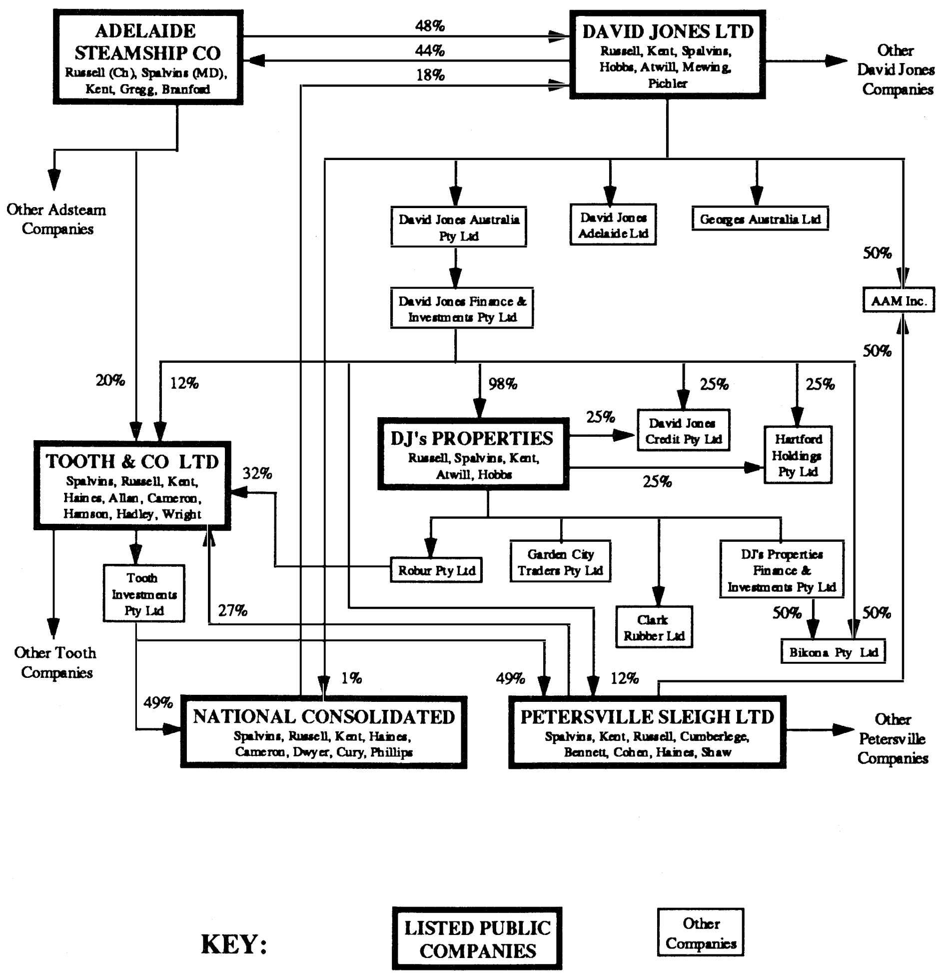
7 Australian Securities Commission *Report on Bond Corporation* (February 1992).

8 See generally S Piciotto "International Taxation and Intra-Firm Policy in Transnational Corporate Groups" in S Piciotto (eds) *Corporate Control and Accountability* (forthcoming).

9 *Qintex Australia Finance Ltd v Schroders Australia Ltd* [1990] ACSR 267.

CHART 1

Parts of the Adsteam Group in Mid 1989



All subsidiaries are 100% owned unless otherwise indicated.

> preserving the same attitude in relation to the demised companies as was displayed during their active commercial life.[10]

Rogers CJ expressed a similar dissatisfaction with the law on liability for negligence by individual companies within a group in a case in which a victim of asbestosis sought to sue both his immediate employer and the two equal corporate partners in a joint venture:[11]

> In the result, as the law presently stands.... the proposition advanced by the plaintiff that the corporate veil may be pierced where one company exercises complete domination and control over another is entirely too simplistic. The law pays scant regard to to the commercial reality that every holding company has the potential and, more often than not, in fact, does, exercise complete control over a subsidiary. .... It remains to be seen whether the time has come for the development of a more principled approach than the authorities provide at present.[12]

The final head of abuse, the avoidance of statutory regulation by the creation of complex corporate relationships, may appropriately be illustrated by the inability of the Trade Practices Commission to contest the take-over of NZ Steel by BHP on grounds of the undue concentration of power since effective control had not been secured 'directly or indirectly' by share purchases but through a more complex chain of holdings of marginally less than the 50 per cent level prescribed for formal control.[13]

IV. ESTABLISHED CONTROLS AND THEIR SHORTCOMINGS

All these forms of manipulation and abuse are well known to lawyers, accountants and legislators and a wide range of regulatory and anti-avoidance measures have been introduced in almost every jurisdiction to deal with them. In the present context the main focus must be on those which form part of company law, though some significant lessons may be learned from other forms of legal regulation. There has been only one major common law development:

(i) the acceptance by the courts that 'the veil of incorporation' may in certain circumstances be lifted so that the operations of a subsidiary may be regarded as those of its controlling or holding company.

As will already be clear, however, this has not proved to be a workable general solution. The more significant legal provisions are those which have been developed in successive companies codes to deal with more specific forms of manipulation or abuse in corporate groups. The most significant of those which appear in established or amended form in the *Corporations Law* or in the 1992 Bill are:

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10 *Ibid* at 268-9.

