

## The Definition of “Associate” in the Corporations Law

Justice R P Austin  
Supreme Court of New South Wales  
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### Introduction

As a result of the enactment of the Corporate Law Economic Reform Program Act 1999 (CLERP Act), from 13 March 2000, there have been two definitions of ‘associate’ for purposes of Ch 6. Prior to that time Pt 1.2 Div 2 (ss 10 to 17), which applies for the purpose of interpreting a reference to an associate anywhere in the Corporations Law, was the only definition. Now there is an additional definition, found in s 9, which identifies the associates of ‘a bidder making a takeover offer, a substantial holder or a 90% holder’, and says that ‘otherwise’ the person's associates are determined under ss 10 to 17.

We shall consider the scope and content of Pt 1.2 Div 2, and then the scope and content of the new s 9 definition in comparison with the older definition. We shall then examine when the new definition applies, and when the old definition remains applicable.

### Associates under Pt 1.2 Div 2

The definition of the concept of associate in Pt 1.2 Div 2 envisages three separate categories: ‘automatic associateship’, ‘associateship under a relevant agreement’ and ‘associateship on the facts’.

*Automatic associateship* Where the primary person is a body corporate, each of its directors, its secretary, each of its related bodies corporate, and their directors and secretary, are all automatically associates of the primary person: s 11. Note that this associateship relationship flows only one way in the case of directors and the secretary; the directors and secretary are associates of the body corporate, but the body corporate is not automatically an associate of the directors and secretary.

A related body corporate or substantial shareholder of a company is not usually an associate of a director of the company: *Robox Nominees Pty Ltd v Bell Resources Ltd* (1986) 13 ACLR 475 at 477; 4 ACLC 164 at 166. Nor are the directors automatically associates of one another, though an associateship relationship may arise ‘on the facts’ in the manner described below: *Payne v Adelaide Steamship Co Ltd* (1988) 14 ACLR 252; 6 ACLC 1175. ‘Automatic’ associateship arises only where the primary person is a body.

*Associateships under a relevant agreement* arise in the circumstances described in s 12. If P is the associate of Q by virtue of the application of s 12, Q may also be the associate of P (s 12 (2)) - indeed, logically this will always be the case. Q is the associate of P under s 12 relating to company T, if Q is a person with whom P has, or proposes to enter into, a relevant agreement:

- because of which one of them has or will have the power to exercise or control or substantially

- influence any voting power attached to shares in T (s 12(1)(d));
- for the purpose of controlling or influencing the composition of T's board or the conduct of its affairs(s 12(1)(e));
- under which one of them will or may acquire, or may be required by the other to acquire, shares in T in which the other has a relevant interest(s 12(1)(f)); or
- under which one of them may be required to dispose of shares in T in accordance with the other's directions(s 12(1)(g)).

The words 'relevant agreement' are defined very broadly in s 9, to include any agreement, arrangement or understanding, even an informal unwritten agreement, regardless of whether it is enforceable at law or in equity.

The cases indicate that the word 'understanding' in the definition of 'relevant agreement' is the broadest component of that definition, encompassing virtually everything covered by the words 'agreement' and 'arrangement'. This was the view reached in *Adsteam Building Industries Pty Ltd v Queensland Cement and Lime Co Ltd* (No 4) [1985] 1 Qd R 127; (1984) 14 ACLR 456; 2 ACLC 829.

According to s 12 (read together with the definition of 'relevant agreement' in s 9), parties may become associates where one 'proposes to enter into' an understanding with the other.

*Elders IXL Ltd v NCSC [1987] VR 1; (1986) 10 ACLR 719; 4 ACLC 465* was one of many cases involving attempts to take over BHP. At the time of that case, Bell Resources had made a proportional partial takeover bid for BHP, and subsequently Elders (a company of which Elliott was a director) acquired 18.9% of the shares of BHP, and was expected to make a rival takeover bid. BHP had a substantial shareholding in ACI, and Equiticorp (a company of which Hawkins and Pratt were directors) had made an unsuccessful takeover bid for ACI.

