

## NOMINEE SHAREHOLDING IN AUSTRALIA

Nominee shareholding is an increasingly important area within the securities industry, but it has not received the attention which it deserves. This article considers its nature, extent and purposes, its advantages and disadvantages, and the adequacy of existing legal regulation.

### General

A *nominee shareholder* is a person who holds shares in his own name on behalf of another person—the beneficiary—who has the effective ownership and control of the shares. Thus, the nominee is owner in name only. He is the registered legal owner, holding the shares on trust for the beneficiary, who has an equitable interest.

A nominee may be an individual, partnership or company. In fact, a company is most frequently used, for both inherent and incidental reasons. First, it is perpetual, while a person (for example) may die or become unwilling or unable to perform his function. Secondly, it has a separate legal identity and consequently the nominee shareholding function is distinct from functions which the nominee would otherwise have. Thirdly, where secrecy<sup>1</sup> is the beneficiary's purpose, his relationship to a particular nominee company is usually less apparent<sup>2</sup> than to a particular individual<sup>3</sup>. Fourthly, due to its size and economies of scale<sup>4</sup>, a nominee company is usually less expensive to the beneficiary.

The nominee, rather than the beneficiary, is a *member*<sup>5</sup> of the company in which the shares are held, and only his name is entered in the register of members<sup>6</sup>. It is doubtful whether the beneficiary is a party to the statutory contract constituted by the memorandum and articles of association of the company<sup>7</sup>. The answer to this question, however, has little practical importance because it is normally sufficient to all concerned that the nominee is a party.

Again, the nominee is entitled to *vote* as far as the company is concerned<sup>8</sup> because he is a member and registered owner of the shares. However, whether he has a power in relation to his beneficiary to vote otherwise than as and when expressly directed, depends upon the terms of his contract of appointment. Express terms dealing with voting are rare; in the absence of such a term,

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1. See further, *infra*, Purposes, (C) SECRECY.

2. For example, no one could tell from the fact that A.N.Z. Nominees hold shares in B.H.P., who are the beneficiaries of those shares.

3. On the other hand, depending on the specific purpose, there may be a disadvantage in that the nominee company is more readily identifiable than an individual *as a nominee*.

4. For instance, it can often combine shares in a given company which it holds for several beneficiaries.

5. *Companies Act*, 1962-73 (S.A.), s.16(5).

6. See *Companies Act*, 1962-73, s.151(1).

7. Under *Companies Act*, 1962-73, s.33. It is arguable that the nominee is a party to the contract as agent for an undisclosed principal, the beneficiary, but it is very doubtful whether this is consistent with the wording or intention of the section.

8. See, for example, Table A, Art. 54 (*Companies Act*, 1962-73, Fourth Schedule). See generally Ford, *Principles of Company Law* (1974), para. 1809.

it is doubtful whether, in general, the contract would be interpreted as authorizing or permitting such a power. This is supported by the fact that, in distinction to other trust relationships, it is the beneficiary who exercises the control over shares held by his nominee.

In the majority of cases, nominees do not and would not vote at all unless expressly directed, but there does exist the potential<sup>9</sup> for a nominee to exploit his position by voting in his own interest. In recognition of this potential, the Ontario *Securities Bill*, 1974, cl. 47, proposes that, *inter alia*, dealers (including sharebrokers), advisers, underwriters and mutual funds, acting as nominee, must not vote otherwise than "in accordance with any written voting instructions received from the beneficial owner"<sup>10</sup>. Similar legislation would be advisable in Australia.

It is not clear whether *disclosure* by a nominee of his beneficiary's identity would be a breach of duty. Again, express terms dealing with disclosure are rare. Given the nature of nominee shareholding, it is quite possible that, in general, a court would imply a term against disclosure in the contract of appointment, and indeed in some cases this may be the basis of the contract<sup>11</sup>. In any case, most nominees consider it a matter of good faith and prudence<sup>12</sup> to keep secret their beneficiaries' identity.

### Extent of Nominee Shareholding

The real extent of nominee shareholding in Australia is not known, due partly to the fact that often it cannot be determined whether a person is a nominee and mainly to the fact that no comprehensive statistics have ever been compiled. However, some indication of its extent is given by three surveys which have been carried out in relation to the largest (usually top twenty)<sup>13</sup> shareholders in Australian companies. The results are summarized in the following table.

Survey	Year	Companies	Large s/h	Nominee s/h	Nominee s/h
			Total s/h	Large s/h	Total s/h
Wheelwright <sup>14</sup> -	1953	102	37.1%	3.9%	1.5%
Wheelwright & Miskelly <sup>15</sup> -	1962-4	299	57.7%	4.7%	2.7%
Financial Review <sup>16</sup>	1972	251	47.1%	16.7%	7.85%

These results show that nominee shareholding is growing in Australia. In 1972, nominees held 16.7% of all shares held by the top twenty shareholders in 251 selected Australian companies, while the nominees in the top twenty *alone* held 7.85% of all ordinary shares in those companies.

9. Although there may be a risk of discovery in a few cases.

10. Cl. 47(4).

11. The *Privacy Bill*, 1974 (S.A.), if it becomes law, may protect the beneficiary from disclosure in some situations.

12. For disclosure may cost the nominee both his position and reputation.

13. The first survey regarded holdings of the nominal value of £10,000 or more (producing an average of 20.7 shareholders per company); the second and third surveys examined top twenty shareholders in each company.

14. Wheelwright, *Ownership and Control of Australian Companies* (1957), pp.52, 56, 58.

15. Wheelwright and Miskelly, *Anatomy of Australian Manufacturing Industry* (1967), p.2.

16. Sykes, "In a Few Hands", *Australian Financial Review*, February 12-16, 1973, at February 13, p.2.

These surveys are incomplete for three reasons. They do not include nominees outside the largest shareholders, nor do they include unknown nominees such as individuals and ordinary companies, which means that nominee shareholding is under-estimated. Although significant, this is not as important as it may appear, because it is likely that the majority by size of nominees would be included. Also, the surveys relate only to selected Australian companies, mainly the larger ones, which means that the Australia-wide position is over-estimated, because nominees are more concentrated in such companies than in smaller ones where personal ownership and control are more emphasized. Consequently, nominees would now constitute about 10% of all shareholders in the top three hundred companies, and somewhat less throughout Australia.

Nominee shareholding is much more extensive in the speculative mining area than in either the heavyweight mining or industrial areas<sup>17</sup>. Its extent also varies between companies and industries<sup>18</sup>; and between countries, such as Australia, the United States<sup>19</sup> and the United Kingdom<sup>20</sup>.

### Purposes of Nominee Shareholding

#### (A) PERSONAL CONVENIENCE

Personal convenience is a major reason for the use of nominees. Overseas investors, both individuals and companies, and local residents travelling overseas, often experience the need for a local agent to take care of the day-to-day management of their shares. The use of a nominee saves time, expense and worry in all dealings with the shares; it also eliminates the risk of loss of opportunities<sup>21</sup> due to delay in attending to them. Local residents, companies, and trustees of superannuation and trust funds, who do not want to be personally concerned and bothered, also use a nominee for the day-to-day management of their shares. In addition, investment clubs frequently find it desirable to use a nominee<sup>22</sup>.

