DUAL LISTED COMPANIES: UNDERSTANDING CONFLICTS OF INTEREST FOR DIRECTORS

MATTHEW HARDING*

I INTRODUCTION

Since 1995, Australian commerce has witnessed the use of the dual listed company structure by companies seeking to operate together across national boundaries. The dual listed company structure offers particular benefits to companies that wish to retain their national and legal identities while reaping the advantages of merged operations. Such benefits flow largely from the fact that shareholders in companies that utilise the structure do not need to deal with their shares in any way for the structure to become effective. The dual listed company structure is still a novelty in Australia although it has been used for many years in Europe.[1] In fact, Australian companies have brought themselves within the dual listed company structure in only three instances. The first of these, in 1995, was the case of CRA Ltd and RTZ plc, which are now known as Rio Tinto Ltd and Rio Tinto plc.[2] The Rio Tinto case was followed, in the first quarter of 2001, by Brambles Industries Ltd and Brambles Industries plc (formerly GKN plc), and by BHP Ltd and Billiton plc. These two latter dual listed company transactions, which were among the largest in Australian corporate history, effectively merged assets of A$20 billion and A$58 billion respectively.[3]

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* BA (Hons), LLB (Hons) (Melb), BCL (Oxon). Barrister and Solicitor of the Supreme Court of Victoria; Lecturer in Law, University of Melbourne.

1 The European origins of the dual listed company structure can be traced to two mergers between British and Dutch companies: the merger of Shell and Royal Dutch in 1903, and the merger of Unilever (UK) and Unilever (Netherlands) in 1930. See Jau-Shi Liew, 'Two Heads are Better than One: An Overview of the Dual Listed Company Structure' [2001] *Australian Mining and Petroleum Law Association Yearbook* 457, 458 (fn 1). In the United States, the dual listed company structure has not received much attention, although see the brief discussion of 'Siamese twins' in Amir Licht, 'Genie in a Bottle? Assessing Managerial Opportunism in International Securities Transactions' [2000] *Columbia Law Review* 51, 69.

2 For the history of this case and a detailed account of the structure used, see Peter King, Neil Radford and Simon Read, 'RTZ/CRA: The Mining Merger' (1996) 7(1) *PLC* 1; Derek Heath and Rupert Weber, 'A New Form of International Merger' (1996) 8(6) *Asia Law* 29.

3 For a detailed account of the structure of the BHP Ltd/Billiton plc transaction, see Anna Styles and Charles Jacobs, 'BHP Billiton' (2001) 6(10) *Global Counsel* 57; Anna Styles and Charles Jacobs, 'BHP Billiton: A Dual Listed Companies Merger' (2001) 12(9) *PLC* 27.

Given the rarity of dual listed companies in Australia to date, it may be thought that an examination of conflicts of interest for the directors of such companies is unwarranted. This is wrong for several reasons. The first is that the dual listed company structure, due to the particular benefits that it offers to companies that utilise it, is set to assume greater significance in the field of options available to corporate actors that seek to merge their operations with other entities in foreign jurisdictions. This is especially true of Australian companies, notably Australian resource companies, which have an interest in retaining a strong national identity and not being subsumed by foreign giants while at the same time exposing themselves (if indirectly) to the advantages of global alliances. A second reason for studying dual listed companies is that as their numbers increase, they and their directors will be more likely to become the subjects of litigation. Scholarship is needed on the peculiar position of these directors so that guidance is available when courts are called upon to consider that position, and so that the directors themselves know how to act in managing their companies. A third reason for being interested in the position of the directors of dual listed companies is that their position offers an opportunity to examine longstanding principles relating to directors' duties from a fresh perspective. In an area of the law that has been the subject of so much academic attention, it is refreshing to have a new angle from which to consider old principles.

The status of dual listed companies — separate legal entities that regard themselves and wish to be treated as a single economic entity — gives rise to some unique issues.[4] Among these are corporate governance matters arising in connection with the management of such companies. In particular, directors of dual listed companies confront unique circumstances in discharging their fiduciary obligation not to place themselves in a position of conflict in respect of their duties to each of their companies.

This article focuses on the conflict of interest issues associated with dual listed companies. It begins with a brief description of the dual listed company structure, identifying three types of such structure. It then considers the unique position of directors of dual listed companies before identifying the conflict of interest issues that arise from that unique position. In identifying these conflict issues, the article examines the equitable rule against fiduciaries' conflicts of interest. The special treatment of directors of corporate groups is then discussed, and it is argued that directors of dual listed companies are in a position analogous to the position of directors of companies within a corporate group. Having regard to the principles governing conflicts of interest of directors of corporate groups and the idea of the dual listed companies as a single economic entity, it is concluded that the unique conflict of interest issues in this situation

4 For instance, the financial reporting requirements of dual listed companies have been the subject of recent attention. See Australian Securities and Investments Commission, Practice Note 71, *Financial Reporting by Australian Entities in Dual Listed Company Arrangements* (2001); Graham Peirson, 'Accounting: Dual Listed Companies' (2002) 20 *Company and Securities Law Journal* 114. Peirson notes (at 116) that the International Accounting Standards Board is due to consider the question of financial reporting for dual listed companies in the near future.

can be solved largely by the application of concepts already available in the general law. However, in the scenario where one dual listed company seeks to resile from its obligations under the structure, the development of new principles is recommended.