11 *Briggs v James Hardie & Co Pty Ltd* (1989) 7 ACLC 841.

12 *Ibid* at 862.

13 *Trade Practices Commission v Australian Iron & Steel Pty Ltd* (1990) ATPR 51,023.

(ii) the established limitations on cross-holdings designed to prevent the most flagrant forms of entrenchment;

(iii) the newly amended provisions on consolidated accounts designed to provide more accurate and intelligible information on group profitability and solvency;

(iv) the newly amended and highly complex provisions designed to prevent directors or others in control of corporate groups from taking unfair advantage of situations in which there is a potential conflict of interest;

(v) the general protection against the oppression of minority shareholders as applied within groups of companies;

(vi) the proposed new provisions under which liability may be imposed on a holding company for the debts of a subsidiary.

The nature and purpose of these provisions and the reasons why they are or are likely to prove unsatisfactory will be discussed in turn.

A. LIFTING THE VEIL OF INCORPORATION

In every common law jurisdiction the courts have developed the principle that 'the veil of incorporation' may in certain circumstances be lifted to impose liability on those who control a company where it has been formed or used to carry out a fraud or for some other illegitimate purpose. This principle has been asserted in a number of cases as a justificiation for imposing liability on holding companies in respect of activities carried out by wholly-owned or controlled subsidiaries.[14] And it is often stated in textbooks that the courts are more likely to lift the veil within a corporate group than in other circumstances.[15] There have been relatively few cases, however, in which the principle has been put into practice and there is no consensus on its precise application in respect of corporate groups. The statement by Rogers AJA, as he then was, in one of the cases already referred to aptly summarises the position:

> ... there is no common, unifying principle which underlies the occasional decision of courts to pierce the corporate veil. Although an ad hoc explanation may be offered by a court which so decides, there is no principled approach to be derived from the authorities.[16]

Even in the United States of America, where the courts are apparently more ready to apply the principle than elsewhere, the only sphere in which there can be said to be any settled and reasonably clear rule of law is in respect of the subordination of intra-group loans to liabilities to external creditors under the *Deep Rock* doctrine.[17] The underlying problem is that if the ground for lifting the veil were to be the exercise of effective control by a holding company over

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14 *Smith Stone & Knight Ltd v Birmingham Corporation* (1939) 4 All ER 116.

15 See, for example LCB Gower et al *Gower's Principles of Modern Company Law* (4th ed) pp 128-33.

16 *Briggs v James Hardie & Co Pty Ltd* (1989) 7 ACLC 841 at 855.

17 *Taylor v Standard Gas & Electricity Co* 306 US 307 (1939).

the affairs of a subsidiary, as is often stated, the principle would have to be applied in a very large number of cases. This would seriously undermine the established rule in *Salomon v Salomon & Co Ltd*[18] that the separate corporate personality of each individual company must be recognised. Such a major departure from this fundamental rule in respect of corporate groups but not in respect of other individual controlling shareholders or corporate joint venturers would not be easy to justify either on formal legal grounds or on the basis of economic analysis.[19] Accordingly, since no other meaningful criterion for lifting the veil than that of effective control has been generally accepted, the courts have taken refuge in wide statements of principle while avoiding their application in all but very occasional cases.

B. THE PROHIBITION OF CROSS-HOLDINGS

The initial purpose of the prohibition of cross-holdings between a holding company and its subsidiaries which has long been established in every major common law jurisdiction was probably to prevent the depletion of capital. The prohibition may also be justified as a means of preventing the entrenchment of control and the abuse of mutual investment in order to support the price of shares of listed companies within an extended group. The traditional formulation of the prohibition in Australia as elsewhere in terms of the traditional definition of holding and subsidiary companies,[20] however, meant that it was relatively easy to avoid by the creation of cross or circular holdings of less than 50 per cent. The retention of this traditional approach in ss 9, 46 and 185 of the *Corporations Law* in contrast to the much broader definitions of chief and subordinate entities adopted for the purpose of consolidated accounts, means that complex cross and circular holdings of the kind developed in the Adsteam group[21] and the resulting concentration of control will remain lawful. The adoption of the same broader definition of control for the purposes of cross holdings as for consolidation would clearly be preferable. It may also be argued that the prohibition of cross holdings should be even more general. It is hard to find a convincing justification for permitting any substantial cross holdings, since they necessarily have the effect of complicating the interpretation of accounts and depleting the voting power of other independent shareholders. In Germany cross holdings have for many years been prohibited in respect of any company which holds more than 25 per cent of another.[22] Even lower thresholds of 5 per cent or 10 per cent might be justified as a means of preventing or discouraging the formation of unduly complex groups without interfering in any legitimate corporate practices. Some temporary exemption

18 [1897] AC 22.

19 For a general discussion of these issues see P Blumberg "Limited Liability and Corporate Groups" (1986) 11 *Journal of Corporation Law* pp 611-23.

20 *Companies Code* s 36.

21 For details see the chart on page 67.

22 Aktiengesetz 1965 art 19.

might be desirable in respect of active take-over bids both in order to prevent one company from preventing another from making a bid or counter-bid by building up a holding of the requisite size and to permit a target company to buy shares in a bidding company as a means of defence or counterattack. But any such exemption would require tight definition and control, not least in respect of the disposal of excessive holdings on the completion of the bid, under the provisions in chapter 6 of the *Corporations Law* governing the acquisition of shares in the context of take-over bids. It would also be desirable to ensure that the established provisions prohibiting the use of a company's assets for the purchase of its own shares were broad enough to prevent the avoidance of any prohibition on cross or circular holdings, not least in the light of the reasoning in *August Investments Pty Ltd v Poseidon Ltd.*[23] The underlying objective should be to ensure that cross or circular holdings cannot be used to create complex corporate structures whose only purpose is to entrench control, to lessen the influence of external investors or to allow controllers to use group assets to influence the market price of shares in group companies.