The nominee does not manage the shares on his own discretion, but merely acts as agent for his beneficiary. He purchases and sells shares as instructed by

17. *Ibid.*, which gives the following results of the 1972 survey.

TYPE	Large s/h	Nominee s/h	Nominee s/h
	Total s/h %	Large s/h %	Total s/h %
Industrial - - -	45.5	16.0	7.3
Mining - - - -	49.1	17.4	8.6
Heavyweight - -	52.3	14.4	7.5
Speculative - -	42.7	29.1	12.4

18. See Wheelwright and Miskelly, *supra*, n.15, pp.46-47. For example, this survey showed that in 1964 nominees held 2.7% of all shares in 299 companies, but they held 5% or more in 47 companies, and 10% or more in 7 companies. The concrete and concrete products industry had an especially high proportion of nominee shareholding.

19. Where it is much more extensive than in Australia. In 1955, the American Society of Corporate Secretaries Inc., *The Nominee Problem* (1955), p.3, stated that "26 to 28 per cent of the stock of our leading corporations are now registered in the names of nominees. . . . It is conservatively estimated that by 1965, 35% of all stocks of investment quality will be so held." See also Metcalf, "The Secrecy of Corporate Ownership", (1973) 6 *Ind. L.R.* 645.

20. For a very brief indication, see Great Britain, Committee on Company Law Amendment, *Report* (1945), Cmnd. 6659, para. 78 (hereinafter referred to as the *Cohen Report*).

21. For example, new and bonus issue entitlements.

22. See, on all reasons, Bank of New South Wales, *A Service for Investors* (pam.), p.4.

his client, pays and receives payment from the broker, and attends to documents; pays calls on contributing shares (as instructed, if there is an option, by his client); collects dividends for the client; accepts or disposes of new and bonus share issues as instructed; and attends to taxation obligations and government overseas exchange control<sup>23</sup>.

Bank nominee companies, sharebrokers, accountants, solicitors, individuals and companies, act as nominees for this purpose. The most important are bank nominee companies; all of the private Australian banks and some foreign banks have subsidiary nominee companies<sup>24</sup>.

#### (B) ADMINISTRATIVE CONVENIENCE

A person or company sometimes uses a nominee to keep separate a shareholding from his other activities. For example, a life insurance company often uses a nominee or creates its own for this purpose. A trustee company frequently creates a separate nominee company to hold shares of which it is trustee for a unit trust or superannuation fund. Also, a group of companies (such as a finance group) sometimes uses a nominee either as a repository for shares acquired before it is decided which member will hold the shares, or as a central holder of all shares owned by the group.

#### (C) SECRECY

Secrecy is another major reason for the use of a nominee. Where a nominee is the registered owner of shares, often no one can discover who is the beneficial owner. Secrecy is vital to the success of the following purposes, and also, for at least the last three purposes, to avoid detection<sup>25</sup> of what is generally a criminal offence.

##### *Control*

A person who wants to take over control of a company may wish to keep secret his identity, and perhaps even the fact that a take-over attempt is being made, in order to obtain at least two advantages. First, he would encounter little or no resistance to the first stage of his attempt. Secondly, he would perhaps be able to buy the shares at a lower price than otherwise, since the market price usually goes up when a take-over bid is made<sup>26</sup>. Even if the fact that someone is making a take-over attempt, but not his identity, is known, there may still be an advantage in that there is less information available to directors and shareholders, resulting in less effective resistance and a lower market price than otherwise.

By using several nominees, especially a large number not identifiable as such, a person can acquire a large proportion of shares before someone eventually notices the heavy buying of shares or their accumulation in certain persons' names. This proportion may *perhaps* be limited to 10% of the company's capital by the beneficiary's obligation to disclose his holding once

23. *Id.*, pp.4-7.

24. The largest are A.N.Z. Nominees Ltd., Bank of N.S.W. Nominees Pty. Ltd., and National Nominees Ltd., which between them in 1972 held shares having a market capitalization of well over \$500m. See Sykes, "The Nominee Companies' Holdings—The Faceless Men of Finance", *Aust. Financial Rev.*, Feb. 14, 1973, p.2.

25. While it is true that an Inspector appointed to investigate such activities (and, it is proposed, the Corporations and Exchange Commission) has power to require a nominee to disclose his beneficiary, the point is that the existence of the activity (or at least the identity of the shares involved) is usually unknown due to the very *use* of the nominee. On these powers, see *infra*, Disclosure, *Investigation*.

26. See Peden, *Control of Company Take-overs* (1970), p.16.

it reaches that level<sup>27</sup>, although there are some problems in the enforcement of this requirement<sup>28</sup>.

Again, a company may wish to acquire an interest in a competitor without the latter's knowledge or reaction. Similarly, a manufacturing firm (for instance) may wish to secretly acquire an interest in a distributing firm to ensure that the latter continues to distribute its products.

#### *Shyness and fear of reaction*

A person may, for a variety of reasons, be reluctant to allow others to know his shareholdings. He may be a politician, public servant or journalist who would be embarrassed if they were known<sup>29</sup>. He may be hiding his assets from creditors or his spouse. He may be frightened of political reaction if the public knew his true wealth. He may simply wish to keep secret his financial affairs.

An overseas investor may not want the government to know the extent or existence of his ownership or control of companies operating in Australia, or he may specifically want to avoid action by the Australian government under the *Companies (Foreign Take-overs) Act, 1972-73* (Aust.). However, to some extent, Exchange Control requirements<sup>30</sup> would disclose large shareholdings in Australian companies<sup>31</sup>.

A shareholder in a company carrying on a business which is not popular, such as causing pollution or manufacturing napalm, may wish to conceal his identity to avoid public or private reaction.

#### *Conflicts of interest*

A sharebroker may wish to sell his own shares to, or buy shares from, his client without disclosing (as he is bound to do) his interest in the shares<sup>32</sup>, in order to fix a favourable price or retain commission on the sale<sup>33</sup>.

Again, a sharebroker or investment adviser may wish to create a (favourable) market for shares which he owns by recommending them to his clients<sup>34</sup>, whether he actually sells them to his clients or to someone else<sup>35</sup>. Clearly, he would not want it known that he owns those particular shares.

27. See *infra*, Disclosure, *Substantial shareholders*.

28. See *infra*, Criticism, (A) SUBSTANTIAL SHAREHOLDING, *Enforceability*.

29. The Joint Committee on Pecuniary Interests of Members of Parliament (Aust.) is currently considering whether "arrangements should be made relative to the declaration of the interests of members of Parliament" (Parliamentary Debates, *Senate Daily Hansard*, Oct. 1, 1974, p.1514) and perhaps some public servants and journalists. There is no present legislation in Australia, State or Federal, which requires such disclosure.

30. See Bank of New South Wales, *supra*, n.22, pp.5-7.

31. Also, the Minister has a power of investigation (but if his suspicions are not aroused, it is not used): see *infra*, Disclosure, *Investigation*.