II WHAT ARE DUAL LISTED COMPANIES?

In broad terms, the formation of dual listed companies can be described as follows. First, two companies, each resident in a different jurisdiction and each listed on a different stock exchange, seek to merge their operations without wishing to cease having separate legal personalities, separate residences for tax purposes and separate stock exchange listings. The two companies enter into a set of contractual arrangements, under which they agree to operate as a single economic entity. The contractual arrangements do not affect the legal personalities, residences or stock exchange listings of either company, and the shareholders of each company retain their shareholdings in the relevant company. Through contractual provisions and amendments to the constitutions of each company, all of the shareholders of both companies are placed in an identical situation in respect of voting at general meetings, the receipt of dividends and returns of capital. Shareholders' rights, therefore, resemble the rights they would have if the two companies were actually merged. The complexities of this 'equalisation' process are beyond the scope of this article, but they are at the heart of the dual listed company structure.[5] The contractual arrangements between dual listed companies also involve each company guaranteeing certain liabilities of its counterpart, the result being that those liabilities are treated as the liabilities of a single entity.[6] Again, this is consistent with dual listed companies operating as a single economic entity.

Each company maintains its own board of directors, because it is required to do so under the companies legislation in the jurisdiction of its incorporation.[7] However, the companies agree that their boards of directors must always consist of exactly the same persons. As a result, the boards of the two companies are identical and remain so throughout the life of the dual listing. The unique position of boards of directors of dual listed companies is explored in greater detail in Part III below.

5 Liew, above n 1, provides an explanation of dual listed company equalisation arrangements.

6 Liew, above n 1, 462.

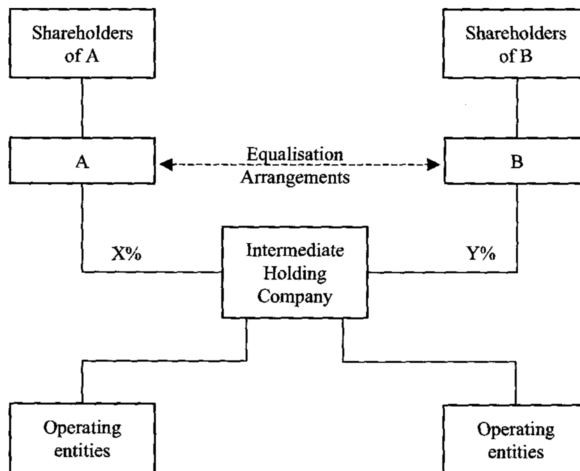
7 For Australian companies, this is the *Corporations Act 2001* (Cth). Section 201A(2) outlines the requirement that public companies maintain a board of at least three directors, two of whom ordinarily reside in Australia.

Dual listed company structures that are formed in this general way can be classified according to three types: the combined entities, stapled stock and separate entities structures.[8]

A Combined Entities Structure

The first type of dual listed company structure involves two companies seeking to merge their operations by holding their assets through one or more jointly owned holding companies. Equalisation arrangements are put in place between the two companies at a level above the jointly owned holding company or companies. The combined entities structure is illustrated below in Figure 1.[9]

FIGURE 1



B Stapled Stock Structure

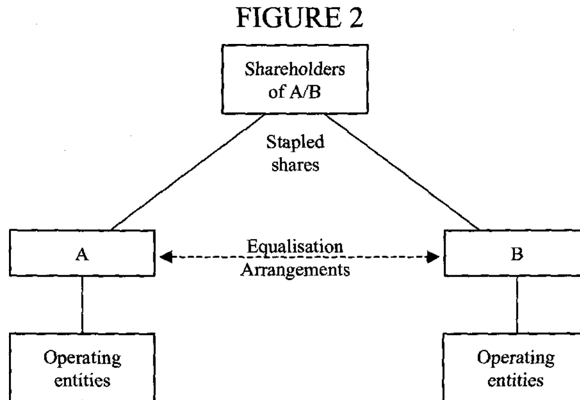
Where two companies use the stapled stock structure to merge their operations as dual listed companies, shares in each of the two companies will be paired together so that they cannot be traded separately. Again, equalisation

8 These three types of dual listed company structure are discussed in the recent consultation paper of the Code Committee of the United Kingdom's Panel on Takeovers and Mergers, *Dual Listed Company Transactions and Frustrating Action* (2002). That consultation paper considers whether the procedures for establishing dual listed company structures should be brought within the purview of the United Kingdom's City Code on Takeovers and Mergers, having regard to the problems created where a takeover offer is made for a company that is considering bringing itself within a dual listed company structure. The particular problems that arise during the period when a company is contemplating a dual listed company structure are beyond the scope of this article, which focuses on conflicts of interest once the dual listed company structure is in place.