C. CONSOLIDATION AND RELATED ACCOUNTING RULES

The purpose of the long established rules governing the publication of consolidated group accounts is to counteract the freedom which those in control of corporate groups have in manipulating profit and loss or solvency in individual group companies by integrated financing techniques and to ensure that the affairs of corporate groups are truly and fairly reported to their shareholders, their creditors and the public at large. A group for this purpose was defined by reference to the traditional definition of a subsidiary company, ie a company in which more than half the shares or votes or the appointment of more than half the directors was controlled by another (holding) company.[24] This meant that the obligation to consolidate could often be avoided, either by establishing supposedly uncontrolled subsidiaries to hold off-balance sheet borrowings or by creating complex groups like that of Adsteam in which it could be argued that the statutory criteria for control in respect of each individual company were not met. This was clearly unsatisfactory. Within the European Community a much broader and more realistic definition of control under which consolidation is required in any case in which one company "actually exercises a dominant influence" or which is "managed on a unified basis" was adopted under Seventh Directive on Consolidated Accounts in 1983 and is already in operation in most member states.[25] The objective is to ensure that consolidated accounts are prepared in all cases where there is actual as opposed to formal control which will in practice have to be assessed by the companies' auditors. The amendments to the *Corporations Law* adopted in the

23 (1971) 2 SASR 71.

24 *Companies Code* ss 7 and 269(3).

25 See for example the *Companies Act* (UK) 1989 s 21, replacing s 258 of the *Companies Act* (UK) 1985.

aftermath of the Adsteam affair are designed to achieve a similar objective by a different route.

The legislation now requires consolidated accounts of all controlled entities to be produced by a 'parent entity' in any case where it is itself or where it controls a reporting entity.[26] The clarification of what is meant both by an entity and by control is then in effect delegated to the Australian Accounting Standards Board ("AASB") in the formulation of the relevant accounting standard.[27] The definition eventually adopted under AASB 1024 on Consolidated Financial Statements in 1991 is based on broad economic rather than traditional legal criteria for both 'entity' and 'control':[28]

> *entity*: any legal, administrative, or fiduciary arrangement, organisational structure or other party (including a person) having the capacity to deploy scarce resources in order to achieve objectives
>
> *control*: the capacity of an entity to dominate decision-making, directly or indirectly, in relation to the financial and operating policies of another entity so as to enable that other entity to operate with it in achieving the objectives of the controlling entity

In addition the freedom of directors of group companies to arrange for different accounting periods for different companies within the group and thus to carry out 'window dressing' transactions in advance of the relevant date, will be eliminated by the requirement that a company's directors must "do whatever is necessary to ensure that that the financial year of each entity that the company controls coincides with the financial year of the company".[29] Finally, with a view to reducing the discretion under the previous regime for directors to produce accounts which did not comply with accounting standards if in their view to do so would not give a true and fair view,[30] it has been made clear that the consolidated statements must not only comply with the relevant accounting standard but must give such additional information or explanations as will give a true and fair view.[31]

If the accounting profession is sufficiently determined to ensure that these new requirements are enforced in practice, most of the major and well-used opportunities for the manipulation or avoidance of the consolidation provisions under the previous *Companies Code* will disappear. It should not be assumed however, that the consolidation of group acounts on this or any other basis meets all the legitimate needs of shareholders and creditors and others interested in a company's financial affairs. The larger and the more diverse the group, the greater is the need for the disaggregation of consolidated accounts to show the performance and worth of operating subsidiaries, entities or divisions within the group. In the context of take-over bids and disposals there is a need for

26 *Corporations Law* s 9; *Corporations Regulations* sch 5; AASB 1024.07 and 1024.10.

27 *Corporations Act* 1989 (Cth) s 32(3).

28 AASB 1024.09.

29 AASB 1024.14.

30 *Corporations Law* ss 298(1) and 299.

31 *Corporations Law* s 295.

shareholders and investors generally to have a more accurate statement of the real worth and contribution to profits of the entities which are to be or have been acquired or disposed of. The new accounting provisions require additional information to be provided by way of a note to the consolidated group accounts in the event of the acquisition of a new subsidiary or the disposal or loss of control over an existing subsidiary, specifying both the payments made or received and the fair value of the net tangible assets of the subsidiary on acquisition or disposal.[32] In addition detailed information must be provided on the name, the country of incorporation, the proportion of shares held and the contribution to group profit of each subsidiary.[33] These requirements are clearly welcome. But they would appear to leave considerable scope for the arrangement or manipulation of apparent profitability within different parts of a group, whether by transfer pricing or some other technique. Tax authorities in most jurisdictions have long asserted the right to adjust the reported profits and losses of subsidiaries or other units within corporate groups with a view to collecting a fairer share of the tax due on activities carried out within the relevant tax jurisdiction.[34] There is no equivalent provision in the new accounting rules and no express requirement to report on any adjustments which may be agreed with or imposed by tax authorities. Nor do the new accounting rules require the group to report on the longer term profitability or asset value of businesses which have been acquired, an issue of some concern to economists and others who doubt the real long term value of many acquisitions. The underlying difficulty is that while the rules in respect of the consolidated group accounts are based on new economic criteria the rules governing the identification of reporting units within the group are based on traditional legal criteria. As long as holding companies remain free to create whatever internal corporate structures they wish, they will retain the capacity to manipulate or conceal the true state of affairs within the group. A requirement to report on contributions to profit of units within the group based on an externally prescribed set of rules for the identification of reporting units would make the accounts much more valuable for external investors or regulators wishing to assess either the merits of particular proposals for acquisitions or disposals or the general performance of group management.