32. At common law, the client has a right to rescind in this case: *Hewson v. Sydney Stock Exchange Ltd.* [1968] 2 N.S.W.R. 224, esp. at 231 (Street J.); *Armstrong v. Jackson* [1917] 2 K.B. 822 (K.B.). See also the *Australian Corporations and Securities Industry Bill, 1974*, cl. 112, which proposes a criminal offence in addition to a right of rescission.

33. For example, this was certainly the effect, if not the purpose, of the use of nominees by some sharebrokers whose transactions are outlined in Australian Parliament, Senate Select Committee on Securities and Exchange, *Report* (1974), Chs. 10 and 11 (hereinafter referred to as the *Rae Report*).

34. For example, this was again the effect, if not the purpose, of an extensive course of behaviour by one adviser documented by the *Rae Report, supra*, n.33, Ch.7.

35. The *Corporations and Securities Industry Bill, 1974*, cl.111, proposes a requirement that any such recommendation be accompanied by disclosure of all relevant interests in the shares held by such sharebroker or investment adviser.

*Undesirable market practices*

A person using inside information for his own profit would want to conceal his identity in order to ensure the success of his venture<sup>36</sup> and to avoid actions for damages<sup>37</sup>, conviction for an offence<sup>38</sup>, and perhaps the loss of his job. While a *director* must disclose all shares in his own company which he holds through a nominee, this requirement is a small obstacle because it is practically unenforceable<sup>39</sup>.

A person who wishes to perpetrate other illegal<sup>40</sup> or undesirable market practices would want to conceal his identity for similar reasons<sup>41</sup>. For instance, he may use nominees to conceal a market rig or corner<sup>42</sup>; he may effect "wash sales" by selling shares from one nominee to another<sup>43</sup>; or he may make a take-over bid through one nominee and when the market price has consequently risen, sell shares in the company through other nominees<sup>44</sup>.

*Exempt proprietary company*

A public company may wish to conceal the fact that it holds shares in a proprietary company in order that the latter can claim to be an "exempt proprietary company" under the *Companies Act*, 1962-73, s.5, and hence enjoy the advantages<sup>45</sup> of that status. For this purpose, it could use a (non-public company) nominee<sup>46</sup>.

*Prohibited shareholdings*

A person approaching bankruptcy may wish to conceal his shareholdings in order to retain them on his bankruptcy, which he is not entitled to do under the Australian *Bankruptcy Act*, 1966-73. Again, a person may wish to conceal the fact that he beneficially owns more than 10% of the voting shares in a bank<sup>47</sup>, which is prohibited by the Australian *Banks (Shareholding) Act*.

36. Thus, for example, if investors know that a director is buying or selling shares in his own company, the market price will probably rise or fall respectively, perhaps before he can complete his purchases or sales.
37. *Companies Act*, 1962-73, ss.124(3)(a), 124a (restricted to "officers"). Cf. the *Corporations and Securities Industry Bill*, 1974, cls.123, 125(5).
38. *Companies Act*, 1962-73, s.124(3)(b) (restricted to "officers"). Cf. the *Corporations and Securities Industry Bill*, 1974, cls.123, 125.
39. See *infra*, Disclosure, *Directors*.
40. See the proposed offences (and civil liability) under the *Corporations and Securities Industry Bill*, 1974, cls.119-122, 125.
41. See Sykes, "The Corporate Criminal's Handbook", Ch. 1, *Australian Financial Review*, July 1, 1974, p.1, on the use of nominees by corporate criminals.
42. The *Rae Report*, *supra*, n.33, Ch.11, documents the concealment through nominees of what was in effect a corner in the shares of Australian Consolidated Minerals N.L. The Report concluded: "In fact . . . the schedule of the 20 largest shareholders gave a misleading picture of the relative importance of the major holders of shares. For the nominee companies of brokers masked the large beneficial interests of the partners in these holdings" (pp.11.18-11.19). "Judging from the evidence . . . markets have been distorted and investors have been misled as a result of brokers not disclosing their financial interest in substantial blocks of shares taken up in new issues and systematically sold in the subsequent market." (p.11.27.) *Quaere*, whether the broadly-worded *Corporations and Securities Industry Bill*, 1974, cl.119, prohibits such a practice.
43. The *Corporations and Securities Industry Bill*, 1974, cl.120, seeks to prohibit such a practice.
44. See Peden, *supra*, n.26, p.16. Again, the *Corporations and Securities Industry Bill*, 1974, cls. 119, 120, seeks to prohibit such a practice.
45. See Yorston and Brown, *Company Law* (3rd ed. 1968), pp.348-352.
46. To disclose this practice, the *Companies Act*, 1962-73, s.156(5), requires such a nominee to disclose that fact. See *infra*, Disclosure, *Proprietary company shareholders*.
47. For this purpose, *several* nominees would be required.

1972-73, s.10. Once again, a subsidiary company may wish to conceal the fact that it owns shares in its holding company, which is prohibited by the *S.A. Companies Act, 1962-73, s.17.*

#### (D) PROTECTION OF CLIENTS

A sharebroker often acts as a nominee to protect both his client and himself. Where a client has bought shares but his broker is unable to transfer them into his name because, *inter alia*, he has not yet paid for them, and a dividend payment or new or bonus issue is about to close, the broker transfers the shares into his own, or his nominee company's, name as nominee for the client, thereby ensuring that the client receives the dividend or share issue. Otherwise, it would in the first instance be sent to the seller, and the buyer's broker would have to obtain it from him, with consequent delay and inconvenience.

#### (E) PROPRIETARY COMPANY

Where a company would otherwise have more than fifty members and hence be precluded<sup>48</sup> from the status of proprietary company, several shareholders can hold their shares through the same nominee in order to keep the number of members below fifty. Thus, a proprietary company could have a million beneficial shareholders, although there is a practical limit in that the expense and inconvenience would outweigh the advantages<sup>49</sup>.

#### (F) VOTING

The articles of a company sometimes provide that the number of votes per share to which a member is entitled is regressive with the number of shares which he holds. A member can therefore increase his votes<sup>50</sup> by splitting his shareholding between several nominees<sup>51</sup>.

### Disadvantages

There are three disadvantages in using a nominee to hold shares. The nominee obviously charges *fees* which can be quite significant<sup>52</sup>; it is uneconomical to use a nominee for a small shareholding. The cost must be weighed against the benefits by anyone contemplating the use of a nominee.

The beneficiary, having only an *equitable interest*, runs the risk of losing it through the nominee's selling the shares to a *bona fide* purchaser for value without notice of it. Generally, however, the beneficiary selects a nominee whom he trusts; for this purpose, bank and trustee company nominees, and most sharebrokers, accountants and solicitors, are safe and reputable. In any case, the nominee would be personally liable, provided that he is available and solvent.