In that turbulent state of affairs, Beid (a company of which Hawkins was a director) entered into the market for BHP shares, and quickly acquired 53 million shares representing 4.4% of BHP. It appeared to the NCSC (ASIC's predecessor) that the motive for Beid's purchase of BHP shares was to put the Hawkins-Pratt interests in a position to make a deal with Elders, under which the Hawkins-Pratt interests would assist Elders to obtain control of BHP provided that Elders would then cause BHP to support the Hawkins-Pratt takeover bid for ACI. The NCSC exercised its discretionary powers by declaring that the acquisition by Beid of BHP shares was an unacceptable acquisition (a role subsequently transferred to the Takeovers Panel), and that the conduct of Hawkins and Pratt in relation to the acquisition was unacceptable conduct. The reported case was an appeal by them against the NCSC's declarations.

The NCSC's declarations asserted that Elders and Elliott were associated with Hawkins and Pratt in connection with the acquisition of the 53 million shares. The NCSC argued that an associate relationship may arise under s 12's equivalent by virtue of a proposal in the mind of one person but not yet and perhaps never communicated to another. Hawkins had formulated a proposal, and according to the NCSC's argument, it was unnecessary for it prove any acquiescence in that proposal by Elders or Elliott.

The court rejected this contention, holding that the Corporations Law is concerned with real combinations and real aggregations of influence. The words 'proposes to' cover an

agreement which may not be capable of being demonstrated as being yet in existence, but which is destined to be - where, for example, P and Q have each purchased shares on a mutual expectation that they will use their voting power together, but have not reached a specific understanding pending the outcome of some particular event such as the enactment of expected legislation.

The requirement of bilaterality was reaffirmed by Ormiston JA in *Endresz v Whitehouse* (1997) 24 ACSR 208; 15 ACLC 936.

*Associateships on the facts* may arise, in the Ch 6 context, under s 15. Q is P's associate under s 15 (1) (a) if P is acting or proposes to act in concert with Q in respect of the matter to which the associate reference relates (for example, the exercise of voting power in a company, when the question arises under s 610). Under s 15 (1) (b) regulations may be made extending the scope of the associate concept, but no regulations have been made for the purposes of Ch 6. Under s 15 (1) (c), Q is P's associate if P is, or proposes to become, associated with Q formally or informally in respect of the matter to which the associate reference relates. This merely underlines the breadth of the concept of associate, saying in effect that people are associates if they are associated in any way.

If P has entered or proposes to enter into a transaction, or has done or proposes to do something, in order to become associated with Q in any of the ways described in ss 11, 12 and 15, then Q is already P's associate by virtue of P taking that step: s 15 (2).

According to *Industrial Equity Ltd v CCA (Vic)* [1990] VR 780; (1989) 1 ACSR 153 two or more people may be held to act in concert without any finding of a physical or overt act. But there needs to be an understanding between them as to a common purpose or object. It is not sufficient that two persons separately and coincidentally act in similar manner: *Adsteam Building Industries Pty Ltd v Queensland Cement and Lime Co Ltd (No 4)* [1985] 1 Qd R 127; (1984) 14 ACLR 456; 2 ACLC 829 at 832.

### ***Exclusions from the definition of 'associate'***

Certain forms of association are expressly excluded from the scope of the definition in Pt 1.2 Div 2. Thus Q is not an associate of P where:

- Q gives advice to P or acts on P's behalf, in the proper performance of functions attaching to a professional capacity or business relationship (s 16(1)(a));
- P as client gives specific instructions to Q, whose ordinary business includes dealing in securities, to acquire shares on P's behalf in the ordinary course of that business (s 16(1)(b));
- Q has sent or proposes to send to P an offer under a takeover bid in relation to P's shares (s 16(1)(c));
- P has appointed Q, otherwise than for valuable consideration given by Q or Q's associate, to vote as a proxy or representative at a meeting of members or a class of members of a body corporate (s 16(1)(d), see also s 609(5), excluding honorary proxies from the concept of relevant interest; see also ASC PN 6).

Just as Q is not an associate of P in any of the above circumstances, neither is P the associate of Q in those circumstances. If Q 1 and Q 2 carry on business together as a dealer or futures broker or adviser, and Q 1 is an associate of P, then Q 2 is also an associate of P: s 17.