D. SUSPECT TRANSACTIONS

Company law has always been concerned both to discourage and to provide remedies against self-interested conduct by company directors and controllers. The traditional common law rules in respect of disclosure and disgorgement, based on the general fiduciary duty owed by directors to their companies, clearly apply to transactions within corporate groups. Accordingly the directors

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32 *Corporations Regulations* sch 5 cl 37.

33 *Ibid* cl 38.

34 *Income Tax Assessment Act* 1936 (Cth) s 31C regarding trading stock; Part III Division 13 regarding Australian company membership of an international group.

of individual companies within a group cannot properly subordinate the interests of the subsidiary to those of the group, for example by lending money or guaranteeing debts of other companies. Nor can the directors of the holding company properly use their effective control over a subsidiary to cause it to enter into transactions which benefit the holding company or the group at the expense of the subsidiary. In practice however, these rules have not generally been strictly applied to intra-group tranactions.[35] And in any event they have not proved sufficiently precise even in respect of transactions in individual companies. In every jurisdiction there are now increasingly complex statutory rules governing particular types of potentially suspect transactions by directors and their associates. Some types of transaction, such as directors salaries, have been subjected to specific disclosure rules.[36] Others, such as payments in connection with take-overs and mergers, have been made subject to express approval by shareholders or other supposedly independent directors.[37] A few, such as loans to directors of public companies, have been prohibited.[38] Most of these rules have included special provisions or exceptions in respect of corporate groups, either to include transactions with controlled companies or in some cases to exempt intra-group transactions from the general controls.[39] This variation in treatment is as good an example as any of the difficulty which regulators have had in applying generally agreed rules to corporate groups.

These various tendencies are clearly observable in the provisions of Part 3.2A proposed under the *Corporate Law Reform Bill* 1992. Since many of the proposals are discussed at length elsewhere in this issue[40] it is necessary here only to place the approach to corporate groups within the general framework of Part 3.2A, which may be summarised as follows.

(i) The most stringent controls are to be reserved for loans and transactions from which individuals might obtain personal or family benefits either directly or through companies in which they have substantial personal or family holdings; such loans or transactions are to be either prohibited or subjected to the approval of 95 per cent of shareholders.[41]

(ii) There is to be a less stringent regime for loans and transactions between companies which do not form part of a group (as defined below); such loans and transactions may be authorised by a simple majority of shareholders; if they are not, the directors of the

35 In the leading case on the topic, *Charterbridge Corp Ltd v Lloyds Banks Ltd* [1970] Ch 62, the principle was stated but effectively ignored on the ground that the contested transaction could be justified as being in the interests of the subsidiary because it was in the general interest of the group.

36 *Corporations Law* s 297(1) and *Corporations Regulations* sch 5 cll 25 and 29.

37 *Ibid* s 237.

38 *Ibid* s 234.

39 See, for example, with respect to loans ss 234(2) and (3)(b).

40 P Redmond "The Reform of Directors' Duties" (1992) 15 *UNSWLJ* 86.

41 Cls 243BA and BG.

company may be liable for any resulting detriment to their company.[42]

(iii) The least stringent regime is to be in respect of loans and transactions between group bodies corporate, which are defined for this purpose as those in which one company holds more than 90 per cent of the shares or votes in another; such loans and transactions are to be exempt from all statutory controls, though they would remain subject to the common law rules.[43]

(iv) Finally there is to be a more flexible and discretionary regime for joint ventures under which the Australian Securities Commission ("ASC") may grant specific or general exemptions from the controls which might otherwise apply.[44]

Most of the initial comments on these proposals have centred on those which affect individual directors. The major criticisms have been that the proposed controls would be too stringent, that compliance with the rules for approval would be unreasonably costly, and that the resulting regime would so complex as to make it very difficult for companies and their advisers to ensure compliance.[45] Objections of this kind, however, appear to miss the point that the object of the exercise is to discourage all forms of self-interested conduct by directors and controllers in public companies by making it difficult and costly to provide what amounts to additional remuneration in such indirect and often concealed ways rather than by open and properly approved payment and incentive schemes. Similar objections to the equally complex regime which was introduced in Britain in 1980 have not been sustained and the business community and its legal advisers have generally sought to avoid any difficulties of interpretation by avoiding suspect transactions, as was intended.

From this perspective the major criticism of the proposals in Part 3.2A is not that they are too stringent but that the looser regimes for inter-corporate and intra-group transactions may encourage those who seek to avoid openness and clarity in their remuneration and incentive schemes to create even more complex (and costly) corporate structures to obscure self-interested transactions. It must also be remembered that individuals can secure personal advantage not only by arranging direct or indirect financial benefits to themselves, their families or companies in which they personally own shares but also by justifying higher personal payments by creating an appearance of greater profitability or asset value in publicly held companies than might otherwise be justifiable. Only some transactions and manipulations of this kind will be covered by the new rules for consolidated accounts, discussed above. And there

42 Cls 243BB, BD and EA.
43 Cls 234AG and DA.
44 Cl 243 GA.
45 See, for example, RP Austin "Loans to Directors, Related Party Transactions and other Aspects of the Exposure Draft" University of Sydney (13 March 1992).

will still be considerable potential for the oppression of minorities - and occasionally majorities - through complex inter-corporate and intra-group transactions.