9 The combined entities structure was adopted in the case of Reed Elsevier: Tim Jones and Richard Baker, 'The Reed Elsevier Merger: Preserving Separate Identities' (1993) 4(1) *PLC* 15.

arrangements will be put in place to ensure that shareholders' voting, dividend and capital return rights are identical in the case of each company. The stapled stock structure is illustrated in Figure 2.[10]

FIGURE 2



C Separate Entities Structure

In a case where the separate entities structure is implemented, the two companies that seek to merge their operations will simply, by contract, institute equalisation arrangements to ensure that all shareholders in each company are in the same position with respect to voting, dividend and capital return rights. No other structural arrangements will be necessary. The separate entities structure has been adopted in the three cases to date where an Australian company has brought itself within a dual listed company structure.[11] This is probably because all three have been companies that operate in joint ventures with parties outside the dual listed company structure. The separate entities structure, involving as it does no movement of assets or shares, is less likely than other types of dual listed company structure to trigger pre-emptive rights in joint venture agreements.[12] For this reason, it is likely to remain a popular structure among Australian resources companies. The separate entities structure is illustrated below in Figure 3.

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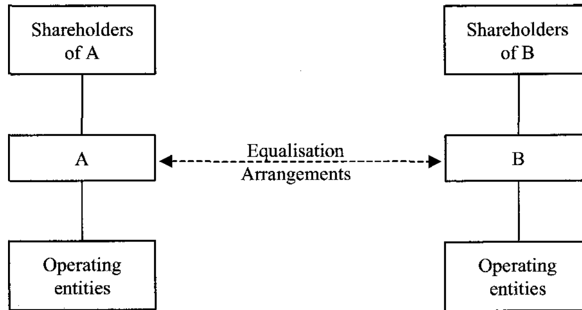
10 The stapled stock structure was used in the merger of SmithKline and the Beecham Group in 1989. However, for a variety of reasons, SmithKline Beecham decided in 1996 to abandon the stapled stock structure: 'SmithKline Beecham Replaces Dual Share Structure' (1996) 7(2) *PLC* 12.

11 See above, 594, for the details of these cases.

12 Liew, above n 1, 460.

FIGURE 3



III DIRECTORS OF DUAL LISTED COMPANIES

The unique position of directors of dual listed companies has already been alluded to above. The boards of directors in such companies are identical — they are 'twin boards'. These twin boards are established and maintained according to provisions in the constitutions of the dual listed companies, provisions in the contractual dual listed company structure, or a combination of both. The twin boards meet separately but simultaneously. Separate notices of meetings are sent to directors in respect of each board on which they sit, and separate sets of board papers and minutes of meetings[13] are kept by the company secretaries of the respective companies.[14] Notwithstanding this, the business of the meetings of each board is often identical, and where this is the case, minutes of meetings often record that one board relies upon the handling of that business by the other board. The procedures that govern the conduct of meetings of directors of dual listed companies reflect the tension inherent in the concept of dual listed companies — each company has independent legal existence but the two companies together operate as a single economic entity. That dual listed companies operate as a single economic entity also explains why the executive management of such companies is invariably in the hands of the same persons. Twin executive management teams and twin boards act as a link between two separate legal entities and the aim of one merged economic entity.

The tension that arises in dual listed company structures, where there is a single economic entity that is nonetheless comprised of two entities with

13 As a corporation with individual legal personality, an Australian company that brings itself within a dual listed company structure will be governed by the *Corporations Act 2001* (Cth). The *Corporations Act 2001* (Cth) requires that such a company keep its own minute books in which proceedings and resolutions of directors' meetings are recorded: s 251A. These minute books will ordinarily be kept at the company's registered office. Note that a company can dispense with the requirement that a notice of directors' meeting always be sent: s 248C. However, s 248C is a replaceable rule which can, under s 135, be displaced or modified by a company's constitution. Nonetheless, if notices of directors' meetings are sent in respect of one dual listed company, then good corporate governance would seem to dictate sending notices of directors' meetings in respect of the other dual listed company within the dual listed company structure in question.