48. By *Companies Act, 1962-73, s.15(1)(a).*

49. In practice, this method is rarely used.

50. As, e.g., in *Pender v. Lushington (1877) 6 Ch.D. 70 (Ch.).*

51. In addition, while voting is usually in the first instance on a show of hands, under the *Companies Act 1962-73, s.139(1)(b)*, the articles must provide that (*inter alia*) at most five members may demand a poll. "The moral is that a member should, to be absolutely safe, always split his holdings among five nominees": Gower, *Modern Company Law* (3rd ed. 1969), p.493. However, this would very rarely be necessitous.

52. For example, the Wales Nominees currently charge \$3 per year for each holding in a company; \$5 per transfer of each shareholding from client to nominee and vice versa (max. \$200); 1% on each dividend received (min. 50c, max. \$25); 50c% on the market value of shares bought or sold (min. \$7, max. \$100), the same charge for payment of application or call monies; and \$5 for other transactions, e.g. bonus issues. See Bank of New South Wales, *Nominee Services Schedule of Charges* as at May 1, 1974 (pam.).

Where the beneficiary is a company, there is now a *taxation* disadvantage in the use of a nominee. This is the result of the decision in *Patrick Corporation Ltd. v. Federal Commissioner of Taxation*<sup>53</sup> in 1974, in which Mason J. held that a company which holds shares in another company through a nominee cannot claim a rebate for dividends paid on those shares to a "shareholder company" under the *Income Tax Assessment Act, 1936-74* (Aust.), s.46, because "a beneficial owner . . . who is not, and has not been, entered on the register as the holder of those shares, cannot accurately be described as a 'shareholder' or 'member' of the company within the meaning of the Act"<sup>54</sup>. The resultant position, as a matter of policy, is clearly anomalous and it is suggested that the Act be amended to rectify the position<sup>55</sup>, which otherwise may mean the end of nominee shareholding for companies.

### **Disclosure of Beneficial Shareholders**

This section describes the extent to which disclosure of the identity of the beneficial owner of shares is required by law.

#### *Substantial Shareholders*

The most important provision<sup>56</sup> requires disclosure by "substantial shareholders" in a company listed on an Australian stock exchange<sup>57</sup>. Every substantial shareholder, who is a person with a beneficial interest<sup>58</sup> in 10% or more by nominal value of any class of voting shares<sup>59</sup> in the company<sup>60</sup>, is required to give to the company full details of his interests in *all* of its voting shares. The original notification must be given within 14 days of acquiring the 10% interest and must be followed by similar notifications of any changes to the interest up to and including the time when the shareholder ceases to have the 10% interest<sup>61</sup>. The company must keep these details in a register which is open to the public<sup>62</sup>. The Act provides a criminal penalty<sup>63</sup> for defaulters, and also gives to the Court wide powers to control dealings with the relevant shares<sup>64</sup>.

This disclosure has two main purposes. Shareholders and potential shareholders "are entitled to know whether there are in existence substantial share-

53. (1974) 3 A.L.R. 251 (H.C.).

54. *Id.*, at 270.

55. See Spry, "Company Shareholders and Rebates of Tax", (1974) 3 *Aust. Tax Review* 179, at 180-181.

56. *Companies Act, 1962-73* (S.A.), Part IV, Div. IIIA.

57. The Australian *Corporations and Securities Industry Bill, 1974*, Part IX, has a similar provision which, if it becomes law, will exclude the S.A. provision by virtue of cl.18. The major difference is the reduction, by cl.222, of the present (S.A.) 10% threshold level to 5%. Minor differences are specifically noted below.

58. Defined broadly by *Companies Act, 1962-73*, s.6a. *Cf.* the *Corporations and Securities Industry Bill, 1974*, cls.17, 222, which gives a slightly wider definition.

59. Defined, basically, to include ordinary shares, but exclude preference (limited voting) shares: *Companies Act, 1962-73*, s.5. *Cf.* the *Corporations and Securities Industry Bill, 1974*, cl.3.

60. *Companies Act, 1962-73*, s.69c. *Cf.* the *Corporations and Securities Industry Bill, 1974*, cl.222.

61. *Companies Act, 1962-73*, ss.69d-69f. *Cf.* the *Corporations and Securities Industry Bill, 1974*, cls.223-225, which reduces the notification period to three days.

62. *Companies Act, 1962-73*, s.69k. *Cf.* the *Corporations and Securities Industry Bill, 1974*, cls.223-225, 268, which provides that the Corporations and Exchange Commission, rather than the company, must keep the register.

63. *Companies Act, 1962-73*, s.69i (\$1,000). *Cf.* the *Corporations and Securities Industry Bill, 1974*, cl.228 (\$2,000 or six months imprisonment).

64. *Companies Act, 1962-73*, s.69n. *Cf.* the *Corporations and Securities Industry Bill, 1974*, cl.229.



holdings of shares which might enable a single individual or corporation, or a small group, to control the destinies of the company, and if such a situation does exist, to know who are the persons on whose exercise of voting power the future of the company may depend"<sup>65</sup>. Also, the requirement discloses the existence and identity of a person who is buying shares in a bid to take control of the company; in view of his reasons in that case<sup>66</sup>, such disclosure is obviously desirable<sup>67</sup>.

### *Directors*

A director is required to disclose all shares in his company in which he has a beneficial interest<sup>68</sup>. He has the same obligations as a substantial shareholder, and the company must keep a register on the same terms<sup>69</sup>. The purpose of this provision is to disclose (or discourage) insider trading by directors, but it is practically unenforceable because the use of a nominee conceals the very fact that the director owns or is trading in the shares.

### *Dealers and advisers*

It is proposed by the *Australian Corporations and Securities Industry Bill*, 1974<sup>70</sup>, that every dealer (including a broker), investment adviser, representative of each, and financial journalist, be required to maintain a register of all shares in which he has a beneficial interest<sup>71</sup>. The purpose of this provision is to disclose (or discourage) conflicts of interest.

### *Proprietary company shareholders*

A nominee who holds shares in a proprietary company must disclose: (a) if he holds them for a corporation, that he so holds the shares<sup>72</sup>; and (b) "that he so holds the shares and such other information relating to the beneficial ownership of the shares as the secretary requires" to determine whether the company is a "prescribed proprietary company" under Part XIII of the *Companies Act*, 1962-73<sup>73</sup>.

### *Broadcasting company shareholders*

Under the *Broadcasting and Television Act*, 1942-74 (Aust.), Part IV, Divs. 2 and 3, the number of radio and television stations in which a person may hold a "prescribed interest"<sup>74</sup> is limited<sup>75</sup>, as is the proportion of shares in a single station which overseas residents may hold<sup>76</sup>. Accordingly, the articles

65. Standing Committee of State and Commonwealth Attorneys-General (Aust.), Company Law Advisory Committee, *Interim Report No. 2 on Disclosure of Substantial Shareholders and Take-overs* (1969), para. 4 (hereinafter referred to as the *Eggleston Report*).

66. See *supra*, Purposes, (C) **SECURITY, Control**.

67. See generally Great Britain, Company Law Committee, *Report* (1962), Cmnd. 1749, para. 142 (hereinafter referred to as the *Jenkins Report*).

68. *Companies Act*, 1962-73, ss.126, 127.