These considerations raise a number of related questions on the merits of the regime proposed in Part 3.2A. First, would it not be more satisfactory to restrict the looser regime - and the definition of group bodies corporate - to those companies in which there is a 100 per cent holding? This would help to ensure that potentially suspect transactions of all kinds from which minority shareholders might suffer detriment were disclosed and subject to independent approval. Secondly, would it not be better to extend the discouragement which the procedures and sanctions under Part 3.2A would undoubtedly create in respect of complex and potentially suspect transactions from those which involve personal self-interest to those which involve corporate self-interest and thus to discourage the creation of complex corporate structures for either purpose? These complex structures often appear to have no other function than to obscure what is being done. A general requirement to disclose the reasons for their creation and to seek external approval for any resulting transactions would help to encourage simpler and more open corporate structures in both spheres. Finally would it not be better to accept that all corporate groups should be encouraged to achieve 100 per cent ownership of all companies within the group rather than making exemptions and allowances in respect of non-wholly owned subsidiaries? There is a developing trend in the regulation of corporate groups to limit substantial exemptions in respect of group transactions to wholly-owned subsidiaries. In Germany, as will be observed below, a provision permitting directors of subsidiaries in integrated groups to subordinate the interests of their company to those of the group has been in force since 1965.[46] In Australia a similar though less far-reaching proposal has been made by the Companies and Securities Law Review Committee to recognise the special position of directors nominated by a holding company to the board of a wholly-owned subsidiary or by the corporate partners to a joint venture, if all the partners agree, by permitting them to take into account the interests of the appointing company as well as their own.[47] In this light the proposals in Part 3.2A are difficult to justify.

E. OPPRESSION OF MINORITIES

In jurisdictions in which there are no special protections in respect of suspect transactions within corporate groups it is sometimes argued that equivalent or better protection for minority shareholders in subsidiaries is provided by the general common law or statutory remedies against oppression. In theory this may be correct. It was established in Britain in 1958 that the statutory remedy against oppression could be relied on in a case in which a holding company

46 Aktiengesetz 1965 art 323; Part VI (B) *infra*.

47 Companies and Securities Law Review Committee Report No 8 *Nominee Directors and Alternate Directors* (1989) at [65].

deliberately diverted business away from a subsidiary which had been set up as a joint venture with a view to depriving the minority shareholders in the subsidiary of a share of its profits;[48] and in the United States it has long been established that the equivalent common law remedy in respect of fraud on a minority may be relied on in a similar way.[49] In practice however, it will often be difficult for minority shareholders in a subsidiary - and virtually impossible for its creditors - to establish that their interests have been subordinated to those of the group. The directors of the subsidiary will normally owe their primary loyalty, not least in terms of job security and prospects of promotion, to the group and will rarely be willing to assert the interests of the subsidiary or to disclose the details of detrimental transactions undertaken in the interests of the group. In the absence of specific procedural measures to require the directors at least of non-wholly-owned subsidiaries to account for and report on potentially detrimental transactions with other group companies, oppression remedies are unlikely to work. German and French law provide some useful examples in this context. In Germany the directors of any company which is in practice dominated by another must prepare an annual report on any prejudicial transactions imposed on it and minority shareholders may apply to the court for independent auditors to be appointed to examine any dealings between the dominant and controlled companies;[50] and in French law a special audit may be called for on specified matters by minority shareholders.[51] The best protection for minority shareholders in a subsidiary within an integrated corporate group, however, would be a general right to require the holding company to buy them out at a fair price. This principle has been adopted in the context of take-over bids in most jurisdictions.[52] There is no reason in principle why it should not be extended on a more general basis.

F. INSOLVENCY AND GROUP LIABILITY

Whether and to what extent group holding companies should be liable for the debts and other obligations of their subsidiaries is perhaps the most important issue in group law. It is also the most difficult to resolve within the traditional conceptual framework. The principle of separate corporate personality established in *Salomon v Salomon & Co*[53] has become almost synonymous with the rule that shareholders are not to be held liable for the debts or obligations of their company. It clearly follows that a holding company is not to be held liable for the debts and obligations of its subsidiaries unless there are some special circumstances to justify lifting the veil of incorporation. This proposition and its corollary that the exercise of control by a holding company over its

48 *Scottish Co-operative Wholesale Society Ltd v Meyer* [1959] AC 324.
49 *Sinclair Oil Corp v Levien* 280 A 2d 717 (1971).
50 Aktiengesetz 1965 art 312; see Part VI (B) *infra*.
51 Loi des Societes 1966 s 26.
52 *Corporations Law* s 703.
53 Note 18 *supra*.

subsidiary is not in itself to be regarded as a special circumstance has been repeatedly reaffirmed in Britain and in Australia.[54]