14 Note that the company secretary of each dual listed company may also be the same person.

separate legal existence, is reflected not only in the procedures that govern the conduct of directors' meetings, but also in relation to directors' duties. Consider the position of the directors of an Australian dual listed company (say, DLC1 Ltd) which has brought itself within a dual listed company structure with a foreign company (say, DLC2 plc).[15] These directors have duties — under statute, at common law and in equity — to DLC1. Among these duties is the statutory duty to act at all times in the best interests of DLC1[16] and the equitable duty not to be in a position where the interests of the directors conflict with their duty to act in the best interests of DLC1 (the 'no conflict' rule). The directors' interests for the purpose of this rule include their duties to act in the best interests of other companies of which they are directors, including DLC2. However, notwithstanding their duties to DLC1, the directors are authorised under DLC1's constitution to take into account the interests of DLC1 and DLC2 as a whole when discharging their duties to DLC1.[17] It is here that the tension in dual listed company structures manifests itself in connection with directors' duties — the directors of DLC1 are obliged to look to the interests of DLC1, but also to the interests of the dual listed companies as a whole, in discharging their duties to DLC1 under the law and under DLC1's constitution.

This appears to be unproblematic at first glance. There is no doubt that directors of one company may properly take into account the interests of that company and its dual listed counterpart as a whole if they are authorised to do so by the company's constitution. Such authorisation can be analysed in two ways. First, it can be regarded as a form of prospective ratification by shareholders of breaches of the duty to act only in the company's best interests. Prospective ratifications of breaches of directors' duties have been recognised in a number of cases, including the recent case of *Pascoe Ltd (in liq) v Lucas*.[18] Secondly, it can be regarded as narrowing the scope of the duties owed to a company by its directors, in which case there can be no question of breach of those duties just

15 It will be assumed throughout this article that the directors of a foreign company that is within a dual listed company structure with an Australian company will be subject to duties as directors of that foreign company that are substantially the same as the duties to which they will be subject as directors of the Australian company.

16 *Corporations Act 2001* (Cth) s 181(1). See below Part IV.

17 This might be done directly, in which case the company's constitution will itself require the directors to take into account the interests of the company and its dual listed counterpart as a whole when making decisions in their capacity as directors of the company. It might also be done indirectly, in which case the company's constitution will require the directors to take into account certain objectives and principles that are set out in the contracts governing the dual listed company structure. Those objectives and principles will include the principle that the interests of the dual listed companies as a whole are to be taken into account by the directors of each company when making decisions in their capacity as directors of that company.

18 (1998) 27 ACSR 737. It is clear that breaches of directors' common law and equitable duties can be ratified prospectively, but there is doubt as to whether *Pascoe Ltd (in liq) v Lucas* stands for the proposition that breaches of directors' statutory duties can be so ratified: Robert Baxt and Timothy Lane, 'Developments in Relation to Corporate Groups and the Responsibilities of Directors — Some Insights and New Directions' (1998) 16 *Company and Securities Law Journal* 628, 640. However, this may not be of great significance where shareholders prospectively ratify the 'no conflict' rule (which is discussed further in Part IV), as this rule is an equitable rule and has no expression in the *Corporations Act 2001* (Cth).

because the interests of the dual listed companies as a whole are taken into account. This second analysis recognises that the scope of directors' duties can be narrowed with the consent of those to whom the duties are owed.[19]

Furthermore, as the interests of dual listed companies will usually coincide given that the companies operate within a dual listed company structure, it will normally be the case that what is in the best interests of the two companies as a whole will also be in the best interests of each company taken separately.

However, the position of the directors of dual listed companies as described above is not without difficulties. Must the directors, as directors of one such company, take into account that company's interests alone, as well as the interests of the dual listed companies as a whole, when making decisions? Is it sufficient to have regard only to the dual listed companies as a whole? A more vexing question is what the directors of dual listed companies should do where the interests of those companies conflict. At this point, it is worth remembering that the directors of a dual listed company are also the directors of its dual listed counterpart and will be considering any state of affairs in which the companies' interests conflict from their position in each company's boardroom. Should they subordinate the interests of one to those of the other (or vice versa) or should they take a decision in the interests of the whole? In the latter case, how do they weigh the interests of each in determining the interests of the whole? After all, the dual listed companies are independent legal entities and the directors do owe duties to each separately. These difficult issues must be explored further, and answered, before the unique position of the directors of dual listed companies can be declared unproblematic.

IV CORPORATE GOVERNANCE ISSUES: THE 'NO CONFLICT' RULE

The rule that requires directors to act in the best interests of their company is set out in s 181(1) of the *Corporations Act 2001* (Cth) (*'Corporations Act'*). However, except for the case of directors of companies within corporate groups (which is considered below in Part V) the *Corporations Act* does not deal with the situation where directors are required to discharge duties to more than one company and are therefore placed in a position such that their duties to each of those companies might conflict. In that situation, directors are guided by the rules of equity relating to fiduciary obligations. Those rules, laid down over hundreds of years, complement the *Corporations Act* which operates alongside them.[20] That directors are regarded as standing in a fiduciary relationship vis-à-vis their company is an uncontroversial proposition that has stood for many years

19 The general rule is that fiduciary obligations will differ from case to case depending upon what has been consented to by those to whom the fiduciary obligations are owed: *Hospital Products Ltd v US Surgical Corporation* (1984) 156 CLR 41, 97, 102 (Mason J).