69. *Ibid.*

70. Part V, Div. 2.

71. *Corporations and Securities Industry Bill*, 1974, cl.83. For the definitions of the above persons, see cls.3, 67, 69.

72. *Companies Act*, 1962-73, s.156(5). Its purpose is to prevent falsely exempt proprietary companies: see *supra*, Purposes, (C) **SECURITY, Exempt proprietary company**.

73. *Companies Act*, 1962-73, s.398(3).

74. Basically, 15% (radio) or 5% (television) of either the company's paid up share capital or (complexly defined) voting shares: see *Broadcasting and Television Act*, 1942-74, ss.90(2), 90E and ss.91(2), 92B.

75. *Broadcasting and Television Act*, 1942-74, s.90C and s.92.

76. *Broadcasting and Television Act*, 1942-74, s.90G and s.92D. The limit is 15% of issued capital for a single resident, and less than 20% for all residents.

of a company licensee must contain a provision under which every transferee of shares is required to state by statutory declaration whether he is a nominee, who is the beneficial owner and whether the latter will have a prescribed interest<sup>77</sup>; and another provision relating to continued (but limited) disclosure<sup>78</sup>.

### *Investigation*

The State Governor, where it is desirable in the interest of shareholders or the public, is authorized under the *Companies Act*, 1962-73, Part VIA, to appoint an inspector who has power, *inter alia*, to investigate the beneficial ownership of a company and to require a nominee to disclose his beneficiary's identity<sup>79</sup>. This power is only used in special cases.

The Australian Minister, in the exercise of his power to regulate foreign take-overs<sup>80</sup> under the *Companies (Foreign Take-overs) Act*, 1972-73 (Aust.)<sup>81</sup>, has an incidental power to require a nominee or potential nominee, holding voting shares, to disclose the identity of his beneficiary<sup>82</sup>.

It is proposed that the Corporations and Exchange Commission under the *Corporations and Securities Industry Bill*, 1974 (Aust.), cl. 266(2), will have a power to require any nominee, holding voting shares in a company, to disclose the identity of his beneficiary.

### **Criticism of the Present Law**

How adequate are the current disclosure requirements? Should more extensive disclosure be required? What is the position in other jurisdictions?

#### **(A) SUBSTANTIAL SHAREHOLDING**

The present legislation<sup>83</sup> requires disclosure of the identity of beneficial owners of 10% of the voting shares of a listed company. This requirement, so far as it goes, is almost universally recognized as desirable.<sup>84</sup>

Substantially similar provisions are found in the other States (except Tasmania)<sup>85</sup> and the United Kingdom<sup>86</sup>; and, apart from the threshold level, in the United States<sup>87</sup> and (it is proposed) Australia<sup>88</sup>. No jurisdiction goes beyond such provisions to require more extensive disclosure. Each aspect of the requirement must now be considered.

#### *Voting shares*

The limitation to voting shares is evident: the rationale for disclosure<sup>89</sup> deals with control of the company, which is only obtained through voting shares.

77. *Broadcasting and Television Act*, 1942-74, s.90L(1)(c) and s.92G(1)(c).

78. *Broadcasting and Television Act*, 1942-74, s.90L(1)(d) and s.92G(1)(d).

79. *Companies Act*, 1962-73, s.173.

80. Those which, if successful, would raise the foreign ownership and control above 15%: see *Companies (Foreign Take-overs) Act*, 1972-73, ss. 9, 11.

81. See ss.13, 14, 17.

82. *Companies (Foreign Take-overs) Act*, 1972-73, ss.20(1), 20(2)(a), 20(2)(b).

83. See *supra*, Disclosure, *Substantial shareholders*.

84. It was unanimously recommended by the English *Cohen Report*, *supra*, n.20, para. 82, and *Jenkins Report*, *supra*, n.67, para 143, and the Australian *Eggleston Report*, *supra*, n.65, para. 4.

85. The Acts are almost uniform: *Companies Act*, 1961-74 (N.S.W.), *Companies Act*, 1961-71 (Vic.), *Companies Act*, 1961-74 (Qld.), *Companies Act*, 1961-73 (W.A.), Part IV, Div. IIIA.

86. *Companies Act*, 1967, ss.33, 34.

87. *Securities and Exchange Act*, 1934-70, s.16(a) and s.13(d)(1) inserted by *Public Law No. 90-439 (Williams Act, 1968)*.

88. Under the *Corporations and Securities Industry Bill*, 1974: see *supra*, n.57.

89. See *supra*, Disclosure, *Substantial shareholders*.

### Threshold level

Is the present 10% level too high? The Australian *Corporations and Securities Industry Bill*, 1974, cl. 222, proposes a level of 5%, which accords with the position in the United States<sup>90</sup> and the position which was proposed in the United Kingdom<sup>91</sup>. Even this figure may be regarded as too high: in many large companies<sup>92</sup>, either no person at all or else only one person owns 5% of the voting shares. A shareholding of 1% is in many companies a substantial holding; the control exercised by such a shareholder may well be at least significant. A threshold level of 1% would achieve more fully and extensively the purpose of the provision. In fact, this level was recommended by the English *Cohen Report*<sup>93</sup> in 1945, and has recently been proposed in the United States<sup>94</sup>.

### Type of company

The present requirement only applies to companies which are listed on an Australian stock exchange<sup>95</sup>. This follows the recommendations of the *Eggleston Report*<sup>96</sup> and *Jenkins Report*<sup>97</sup>, but the *Cohen Report*<sup>98</sup> recommended that it apply to all companies. There is no reason why it should not apply universally: the rationale applies equally to all companies, whether public or proprietary, listed or unlisted. Indeed, control of the company is usually *more* important in a small company because it is more personal and flexible than in a large one. Moreover, since trading of shares in unlisted companies is generally more restricted, control is likely to be more relevant to such a shareholder.

All that the *Jenkins Report*<sup>99</sup> said on this point was that the limitation "would make the number of persons affected by the new provision relatively few, but the companies about which information would be provided would be those companies whose membership is likely to be a matter of interest to investors, potential investors and the public at large"<sup>100</sup>. There is no force in this point, because inconvenience to persons affected is very minor indeed.

### Enforceability

Where a substantial shareholder uses several nominees, it may be difficult to discover the fact if he does not report it. On the other hand, the *Jenkins Report* said: "Mr. Cohen [an American witness] . . . agreed that sooner or

90. *Supra*, n.87. The level was lowered in 1970 from 10% to 5% by *Public Law No. 91-567*. See generally "Comment: Section 13(d)", (1971) 119 *Uni. Penn. L.R.* 853.

91. By the Conservative *Companies Bill*, 1973/74, cl.18. See Great Britain, Department of Trade and Industry, *Company Law Reform* (1973), Cmnd. 5391, para. 23.

92. An obvious example is B.H.P.

93. *Supra*, n.20, para. 82. *Cf.* the *Jenkins Report*, *supra*, n.67, para. 143, and *Eggleston Report*, *supra*, n.65, para. 4, which both recommended 10%, but without giving any substantial reasons.