### ***Collective action by institutional investors***

The breadth of the notions of 'associateships under a relevant agreement' and 'associateships on the facts', coupled with the breadth of the definition of 'relevant interest', gives rise to some issues for institutional investors. Institutional investors who wish to advocate or propose a course of action at a company meeting are constrained by the takeover provisions of the Corporations Law from discussing their voting intentions with one another. If the institutions together hold more than 20 % of the shares, the discussions themselves could be regarded as a transaction prohibited by s 606; further, whether or not that is so, the discussions made inhibit the institutional investor from acquiring additional shares in the company before the meeting, even in the ordinary course of its investment management business.

In PS 128 ASIC sets out the circumstances in which, in its opinion, institutional shareholders may have discussions about a matter relating to voting at a company meeting without entering into a relevant agreement or becoming associates. The Commission also outlines class order relief which applies where institutions wish to enter into an agreement with respect to their voting at the meeting.

### **Associates under s 9**

Under the Corporations Law before 13 March 2000, and also under the previous national cooperative companies and securities scheme which regulated takeovers from 1981 to 1990, P was 'entitled' to the shares in which its associate, Q, had a relevant interest. Until the commencement of the Corporations Law in 1991, all three kinds of associate relationships gave rise to an entitlement to shares, for the purpose of applying the basic prohibition. This created a problem where the associate relationship arose under a relevant agreement relating to voting or disposal of shares. It meant that if P took a call option from Q over 100 shares in T, out of Q's total holding of 1,000,000 shares, P would become entitled to 1,000,000 rather than 100 shares in T.

This irrational result was overcome in the Corporations Law, under which this part of the definition of the associate relationship did not apply for the purposes of measuring breach of the basic prohibition against exceeding the 20% threshold. Instead, there was a 'deemed entitlement' to the shares which were the subject of the agreement, but only those shares. In our example, the agreement would not cause P and Q to become associates but instead, P would have a deemed entitlement to 100 shares in T.

The CLERP Act introduced a new definition of 'associate' in s 9. The definition sets out three categories of persons who are the associates of: a bidder making a takeover offer, a substantial shareholder, or a 90% holder (a 90% holder may proceed to compulsory acquisition – see the discussion in Ch 24 of Ford's Principles of Corporations Law).

Limb (a) of the new definition is that if the bidder or holder is a body corporate, its associates include a body corporate that it controls, a body corporate that controls it, and a body corporate that is controlled by an entity that controls it. Control is defined in s 50AA. This is broadly similar in effect to s 11(b), according to which the associates of a body corporate include its related bodies corporate, but there are two notable differences. First, the definition of 'control' in s 50AA is broader and more flexible than the definition of related bodies corporate in s 50. Secondly, the new definition does not include directors and the secretary as associates of a body corporate.

Limb (b) of the definition includes in the associates of the bidder or holder a person with whom the bidder or holder has, or proposes to enter into, a relevant agreement for the purpose of controlling or influencing the composition of the body's board or the conduct of the body's affairs. This is similar to

s 12(1)(e), except that under the new definition the question is about the purpose of the arrangement rather than its effect, and influence is not confined to 'substantial' influence.

Limb (c) of the definition is that the associates of the bidder or holder include a person with whom the bidder or holder is acting, or proposes to act, in concert in relation to the body's affairs. Under the previous law the definition of acting in concert in s 15 was unspecific, and it was arguable that an associate relationship would arise between people who act in concert in relation to voting, even in the absence of a relevant agreement between them. Now the concept of acting in concert is limited to doing so in relation to the body's affairs.

### ***When does the new definition apply?***

The new definition declares that the three categories described above are 'the associates of a bidder making a takeover offer, a substantial holder or a 90% holder'.

The new definition appears to be intended to be comprehensive and exclusive, as regards associates of a bidder, substantial shareholder or 90% shareholder. It speaks about 'the' associates of the bidder or holders. After the three limbs of the definition are set out, it is said that 'otherwise a person's associates are determined under sections 10 to 17'. The word 'otherwise' implies that ss 10-17 (Pt 1.2 Div 2) deal with associate relationships other than those involving a bidder, substantial shareholder or a 90% holder. If ss 10 to 17 also applied to them, a drafting difficulty would be whether the exemptions in s 16 applied to the new definition.