20 Section 185 of the *Corporations Act 2001* (Cth) provides that s 181 (as well as the other sections of the *Corporations Act* dealing with directors' duties) has effect in addition to, and not in derogation of, other rules of the common law and equity relating to directors' duties.

— indeed, the relationship between director and company has been described by Paul Finn as falling inside the 'first circle of the fiduciary'.[21]

The starting point in equity is the rule that a person who stands in a fiduciary relationship vis-à-vis another person may not place themselves in a position where their own interests, or their duty to a third party, conflicts with their duty to serve the interests of that other person. This is the 'no conflict' rule, which has its origin in the 18th century case *Keech v Sandford*[22] and finds more recent form in Australian cases such as *Chan v Zacharia*.[23] The 'no conflict' rule has been judicially affirmed in the context of directors' duties to their companies in the leading case of *Regal (Hastings) Ltd v Gulliver*,[24] and more recently in the judgment of Perry J of the South Australian Supreme Court in *State of South Australia v Marcus Clark*.[25] The rule is strict, applying even where a fiduciary has acted in good faith and where the situation of conflict does not give rise to any adverse effect upon the interests of the person to whom fiduciary obligations are owed.[26] This strict approach reflects the unyielding attitude of courts of equity to breaches of fiduciary obligations generally. As the American judge Cardozo CJ noted in his famous judgment in *Meinhard v Salmon*,[27] nothing short of such an attitude is able to ensure that those persons who owe fiduciary obligations operate 'at a higher level than that trodden by the crowd'.[28] Given this general approach, it is not surprising that the 'no conflict' rule applies even where no conflict exists. All that is required in order for a fiduciary to be found in breach of the 'no conflict' rule is that there be a 'real or substantial possibility of a conflict'.[29]

The application of equity's 'no conflict' rule to the position of the directors of dual listed companies (one of which is Australian) can be summarised as follows. The directors, as directors of the Australian dual listed company, are required under the *Corporations Act* to act in the best interests of that company. However, the directors are also authorised by the company's constitution to take into account the interests of the dual listed companies as a whole in making decisions in their capacity as directors of the company. The directors, as fiduciaries, are required to refrain from placing themselves in a position where

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21 Paul Finn, 'The Fiduciary Principle' in Timothy Youdan (ed), *Equity, Fiduciaries and Trusts* (1989) 1, 33. See also *Regal (Hastings) Ltd v Gulliver* [1942] 1 All ER 348; *Australian Growth Resources Corporation Pty Ltd v Van Reesema* (1988) 13 ACLR 261; *Permanent Building Society (in liq) v Wheeler* (1994) 14 ACSR 109.

22 (1726) 2 Eq Cas Abr 741; 25 ER 223. See also *Aberdeen Railway Co v Blaikie Bros* [1854] 1 Macq 461.

23 (1984) 154 CLR 178 (Deane J).

24 [1942] 1 All ER 348.

25 (1996) 19 ACSR 606. See also *R v Byrnes* (1995) 130 ALR 529. For a short history of the 'no conflict' rule in the context of directors' duties, see Michael Christie, 'The Director's Fiduciary Duty Not to Compete' (1992) 55 *Modern Law Review* 506, 507–13.

26 *Keech v Sandford* (1726) 2 Eq Cas Abr 741; 25 ER 223; *Regal (Hastings) Ltd v Gulliver* [1942] 1 All ER 348; *Boardman v Phipps* [1967] 2 AC 46.

27 (1928) 164 NE 545.

28 Ibid 464.

29 *Boardman v Phipps* [1967] 2 AC 46, 124 (Lord Upjohn); *Hospital Products Ltd v US Surgical Corporation* (1984) 156 CLR 41, 103 (Mason J); *Clay v Clay* (2001) 178 ALR 193, 207–8; *Pilmer v The Duke Group Ltd (in liq)* (2001) 180 ALR 249, 271.

there is a real or substantial possibility of a conflict between their duty to act in the best interests of the Australian dual listed company and their duty to act in the best interests of any other company of which they are directors, including the Australian company's dual listed counterpart. However, the scope of this fiduciary obligation can be narrowed with the consent of shareholders, which might also operate to prospectively ratify breaches of the 'no conflict' rule and perhaps also breaches of s 181(1) of the *Corporations Act* (unless breaches of the *Corporations Act* cannot be prospectively ratified).