94. Proposed by the *Corporate Ownership Reporting Bill*, 1972 (S.3923). Recommended by the Senate Committee on Government Operations in 1974: see (1974) 32 *Congressional Quarterly Weekly Report* 70, at 71. See generally Metcalf, *supra*, n.19.

95. *Companies Act*, 1962-73, s.69a(2).

96. *Supra*, n.65, para. 4.

97. *Supra*, n.67, para. 143.

98. *Supra*, n.20, para. 82.

99. *Cf.* the *Eggleston Report*, *supra*, n.65, para. 4, which gave no reason at all for the recommended limitation.

100. *Jenkins Report*, *supra* n.67, para. 143.

later those who failed to report their holdings were generally found out. We think there is great force in this last point. For example, someone who buys shares anonymously with a view to acquiring control of a company would find it difficult to conceal his identity once he gained control and the possibility that in one way or another over the years his identity might come to light would, if the penalty for non-compliance were substantial, be a powerful deterrent to evasion<sup>101</sup>. There is *considerable* force in the latter point, although a meticulous investor, using a relatively large number of nominees not identifiable as such, could disclose only part of his shareholding—the threshold level of 10%—and then “acquire” the remainder from his nominees, either through a take-over offer or individually over time. Also, the point is inapplicable where the investor’s purpose is not control.

Unfortunately, it is difficult to know how many defaulters are discovered, because a successful utilization of nominees to avoid disclosure would *ipso facto* be unknown to an outsider. Of course, the mere fact that the requirement is difficult to enforce is no reason against its adoption.

#### (B) NOMINEE STATUS

One proposal made is that every registered holder of voting shares in a company be required to disclose whether or not he is a nominee<sup>102</sup>. This was recommended in 1945 by the *Cohen Report*<sup>103</sup>, but it has not been adopted. Its purpose is to enable directors, shareholders and potential investors to ascertain the extent of nominee shareholding in a company, which would often indicate whether an unknown person *may* have some degree of actual or potential control. It is subsidiary to substantial shareholding disclosure, for the purpose is the same. There is no reason why it should not be adopted: it would involve no expense, inconvenience or difficulty<sup>104</sup>.

#### (C) POWER OF THE COMPANY

A further suggestion is that every company be empowered to require any nominee to disclose the identity of his beneficiary. This is proposed<sup>105</sup> by the Australian *Corporations and Securities Industry Bill*, 1974, cl. 266(1), and was proposed by the U.K. *Companies Bill*, 1973/74, cl. 19. Its purpose is again to enable a company (directors, shareholders and potential investors) to discover who is in actual or potential control. Being subsidiary to substantial shareholding disclosure<sup>106</sup>, it is only justified to the extent that it secures greater compliance with that requirement due to the fact that a nominee is generally more reluctant to break the law than his self-interested beneficiary<sup>107</sup>.

The power would be exercised by the directors, but it is for the benefit and information of the company as a whole, including shareholders and potential investors. Moreover, if the information obtained is not made public, the

101. *Id.*, para. 142.

102. This would be a continuing requirement; the nominee status would be entered in the members’ register which is kept under *Companies Act*, 1962-73, s.151.

103. *Supra*, n.20, para. 81. It was not considered by either the *Jenkins Report*, *supra*, n.67, or the *Eggleston Report*, *supra*, n.65.

104. There is some difficulty in the universal enforcement of this proposal, but that is no reason in this case why it should not be adopted. *Cf.*, *infra*, (D) FULL DISCLOSURE, *Enforceability*.

105. In relation to voting shares in (basically) public companies. The reasons for, and merits of, these limitations have been considered: *supra*, (A) SUBSTANTIAL SHAREHOLDING, *Voting shares and Type of company*.

106. Which already achieves the purpose (to the extent considered necessary—now 10%) to the extent with which it is complied. See *supra*, Disclosure, *Substantial shareholders*.

107. This is elaborated *infra*, (D) FULL DISCLOSURE, *Enforceability*.

directors are in a privileged position and may use it for their own benefit<sup>108</sup> at the expense of shareholders and the company. Accordingly, the U.K. *Companies Bill*, 1973/74, cls. 19(4), 19(5), provided that a public register of all information obtained under the proposed power must be maintained by the company. On the other hand, the *Corporations and Securities Industry Bill*, 1974, omits such a provision. This is arguably a significant defect, which, it is hoped, will be rectified.

In general, this proposal seems to be uncontroversial. This is perhaps surprising because the arguments relative to it also apply in general<sup>109</sup> to the following more extensive and apparently more controversial proposal that full disclosure of beneficial ownership be mandatory. Since the latter would clearly supersede the former, it is immediately considered.

#### (D) FULL BENEFICIAL DISCLOSURE

The most important proposal yet made is that full disclosure of all beneficial owners of voting shares in a company be mandatory<sup>110</sup>. Every transferee of shares, and every person himself disclosed<sup>111</sup> under the provision<sup>112</sup>, would be required to disclose<sup>113</sup> the identity of his beneficiary, if any. Any subsequent change in the beneficial ownership of the shares would also have to be disclosed. A register<sup>114</sup> of the beneficial shareholders in each company would be maintained<sup>115</sup>, so that any person could discover<sup>116</sup> the beneficial ownership and control of the company.

The conclusion of the arguments which are now considered, both for and against the proposal (in that order), is that full disclosure is justified and should be adopted, although there is considerable dissent, at least in the first instance, from this conclusion.

#### *Public awareness and shareholder accountability*

A company is a creation of the State: its shareholder owners and controllers are enabled by the State to function as a company and assume the company form in its relations with the public, to the advantage of the shareholders. Accordingly, the public ought to know who it is that is functioning in the com-

108. For instance, through insider trading or an allotment of shares pre-empting (to the detriment of the shareholders) a likely take-over offer.
109. The arguments against full disclosure apply (*infra*, nn.137, 153), with one (weak) exception (*infra*, n.142). The arguments in favour of full disclosure do not *all* apply (*infra*, n.133). Hence, there is perhaps a stronger case for full disclosure.
110. This was not recommended by the *Cohen Report*, *supra*, n.20, *Jenkins Report*, *supra*, n.67, or *Eggleston Report*, *supra*, n.65, but they gave little more than superficial consideration to it.
111. Or (perhaps) who ought to be disclosed. This would create a double obligation on both nominee *and* beneficiary, if it is considered advantageous.
112. This is necessary to cover the use of several nominees (or agents) in stratum: e.g., A is nominee for B who is nominee for C. *Cf.* the U.K. *Companies Bill*, 1973/74, cl.19(2), which, in relation to the proposed disclosure power of the company (*supra*, (C) POWER), made provision to cover the use of *two* nominees in stratum.
113. On say, his Security Transfer Form.
114. Supplementary to, or incorporated in, the main register of legal shareholders which is kept under *Companies Act*, 1962-73, s.151.
115. By either the company itself or perhaps the proposed Corporations and Exchange Commission, depending on, *inter alia*, the jurisdiction. *Cf.* the substantial shareholders' register: *supra*, text to n.62.
116. Where the beneficial owner is a company or unit trust, the beneficial ownership can be traced *through* it to its own shareholders or unit-holders, because a register must be kept of (a) shareholders, under the proposal itself, and (b) unit-holders, under *Companies Act*, 1962-73, s.84 (as extended by the proposal).

munity and dealing with its members through the utilization of the (State-granted) company form. That form should not obscure the identity of such persons, who after all would otherwise have to act openly. Thus, by rights, and in any case in return for the special benefit conferred upon it, the composition of the company ought to be visible to the public.