Putting aside substantial holders and 90% holders, the definition identifies associates of a bidder making a takeover offer. Sometimes Ch 6 employs the concept of associates in a context in which there is an identified bidder making a takeover offer. For example, s 621 (3) says that the consideration under a takeover bid must equal or exceed the maximum consideration that the bidder or an associate provided during the four months before the bid. Here, there clearly is a bidder making a takeover offer, and so the definition in s 9 applies, and Pt 1.2 Div 2 does not. The same is true where the word 'associate' is used in s 622 (escalation agreements), s 623 (collateral benefits), s 629 (defeating conditions) and s 661A (compulsory acquisition of bid class securities). But sometimes Ch 6 uses the concept of associates in a context where there is not, at that stage, any declared bidder making a takeover offer. For example (and of central importance to the basic prohibitions), a person's voting power is defined s 610 by reference to the 'person's and associates' votes'. Does the s 9 definition apply for the purposes of s 610, or should we refer to Pt 1.2 Div 2?

As far as s 610 is concerned, it is submitted that the legislature intended the s 9 definition apply to the exclusion of Pt 1.2 Div 2. This conclusion seems to follow from the history of the definitions used for the purposes of the basic prohibition. One of the main uses of the associate concept, since it was first defined in 1981, has been as an ingredient in the basic prohibition against exceeding the 20% threshold. In the case of a relevant agreement with respect to voting, acquiring or disposing of shares, the effect of the revision of the definition of 'associate' when the Corporations Law began in 1991 was that in our example above, the agreement gave P an entitlement to only 100 shares in T rather than 1,000,000. The new s 9 definition of associate does not include a relationship arising out of a relevant agreement with respect to voting, acquisition or disposal of shares. Such an agreement gives rise to a relevant interest in the party who has thereby become entitled to exercise control over voting or to acquire shares, under s 608 (8). Thus, in the post-13 March 2000 law, the definition of relevant interest is relied upon, evidently with the intention of depriving the associate concept of any role with respect to relevant agreements about voting, acquisition or disposal of specific shares. It follows that for the

purposes of s 610, the legislature must have intended that the s 9 definition of associate be used, because that definition (unlike Pt 1.2 Div 2) does not extend to relevant agreements concerning voting, acquisition or disposal of shares.

Unfortunately, however, this may be one of those unusual cases where a court cannot give effect to the intention of the legislature because the statutory language is inconsistent with that intention. The s 9 definition applies (relevantly) only to 'a bidder making a takeover offer'. Section 606 prohibits any person from acquiring a relevant interest in issued voting shares in the company if, inter alia, that person's or someone else's voting power in the company increases above the threshold. Then s 610 defines a person's voting power by reference to the relevant interests of the person and his or her associates. The 'person' whose voting power is defined in s 610 may be the person making the acquisition prohibited by s 606, who by a generous extension of language could be regarded as a 'bidder making a takeover offer'; but s 610 also defines the voting power of 'someone else' whose voting power may cross the s 606 threshold and give rise to a contravention by the person making the acquisition. No degree of generosity of interpretation can justify describing 'someone else' as 'a bidder making a takeover offer'.

The conclusion is that for the purposes of s 610, one uses the definition of 'associate' in Pt 1.2 Div 2 rather than the definition in s 9. Therefore in our example, where Q has a relevant interest in 1,000,000 shares in T, and P takes a call option from Q over 100 shares in T, P's voting power must be measured under s 610 by adding in the whole 1,000,000 rather than only 100 of the shares in T in which Q has a relevant interest.

In item 7 of s 611 the word 'associate' is used to determine who may vote at a meeting to approve an acquisition, in order to gain an exemption from the basic prohibitions in s 606. Again, although the legislative intention may have been otherwise, it appears that Pt 1.2 Div 2 is to be used, rather than the s 9 definition, to determine who is an associate for that purpose. This is because, in the context of item 7 of s 611, the very point of the meeting is to enable the 'person proposing to make the acquisition' to avoid having to become 'a bidder making a takeover offer', and consequently the person making the acquisition cannot be so described.