The first point to note about this position is that nowhere are the directors of a dual listed company incorporated in Australia authorised to ignore the interests of that company standing alone in taking decisions in their capacity as directors of that company. They are authorised to take into account the interests of the dual listed companies as a whole, but they also appear to be required to take into account the interests of their Australian company standing alone. There will be no difficulty here for the directors where the company's separate interests are consistent with the interests of the dual listed companies as a whole, as will usually be the case. However, where the company's interests standing alone are different from the interests of the whole, the directors appear to face difficulties if they wish to act in the interests of the whole rather than in the interests of the company alone. This is especially so if prospective ratification of breaches of directors' duties cannot extend to breaches of directors' duties under the *Corporations Act*,[30] because in that case, shareholders cannot even consent to the directors ignoring the interests of their company standing alone in taking decisions in their capacity as directors of that company.

The second point to note is that nowhere are the directors of a dual listed company incorporated in Australia permitted to take into account only the interests of its dual listed counterpart in making decisions in their capacity as directors of the Australian company. Again, this will present difficulties where the interests of two dual listed companies do not coincide, because any decision that is taken will fail to be in the interests of one of the companies in question or in the interests of the two companies as a whole. There appears to be no way of avoiding the 'no conflict' rule in such a situation.

The scope of the seemingly insurmountable difficulties that present themselves to the directors of a dual listed company, due to the directors' duty to act in the best interests of that company and the operation of the 'no conflict' rule, depends on what is meant by a dual listed company's best interests. If such a company's best interests are always to be found in the best interests of the dual listed companies as a whole, then the directors of the company will serve its best interests in serving the best interests of the whole. Moreover, if the company's best interests can be regarded as appropriately served by a decision that is in the best interests of its dual listed counterpart, then the directors of the company might even be able to take into account only the counterpart's best interests in making a decision in their capacity as directors of the company and, again, the company's best interests will be necessarily be served by that decision. In other

30 *Miller v Miller* (1995) 16 ACSR 73, 89 (Santow J).

words, potential conflicts might be avoided if it can be said that what is in the best interests of the whole, or even just what is in the best interests of one dual listed company, is also necessarily in the best interests of the other dual listed company. Such an innovative conception of the best interests of a company that is closely associated with other companies is already available in company law, in the principles that have been developed in relation to companies within a corporate group. These are examined further below.

V CORPORATE GROUPS

The rule against fiduciaries placing themselves in a position where their interests conflict with those of the person to whom their fiduciary obligations are owed is, as was noted above, very strict. However in certain situations, courts, and the Parliament, have found ways of relaxing the 'no conflict' rule to accommodate the realities of modern commerce.[31] One particular situation in which the rule has been relaxed is in relation to companies within corporate groups.

According to s 187 of the *Corporations Act*:

> A director of a corporation that is a wholly-owned subsidiary of a body corporate is taken to act in good faith in the best interests of the subsidiary if:
>
> (a) the constitution of the subsidiary expressly authorises the director to act in the best interests of the holding company; and
>
> (b) the director acts in good faith in the best interests of the holding company; and
>
> (c) the subsidiary is not insolvent at the time the director acts and does not become insolvent because of the director's act.

This provision expressly permits the directors of a company to take decisions in respect of that company that are driven by the best interests of the company's sole corporate shareholder, so long as certain conditions are present. It is an exception to the equitable and statutory rule that directors must take into account only the best interests of their company when taking decisions in respect of it.

Section 187 of the *Corporations Act* was introduced as one of the many legislative reforms resulting from the Corporate Law Economic Reform Program

31 Thus, in *Warman International Ltd v Dwyer* (1995) 182 CLR 544, the High Court recognised that liberal remuneration should be paid to a fiduciary who, in dishonest breach of the 'no conflict' rule, developed a business in competition with the company to which his fiduciary obligations were owed and was therefore liable to an account of profits. See also *Boardman v Phipps* [1967] 2 AC 46 (although there the breach was honest). In *Pilmer v The Duke Group Ltd (in liq)* (2001) 180 ALR 249, the majority of the High Court has arguably relaxed the 'no conflict' rule in connection with the provision of professional advice, by demanding a 'real and substantial' possibility of conflict and by maintaining the proscriptive approach to the scope of fiduciary obligations that was forcefully affirmed by the Court in *Breen v Williams* (1996) 186 CLR 71. Justice Kirby's dissent in *Pilmer* stands as evidence that relaxation of the 'no conflict' rule to accommodate the realities of modern commerce is not without its critics.

('CLERP').[32] Obviously, its operation is confined to directors of wholly-owned subsidiary companies and does not extend to directors of companies that are members of a 'group' in any other way. It seeks to treat the directors of wholly-owned subsidiary companies as specific exceptions to the general principles governing directors' duties. It is therefore of limited assistance in considering the position of directors of dual listed companies, who are not directors of companies within a vertical, proprietary relationship of holding company and subsidiary, but rather are directors of companies in a horizontal, contractual relationship that in some ways looks more like a relationship between partners.