Non-statutory exceptions to this general rule have been very limited. Though there are plenty of dicta to indicate that the corporate veil may be lifted on a wide variety of grounds, there are remarkably few cases even in the United States where direct financial liability has actually been imposed on a holding company as a matter of company law. Where liability has been imposed it has typically be justified on other legal principles. There have been a few cases in the United States for example, in which liability has been imposed on a holding company in tort on the ground that it has effectively controlled the operations of a subsidiary, notably in the *Amoco Cadiz* and *Union Carbide* cases.[55] Most of the major exceptions, however, have been developed under statutory provisions in respect of corporate insolvency. In the United States the broad discretionary terms of the Bankruptcy Code have permitted the development of the *Deep Rock* doctrine under which intragroup loans may be subordinated to those of external creditors in any case in which the finances of the group have been carried out on an integrated rather than an arms length basis.[56] A similar approach has been adopted under the more specific provision of the *Companies Act* 1980 (NZ) for the pooling of assets of all insolvent companies within the same group.[57]

In Britain and Australia a more direct form of group liabiity has been developed out of the concepts of fraudulent and wrongful trading. The concept of fraudulent trading - deliberately or recklessly carrying on a company's business when there is no reasonable prospect of paying its debts - was not introduced in either jurisdiction to deal with abuses of limited liability within corporate groups. In the only major British case on the issue it was held that the winding up of a potentially insolvent subsidiary with substantial contingent liabilities would not in itself constitute fraudulent trading by the directors of the holding company.[58] Nor was the extension of civil liability to wrongful trading - negligently carrying on a company's business when there is no reasonable prospect of paying its debts - under the *Insolvency Act* 1985 (UK) intended to cover holding companies.[59] But this new form of liability in conjunction with the concept of a 'shadow director' has in effect rendered holding companies in Britain liable for the debts of any insolvent subsidiary which was accustomed to act in accordance with the instructions of the holding company in any case in

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54 *In Re Southard & Co Ltd* [1979] 1 WLR 1198; *Multinational Gas & Petrochemical Co v Multinational Gas & Petrochemical Services Ltd* [1983] 3 WLR 492; *Industrial Equity Ltd v Blackburn* (1977) 137 CLR 567.

55 *The Amoco Cadiz* [1984] 2 Lloyds Rep 304; in *Re Union Carbide Gas Plant Disaster at Bhopal, India* (1986) 634 F Supp 842; 809 F 2d 195.

56 Note 17 *supra*.

57 *Companies Amendment Act* 1980 s 30.

58 *In Re Sarflax Ltd* [1979] 2 WLR 202.

59 Section 15, see now *Insolvency Act* 1986 (UK) s 214.

which the insolvency could reasonably have been foreseen.[60] In Australia a broadly similar result will be achieved by a somewhat less tortuous route if the proposals in the 1992 Bill are adopted. The particular reformulation of the offence of fraudulent trading under the *Companies Code* had the unexpected effect of making it possible for individual creditors to seek to recover their debts from the directors of debtor companies.[61] The multiplicity of actions and the unequal treatment of creditors which this produced led to the appointment of the Harmer Committee which recommended a package of measures similar in effect to those in force in Britain, but with a more explicit though discretionary provision for a court to declare a holding company liable for the debts of an insolvent subsidiary.[62] The terms of the proposed section 588X in the Bill are more precise and directly comparable to those in respect of individual directors: the holding company would be liable for the debt of a subsidiary where (i) the subsidiary is or becomes insolvent as a result and (ii) the holding company or its directors were aware, or had reasonable grounds having regard to the nature of control exercised over the subsidiary for suspecting, that it was or would become insolvent.

These provisions, if adopted, will make substantial inroads into the principle of limited liability both for holding companies and for individual directors, but they fall far short of general group liability. Potential liability will be restricted to specific transactions and will require a detailed consideration of the circumstances in which they were undertaken. The reference to incurring a debt would also appear to rule out more general liability in respect of the activities of the subsidiary, notably in respect of accidents or disasters, whatever the level of control exercised by the holding company. The resulting regime will thus be substantially different from that which has been developed in respect of integrated groups in Germany where, as will be seen, more general group liability has been imposed in respect of wholly-owned subsidiaries in respect of which the traditional duty of directors to pursue the interests of their individual company has been expressly subordinated to the interests of the group. The arguments in favour of a more structured approach to group liability in which the nature of the group takes precedence over the nature of particular transactions and in which the rules for liability are coordinated with those for other purposes will be developed below.

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60 *Companies Act* 1985 s 741; see generally D Prentice "Insolvency and the Group" in RM Goode (ed) *Group Trading and the Lending Banker* (1988).

61 *Companies Code* 1981 s 556.

62 Law Reform Commission Report No 45 *General Insolvency Inquiry* (1988) at [334]-[336].

V. THE REGULATION OF CORPORATE GROUPS FOR OTHER PURPOSES

Company law is not of course the only framework within which corporate groups may be regulated. There are detailed and complex provisions in almost every jurisdiction in respect of such matters as monopolies and mergers or acquisitions, inward investment, and taxation in which the reality of corporate groups has long been recognised. It is not practical in this context to attempt even a brief summary of provisions of this kind in Australia or elsewhere.[63] But some general tendencies may be noted.

The first is that legislators have typically not found any difficulty in focusing their attention on corporate groups rather than individual companies as the primary objects of regulation. This is most clearly observable in respect of monopolies in which any other basis than that of the operating economic entity would make no sense at all. The group is also accepted as the effective unit of taxation in most jurisdictions, though this is typically achieved by complex provisions for intra-group relief allowing profits and losses in constitutent taxable companies within the group to be set off against each other.