A special application of this argument is that members of a company ought to be *accountable* for its actions to the public. For instance, if the company is polluting the environment or prosecuting other undesirable or unpopular activities, its members should not, at their whim, be able to hide behind a combination of their nominees and the company. Indeed, the accountability and consequent embarrassment of members for their company's actions may result in a change of its policies<sup>117</sup>. A negative<sup>118</sup> reply to this argument is that a member is rarely embarrassed through being accountable, and in any case, except for the larger members, no one knows or bothers to find out who are the members of the company. While the truth of this generalization may be disputed, it misses the point that the question is not whether the members are *made* to account, but, rather, whether they are *available* to account.

#### *Shareholder democracy*

Complete disclosure is necessary to give full effect to the concept of shareholder democracy. A member should know with whom he is carrying on the joint activity which the company represents. Thus, a member who wishes to consult or canvass support from his fellow members must know who *are* his fellows<sup>119</sup>. For instance, this is important in respect of the appointment of directors, the passing of ordinary and special<sup>120</sup> resolutions, the variation of class rights<sup>121</sup>, and the application to the Court<sup>122</sup> in relation to such variation. A negative reply is that a member can first approach the nominee who can refer either the matter or, *if so directed*, the member himself to the beneficiary. However, nominees often refuse or fail to pass on such information; in any case, the circuitous communication between member and beneficiary involves needless expense, inconvenience and delay<sup>123</sup>.

#### *Secure substantial shareholder disclosure*

Full disclosure would secure greater compliance with the specific disclosure provisions<sup>124</sup> which are encompassed by it. There would basically<sup>125</sup> be just one simple and efficient provision.

In particular, it would achieve the objectives of the substantial shareholding provision more easily and effectively. Reference has already<sup>126</sup> been made to

117. Whether directly by action or indirectly through members' selling their shares (causing difficulty to the company in raising further capital).

118. In the sense that it provides no positive reason against disclosure, but merely seeks to deny or diminish the importance of reasons for disclosure.

119. See *Cohen Report*, *supra*, n.20, para 79.

120. Which require a 75% majority: *Companies Act*, 1962-73, s.144.

121. Which usually requires a 75% majority of class shareholders: e.g., Table A, Art. 4 (*Companies Act*, 1962-73, Fourth Schedule).

122. Which requires 10% of class shareholders: *Companies Act*, 1962-73, s.65.

123. It is arguable that one purpose of the register of members kept under *Companies Act*, 1962-73, s.151, is "to enable a shareholder to know who his co-adventurers are": see *Cohen Report*, *supra*, n.20, para. 77. On the other hand, that report also suggests a (compatible) alternate purpose and an (inconclusive) rebuttal of the first purpose.

124. See *supra*, Disclosure.

125. At least in the case of voting shares.

126. *Supra*, (A) SUBSTANTIAL SHAREHOLDING, *Enforceability*.

the difficulty in the enforcement of that provision. Under the full disclosure requirement, in order to conceal the beneficiary's identity, the *nominee* would have to falsely declare that he is not a nominee. In general, a nominee would be much more reluctant to break the law by making a false declaration than would be the beneficiary, in his own interest, to break the law without making any declaration at all (which is the present position). It would be all the *more* difficult and expensive<sup>127</sup> for a beneficiary to find the number of willing nominees, not identifiable as such, which he requires<sup>128</sup> to achieve his purpose. Perhaps this may even result in the personal relationship between such nominees and the beneficiary being, in retrospect, sufficiently apparent.

In reply, it is argued that there are, in any case, few problems in the enforceability of the substantial shareholding provision, and alternately that the proposal to empower each company to require disclosure would be just as effective. The first has been considered<sup>129</sup>. The alternate proposal would have to be used extensively in practice to be effective<sup>130</sup>; furthermore, any reason (with one exception<sup>131</sup>) which can be advanced<sup>132</sup> against full disclosure applies also to this proposal<sup>133</sup>.

#### *Secure director disclosure*

The proposal would also secure better disclosure of a director's shareholdings (or alternately discourage insider trading) because, again, a nominee would be much more reluctant to break the law than the director himself. The consequent reduction in the field of available nominees, from a wide range including respectable and readily identifiable nominees to those willing to break the law, would result in the personal relationship between nominee and beneficiary becoming more, and perhaps sufficiently, apparent. Hence, while it cannot secure total disclosure, the proposal would at least present greater difficulties and risks to a director intent on insider trading<sup>134</sup>.

#### *Discourage undesirable practices*

The proposed requirement would disclose and hence discourage several undesirable or illegal activities which are currently pursued under the cloak of secrecy established by the use of a nominee<sup>135</sup>. It cannot achieve this purpose completely, of course, but, for the reasons advanced in the previous two arguments, it would at least secure *better* enforcement of or compliance with the laws which are currently evaded, and *better* disclosure of activities which depend upon secrecy for their success.

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127. As an inducement to break the law, the beneficiary would probably have to split the profits with his nominees.

128. See *supra*, (A) SUBSTANTIAL SHAREHOLDING, *Enforceability*.

129. *Ibid*.

130. Otherwise, the nominees would run only a small risk of discovery of what is *not* (for them) an illegal activity, anyway.

131. *Viz.*, the expense argument, which is a very weak one indeed. See *infra*, *Expense*, n.142 and text thereto.

132. See *infra*, *Privacy*, n.137; *Enforceability*, n.153.

133. Which indeed does not have all the advantages of full disclosure. See *supra*, *Public awareness and Shareholder democracy*; and (partially—due to its less extensive range) *infra*, *Secure director disclosure* and *Discourage undesirable practices*.

134. This proposal should preferably be combined with a prohibition on the use of inside information by a person in *association* with (*inter alia*) a director, for otherwise the director could more easily sell the information than use it himself through a nominee. Such a prohibition is proposed by the Australian *Corporations and Securities Industry Bill*, 1974, cls.123(3)-123(5).

135. See *supra*, Purposes, (C) *SECURITY*.

In particular, to the extent with which it is complied, it would disclose shareholdings of an overseas investor; conflicts of interest by sharebrokers and investment advisers; insider trading and other undesirable or illegal market practices; illegal shareholding by a bankrupt, person in a bank (exceeding 10%), or subsidiary in its holding company; and falsely exempted proprietary companies.

### *Privacy*

The principal reason<sup>136</sup> why the proposal<sup>137</sup> should *not* be adopted is that it is an invasion of privacy to require a person to disclose financial matters such as his shareholdings, which are analogous in this respect to his bank account. A person's assets are and should remain private. This is, in particular, a counter to the first two reasons<sup>138</sup> for disclosure.