Of more assistance in considering the position of directors of dual listed companies are the general law principles that courts developed in dealing with the position of directors in corporate groups prior to the introduction of s 187. Ostensibly, those general law principles simply asserted the longstanding equitable rule that directors must act at all times in the best interests of the company of which they are directors without regard to the interests of other companies in the group within which the first company rests. However, by the time s 187 was enacted, the courts had begun to apply that longstanding rule with more sensitivity to the relationships between companies that stand in a group relationship with each other. It is this more sensitive approach that is of assistance when considering the position of directors of dual listed companies.

The starting point is the decision of the High Court in *Walker v Wimborne*.[33] In that case, the Court held that any director who is considering whether their company should lend money to another company within the same group of companies should, in order to properly discharge their duty to act in the best interests of their company, 'consult its interests and its interests alone'.[34] Nothing here suggests that the 'no conflict' rule is given anything but the most rigorous application. Indeed, in cases following *Walker v Wimborne*, this rigour has been maintained.[35] For instance, in *Parker v National Roads & Motorists' Association*,[36] Kirby P of the New South Wales Court of Appeal said of the

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32 The CLERP reforms, including s 187, were introduced in the *Corporate Law Economic Reform Act 1999* (Cth). Prior to its introduction, s 187, which was based on s 131(2) of the *Companies Act 1993* (NZ), was discussed at length in Companies and Securities Advisory Committee ('CASAC'), *Corporate Groups*, Discussion Paper (1998). Chapter 2 of the CASAC Discussion Paper contains much valuable analysis of the general law treatment of directors of companies within corporate groups prior to the introduction of s 187. There is a large literature on corporate groups generally: see, eg, Tom Hadden, 'The Regulation of Corporate Groups in Australia' (1992) 15 *University of New South Wales Law Journal* 61; the collection of essays in Michael Gillooly (ed), *The Law Relating to Corporate Groups* (1993); Karen Yeung, 'Corporate Groups: Legal Aspects of the Management Dilemma' [1996] *Lloyd's Maritime and Commercial Quarterly* 208; John Farrar, 'Legal Issues Involving Corporate Groups' (1998) 16 *Company and Securities Law Journal* 184; Baxt and Lane, above n 18.

33 (1976) 137 CLR 1.

34 Ibid 6–7 (Mason J).

35 *Industrial Equity Ltd v Blackburn* (1977) 137 CLR 567; *Qintex Australia Finance Ltd v Schroders Australia Ltd* (1990) 3 ACSR 267.

36 (1993) 11 ACSR 370.

companies that comprised the NRMA group:

> Nevertheless, they remained in the eye of the law separate companies. The directors of each company owed separate duties to each. It was not open to the directors to ignore these separate duties or to conceive of themselves as owing a higher, larger or broader duty to the group, represented by NRMA.[37]

This strict application is the starting point. However, the dicta of Mason J in *Walker v Wimborne* point to the more relaxed attitude towards companies within corporate groups that eventually caused Parliament to intervene in the form of s 187 of the *Corporations Act*. In declaring the principle that the interests of a company must be regarded apart from that company's status within a group of companies, Mason J acknowledged that a company's best interests may sometimes be bound up inextricably with what is best for the group of which it is a member. The example he cited was again that of an intra-group loan:

> In such a case the payment of money by company A to company B to enable company B to carry on its business may have derivative benefits for company A as a shareholder in company B if that company is enabled to trade profitably or realise its assets to advantage.[38]

Through this concept of 'derivative benefits' developed by the courts prior to the introduction of s 187 in relation to companies within corporate groups, the directors of dual listed companies may find a way out of the seemingly intractable problems of conflicts of interest described above.[39]

The concept of 'derivative benefits' bears closer examination. Exactly how can the directors of company A conclude that A will gain 'derivative benefits' from an action that is ostensibly in the best interests of companies A and B as a whole, or simply in the best interests of company B, where companies A and B belong to the same corporate group? Fortunately, some guidance is available in the form of a principle that was laid down by Chancery judge Pennycuick J in the English case *Charterbridge Corporation Ltd v Lloyds Bank Ltd*.[40] The *Charterbridge* principle, as it has come to be known, states that when considering whether directors of a company have acted in the best interests of that company in a situation where it appears that they have in fact acted in the best interests of a group of companies or in the best interests of another company within the group of which their own company is a member, the court must consider

> whether an intelligent and honest man in the position of a director of the company concerned could, in the whole of the existing circumstances, have reasonably believed that the transactions [in question] were for the benefit of the company.[41]

If the intelligent and honest director could have so reasonably believed, then they will be taken to have acted in the best interests of their own company. When

37 Ibid 376, although note that President Kirby's judgment was in dissent. Kirby P reiterated his strict approach to the 'no conflict' rule as it applies to corporate groups in his dissenting judgment in *Equiticorp Finance Ltd (in liq) v Bank of New Zealand* (1993) 11 ACSR 642, 682–4.