The second is that there is no single definition of a group for these various purposes. A wide range of criteria have been developed to identify various types of group for various regulatory or fiscal purposes. For some purposes, notably taxation, specific levels of ownership or control are typically prescribed. For others more general phrases such as "directly or indirectly" or "acting in concert" are used to permit regulatory agencies or courts to identify and deal with effective economic units. The choice of definition or phraseology will depend both on the particular regulatory objectives and on the propensity of the courts to adopt a restrictive interpretation based on the traditional company law doctrine of separate corporate personality.

The general conclusion must be that there is no clearly defined business or economic entity which corresponds to the concept of a corporate group but rather a wide range of different types of corporate combinations stemming from the almost unlimited freedom which the business community has been granted to structure their operations as they wish. In this sense the phrase corporate group is best understood as an umbrella concept which covers a large number of different forms of economic organisation but does not set any precise boundaries to what is and what is not included. It follows that there should be no inherent or conceptual difficulty in recognising the need to identify and define a number of different types of corporate group for different regulatory purposes.

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63 For a detailed summary of the rules in the United States see P Blumberg "The Corporate Entity in an Era of Multinational Corporations" (1990) 15 *Delaware Journal of Corporate Law* 283.

VI. STRATEGIES FOR REFORM

The essential question raised by this brief review of existing controls in respect of corporate groups in company law and for other purposes is whether company lawyers and legislators in Australia should retain and develop their traditional approach to corporate groups or make a quantum leap into a new strategy in which different types of corporate group would be defined and regulated in their own right. The most developed example of the latter approach is the regime for corporate groups adopted in Germany in 1965, some aspects of which have already been referred to. But it would clearly be possible to introduce more direct controls on the internal structures and complexity of corporate groups of various types without following the German model. The advantages and disadvantages of the traditional common law approach, of the German model and of developing other more direct controls on group structures can now be summarised.

A. DEVELOPING THE EXISTING COMMON LAW APPROACH

It would clearly be possible to continue indefinitely the policy of making special provision for corporate groups in the form of additions to or exceptions from the ordinary rules for individual companies wherever that is shown to be necessary. This is the established approach in every major common law jurisdiction, and has been repeatedly reaffirmed in Britain, if only in reaction to a perceived threat of the imposition of the German model within the European Community company law harmonisation programme.

The major advantages of maintaining this approach are that it allows companies a very high degree of freedom in structuring their operations, that it gives regulators a corresponding degree of flexibility in responding to perceived abuses and that it avoids the need for any major recasting of the law. But there are some significant disadvantages. Firstly, the approach is likely to lead to ever increasing complexity in the law, as different rules are developed for different types of group for different purposes. The lack of any observable coordination, either in their rationale or their practical impact, in respect of the different definitions and rules adopted under the consolidated accounting provisions and the provisions covering self-interested transactions under the proposed Part 3.2A is a striking example. Secondly, it may also lead to increasing complexity in corporate groups themselves, as new and more intricate structures are developed to avoid the new controls. Thirdly, both these forms of complexity are likely to lead to an increase in unproductive and costly managerial and professional energy. Finally, there are a number of established regulatory objectives which it is inherently difficult to achieve while corporate groups have unfettered freedom to structure themselves with whatever degree of complexity they wish. The most significant of these are the disclosure of appropriate and useful information for investors on the performance of major operating units within the group and the exercise of appropriate forms of governance over the activities of these operating units. For example, it is much more difficult to prevent the concealment of significant operations carried out through subsidiaries in 'disclosure-havens' if there is no power to prohibit their establishment. Similarly, Eisenberg's suggestion of a pass-through of voting power in respect of significant transactions by 'mega-subsidiaries' from the shareholders in the subsidiary to those of the ultimate holding company[64] cannot be effectively and uniformly implemented without imposing some requirements in respect of internal group structures. This is equally the case in respect of any provisions for employee involvement in the supervision or governance of group operations.

B. EUROPEAN DEVELOPMENTS: THE GERMAN MODEL

The provisions for corporate groups ("Konzernrecht") under the *German Joint Stock Companies Act* ("Aktiengesetz") of 1965 may be traced to the practice in pre-war Germany of arranging control contracts and profit transfer contracts between companies with a view to securing tax advantages.[65] For that reason it is often difficult for company lawyers from other jurisdictions to understand fully the rationale for the German regime and for the distinctions it makes between three categories of corporate group: (i) integrated groups; (ii) control contract groups; and (iii) de facto groups. But the underlying principles which have been developed in respect of the duties of directors, the protection of minority shareholders and potential group liability are of general interest.

An integrated group is formed when a resolution for integration is approved by a 75 per cent majority of shareholders in a joint stock company which holds at least 95 per cent of the shares in another joint stock company.[66] The holding company must then buy out any remaining shares.[67] When 100 per cent ownership has been achieved, the holding company is authorised to place the assets and operations of the subsidiary under uniform management and is relieved of the obligation to give any special consideration to the interests of the subsidiary as a separate legal entity.[68] In return the holding company is made fully liable for the debts and obligations of the subsidiary.[69]

A control contract group is formed by agreement between two joint stock companies. There is no requirement that any particular proportion of shares in the controlled company be held by the controlling company. But the control contract must be approved by a 75 per cent majority of the shareholders in the company to be controlled.[70] The controlling company then becomes entitled to issue binding instructions to the management board of the controlled company,

64 M Eisenberg *The Structure of the Corporation* (1976) pp 285-99.

65 For a general account see F Wooldridge *Groups of Companies: The Law and Practice in Britain, France and Germany* (1981).