However, the right to privacy can only exist (if at all) in relation to matters which are not, by their nature and the nature of the community, of public relevance. In this respect, voting shares are clearly different from a bank account in that they constitute part ownership and control of a company which operates in the community<sup>139</sup>. They also constitute a relationship between the shareholder and his fellow members of the company<sup>140</sup>. Such a shareholding thus represents an important public activity, which is particularly relevant for the reasons advanced in favour of disclosure. There is thus no possibility of a right to privacy in this case<sup>141</sup>.

### *Expense and inconvenience*

The proposal<sup>142</sup> would involve great expense and inconvenience because every beneficial owner of shares would have to be entered in a register<sup>143</sup>. It "would involve a volume of work out of all proportion to the probable benefits to the public" (*Cohen Report*<sup>144</sup>); it "would lead to an enormous amount of paper work much of which would be pointless" (*Eggleston Report*<sup>145</sup>).

This objection is basically incorrect; it has usually been made without full

136. This reason was not advanced by either the *Jenkins Report, supra*, n.67, or the *Eggleston Report, supra*, n.65. It was apparently rejected by the *Cohen Report, supra*, n.20, para 80, which stated: "No member of our Committee believes that any legitimate purpose would be prejudiced by disclosure of the names of the beneficial owners if such disclosure is considered desirable in the public interest . . ."

137. Basically, this argument also applies to the proposal that every company have power to require disclosure (see *supra*, (C) POWER OF THE COMPANY). It is true that the disclosure would not be so extensive, but the mere power, combined with partial disclosure (which would, to a large extent, be *arbitrary* if it is to be effective), is inconsistent with privacy.

138. *Infra*, nn.139, 140.

139. See *supra*, *Public awareness*.

140. See *supra*, *Shareholder democracy*.

141. Even if there were a *prima facie* right to privacy, it would be outweighed by the reasons for disclosure.

142. This objection does not apply to the proposal that the company have power to require disclosure: see *supra*, (C) POWER OF THE COMPANY.

143. It has also been (half-heartedly) suggested that there would be a problem in that the proposal would apply to shares held under a trust, and to all the beneficiaries thereof. However, there are no greater difficulties than in the case of pure nominees. One *alternative* to such inclusion is to exclude remote beneficial interests (e.g. interests not in possession) which have no effect on voting. In either case, there is no problem of interpretation (another allegation): *cf.* the present substantial shareholding provision which clearly includes all interests—*supra*, n.58.

144. *Supra*, n.20, para. 80.

145. *Supra*, n.65, para. 4.



consideration of either the expense involved or the justification for it<sup>146</sup>. The *only* expense or inconvenience occasioned<sup>147</sup> by the proposal is the cost to each company<sup>148</sup> of maintaining the register of beneficial shareholders. Each company presently maintains a *much larger*<sup>149</sup> register of legal shareholders<sup>150</sup>. Since this includes the nominees, the only *extra* expense is the cost of entering the proportionate number<sup>151</sup> of beneficiaries in the register, perhaps on the same card as their respective nominees. Moreover, the company is partially compensated for this extra expense by the *saving* of time and money which it currently makes<sup>152</sup> due to the use of nominees, by dealing in many instances with just one nominee instead of his several beneficiaries.

Consequently, the cost is small in comparison with current expenses and is easily justified by the reasons in favour of disclosure.

### *Enforceability*

The proposal<sup>153</sup> is difficult to enforce and could be easily evaded because, if the nominee does not disclose the fact, no one will know either that he is a nominee or the identity of his beneficiary<sup>154</sup>.

This point is exaggerated. In most cases the beneficiary has nothing to hide and therefore his identity will be disclosed. Even if he does have something to hide, the *nominee* will in general be very reluctant to make a false declaration and break the law<sup>155</sup>, especially if the penalty for non-compliance were substantial<sup>156</sup>. Consequently, in the main, there would be compliance with the provision, and where there is not, it would at least cause difficulties to the law-breaker. In any case, the mere fact that it is not completely enforceable is no reason against its adoption.

146. For example, the two Reports cited did not consider any of the reasons advanced above in favour of disclosure, nor did they back up their assertions. In general, they devoted little attention to the proposal (*supra*, n.110) and considered this argument basically in the context of disclosure of substantial shareholding.
147. There is no real expense to the nominee, beneficiary or sharebroker.
148. This cost would be roughly proportional to the size of the company. It may even be that the register would be maintained by the Corporations and Exchange Commission: see *supra*, n.115.
149. Thus, if nominees constitute 10% by size of all shareholders (see *supra*, Extent of Nominee Shareholding), it would be about 10 times larger.
150. Required by *Companies Act*, 1962-73, s.151.
151. Depending, of course, on the ratio of beneficiaries to nominees. If this is *even* (one-to-one), the cost would only be an extra 10% (*supra*, n.149). It is true that the extra cost increases if the ratio is greater than one-to-one (which is likely: see *infra*, text to n.152), but this is *entirely* due to the fact that the *present* cost is correspondingly *lower* than it would be if no nominees were used, since the company currently enters the (less numerous) nominees rather than their (more numerous) beneficiaries in the legal register. So, in fairness, the extra cost is limited to the 10% figure.
152. For instance, in respect of the payment of dividends, the issue of bonus and new shares, and the distribution of voting material and notices.
153. Cf. the proposal that a company have power to require disclosure (see *supra*, (C) POWER OF THE COMPANY), to which the same argument applies.
154. This was only explicitly advanced by the *Cohen Report*, *supra*, n.20, para. 80: "Our doubts are on the question of enforceability . . ." This could not be sustained, however, in view of the fact that, at the same time, the Report recommended disclosure of nominee status (*supra*, n.103), to which exactly the same argument applies (see *supra*, n.104).
155. See further *supra*, *Secure substantial shareholder disclosure* and *Secure director disclosure*.
156. Cf. *Jenkins Report*, *supra*, n.67, para 142, in relation to substantial shareholding: *supra*, text to n.101.

*Conclusion*

In conclusion, full beneficial disclosure is justified by the purposes which have been advanced, and the objections to it are not substantial.

**(E) PROHIBITION**

The final proposal is that nominee shareholding be prohibited. However, this is almost universally rejected for two main reasons<sup>157</sup>. First, the practice of using a nominee for personal and administrative convenience is a legitimate and important one. Secondly, prohibition is no more enforceable or effective<sup>158</sup> than the proposed full disclosure requirement, yet it achieves no additional purpose whatsoever.

**Conclusion**

Nominee shareholding is a significant activity in Australia which serves both legitimate and illegitimate purposes. While the legitimate ones should be preserved, full disclosure of the beneficial ownership of all voting shares should be required, both in the general interest of the community and to discourage the illegitimate purposes. In this respect, existing legal regulation is inadequate.

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157. See, e.g., Great Britain, Department of Trade and Industry, *Company Law Reform* (1973), para. 21.

158. Because there is the same problem (whatever its extent) of determining whether a shareholder is a nominee if he does not disclose the fact. See *supra*, (D) FULL DISCLOSURE, *Enforceability*.