66 Arts 319-20.

67 Art 320.

68 Art 323.

69 Art 325.

70 Art 293.

which is to that extent absolved from its duty to act exclusively in the interests of the controlled company.[71] But the controlling company is obliged to make good any deficit in the controlled company's trading account or to compensate it if it requires it to take any action which is not in its interest.[72] It must also offer to pay a guaranteed dividend to minority shareholders in the controlled company or to buy out their shares at a fair price.[73] If the amount for either purpose is not agreed it may be determined by the court.[74]

The formation of a de facto group does not require any deliberate action by either company, but comes into being by operation of law as soon as one company can directly or indirectly exercise a controlling influence over it.[75] The dominant company is then required to compensate the dependent company for any loss which results from the influence which it exercises.[76] To assist in enforcing this obligation the management board of the dependent company must submit an annual report to its supervisory board (Aufsichsrat) and auditor (but not to its shareholders) identifying any such losses and stating whether any compensation has been paid.[77] Minority shareholders, however, may apply to the court for a special examination by independent auditors of the dealings between the dominant and dependent companies.[78]

German group law is clearly the most developed set of provisions based on the strategy of classifying and regulating different types of corporate group. It does not seek to impose absolute liability on all holding companies for all group debts and obligations, and thus avoids the serious objections in economic theory to such a regime.[79] Instead it sets out the consequences of operating within different types of group structure and leaves a good deal of freedom to individual enterprises to select the most appropriate status. It has also led the way in establishing the principle that the regime for wholly-owned subsidiaries should be essentially different from that for non-wholly owned subsidiaries, both in respect of the duties of directors and the liability of the parent company for the debts and obligations of its subsidiaries. But it is by no means perfect. The provisions in respect of control contract groups make little sense to non-German lawyers, since the development of such arrangements depended largely on the particular provisions of German tax law. And there has been a good deal of dissatisfaction even in Germany over the lack of clarity in the regime for de facto groups.[80] The proposal that the German model be adopted as the basis for

71 Art 291.
72 Arts 302 and 309.
73 Arts 304-5.
74 Art 305.
75 Art 17.
76 Art 311.
77 Art 312.
78 Art 315.
79 Note 19 *supra*.
80 See F Wooldridge note 65 *supra*.

a possible Ninth European Community Company Law Directive has consequently made little progress.[81]

C. CONTROLLING GROUP STRUCTURES

The best longer term strategy for Australia and other common law jurisdictions may thus be to build on the most satisfactory aspects of the German model while retaining a basic common law structure. This suggests that attention should be focused on developing specific and coherent regimes both for wholly-owned and for non-wholly-owned subsidiaries in which the extent of group liability would be linked to the extent to which the interests of the subsidiary were in practice subordinated to those of the group. This would in turn facilitate a more realistic formulation of directors duties in groups of various types. In addition consideration might be given to restricting the freedom of groups to develop the highly complex and confusing structures that have been a feature of many recent failures. The first step in this might be the enactment of a more stringent legal prohibition on cross-holdings, as suggested above. This might then be supplemented by a set of rules or guidelines for the simplification of group structures which could be administered and enforced by the ASC as a condition of continued public quotation. For example, quoted companies might be required to justify or abandon the establishment of subsidiaries in tax or disclosure havens and to create corporate subsidiaries for major operating units within the group.[82] This would assist in the development of more effective rules to provide shareholders and investors with meaningful information on such units and to enable them to exercise appropriate powers of approval or veto over major managerial decisions, notably in respect of acquisitions or disposals.

The development of rules to govern the permitted structure and complexity of corporate groups may be portrayed by some as an unwarranted interference in business freedom. It may equally be portrayed as a natural extension to corporate groups of the kind of controls which have long been accepted as necessary in respect of individual companies. It may also be argued that any such increase in regulation would be uneconomic. As with other such issues - not least the decision to codify[83] - discussed by those interested in law and economics, however, it is probably impossible to measure the effects of the alternative approaches. As there is certainly no proven law or theoretical principle that all regulation is inherently uneconomic, the matter thus falls to be decided in the usual way on the balance between the different policy objectives of maximising business freedom and minimising potential abuses. If, as has been argued above, the development of such controls is necessary to the

81 Draft Proposal *Ninth Directive on Links between Undertakings and in Particular on Groups* (1980); the draft has been widely circulated but not formally published.

82 This suggestion may be compared with the discretionary power for the ASC to approve potentially suspect transactions by joint ventures under cl 243GA of the *Corporate Law Reform Bill* 1992.

83 See generally IM Ramsay "Company Law and the Economics of Federalism" (199) 19 *Fed L Rev* 169.

development of effective and coherent rules on disclosure, governance and directors duties within corporate groups, then there can be no rational objection. No-one now argues that there is no need for the regulation of internal structures and procedures within individual companies and only a few proponents of the Chicago school argue that there is no need for any disclosure requirements. If, as few would deny, corporate groups have now replaced individual companies as the typical legal form for all but the smallest private enterprises, lawyers and legislators must look for the most effective means of achieving agreed regulatory objectives. Just as Copernicus was able to achieve his objectives of explanation and prediction more effectively by shifting the focus of attention from the earth to the sun as centre of the planetary system, so too will lawyers and legislators be better able to achieve their objectives by shifting the focus of attention from individual companies to corporate groups.