38 *Walker v Wimborne* (1976) 137 CLR 1, 6.

39 Judicial recognition of 'derivative benefits' in the context of wholly-owned groups can be found, after *Walker v Wimborne*, in *Northside Developments Pty Ltd v Registrar-General* (1990) 170 CLR 146; *Equiticorp Finance Ltd (in liq) v Bank of New Zealand* (1993) 11 ACSR 642.

40 [1970] 1 Ch 62 ('*Charterbridge*').

41 Ibid 74.

one recognises that in light of Justice Mason's reference to derivative benefits in *Walker v Wimborne,* Justice Pennycuick's reference to the 'benefit of the company' is in fact a reference to the 'direct or derivative benefit of the company',[42] the scope of the *Charterbridge* principle becomes clear. It affords directors great latitude to determine what is in the best interests of their company, even indirectly, having regard to their company's particular circumstances, including the circumstance of being a member of a group of companies. Additionally, of course, courts are as a general rule reluctant to impugn reasonable decisions of directors as to what is in their company's best interests,[43] a fact illustrated by the trial judge in *Equiticorp Finance Ltd (in liq) v Bank of New Zealand*[44] who refused to interfere with what he regarded as the directors' pursuit of sensible commercial goals.[45]

VI THE ANALOGY WITH CORPORATE GROUPS

The *Charterbridge* principle has been applied many times by Australian and English courts since its elaboration in 1970.[46] Since the introduction of s 187 of the *Corporations Act* it has received little attention where directors of wholly-owned subsidiary companies act in the best interests of their holding company or in the best interests of the group of which their company is a member. However, it still has application where decisions are taken in the context of a corporate group by directors of companies that are not wholly-owned subsidiaries, and it is of great assistance when considering the position of directors of dual listed companies, which, as noted above, fall outside the purview of s 187.

Consider once again Justice Mason's statement in *Walker v Wimborne* that directors might properly act in the interests of a subsidiary company of their own company where 'derivative benefits' will flow to their own company from so acting. That statement draws attention to the fact that such 'derivative benefits' will flow due to the position of the directors' own company as a shareholder of the subsidiary. Justice Mason's statement can also be interpreted to permit the

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42 In his dissenting judgment, Kirby P explicitly recognised that the *Charterbridge* principle extends to the recognition of 'consequential effect[s]': *Equiticorp Finance Ltd (in liq) v Bank of New Zealand* (1993) 11 ACSR 642, 684.

43 *Harlowe's Nominees Pty Ltd v Woodside (Lakes Entrance) Oil Co NL* (1968) 121 CLR 483, 493 (Barwick CJ, McTiernan and Kitto JJ); *Howard Smith v Ampol Petroleum Ltd* [1974] AC 821, 832 (Privy Council); *Wayde v New South Wales Rugby League Ltd* (1985) 3 ACLC 799, 805; *Equiticorp Finance Ltd (in liq) v Bank of New Zealand* (1993) 11 ACSR 642, 675.

44 (1993) 11 ACSR 642.

45 *In re Asiatic Electric Co Ltd* [1973] NSWR 603 (Street CJ in eq). See also Baxt and Lane, above n 18, 632.

46 *Reid Murray Holdings Ltd (in liq) v David Murray Holdings Pty Ltd* (1972) 5 SASR 386; *Rolled Steel Products (Holdings) Ltd v British Steel Corporation* [1986] 1 Ch 246; *Spedley Securities Ltd (in liq) v Greater Pacific Investments Pty Ltd (in liq)* (1992) 30 NSWLR 185; *Australian National Industries Ltd v Greater Pacific Investments Pty Ltd (in liq)* (1992) 7 ACSR 176; *Equiticorp Finance Ltd (in liq) v Bank of New Zealand* (1993) 11 ACSR 642; *Farrow Finance Co Ltd (in liq) v Farrow Properties Pty Ltd (in liq)* (1997) 26 ACSR 544; *Japan Abrasive Materials Pty Ltd v Australian Fused Materials Pty Ltd* (1998) 16 ACLC 1172.

making of decisions by directors of a subsidiary company that are for the primary benefit of their holding company, again due to the shareholding that links the two companies together. It is this latter situation that is expressly permitted (with the appropriate constitutional authorisation) by s 187 of the *Corporations Act*. The difficulty in drawing an analogy between group companies and dual listed companies that would bring dual listed companies within the scope of Justice Mason's statement is that dual listed companies are not linked by a shareholding relationship.

However, dual listed companies are linked by contractual arrangements that seek to unify them as a single economic entity. Their fortunes stand or fall together in the same way as those of companies that are linked by a shareholding relationship. Indeed, the dual listed company structure is designed to ensure that this is so, and that the companies that bring themselves within it are treated as one. It is the fact that dual listed companies regard themselves and wish to be treated as one economic entity, and are so treated, that enables an analogy to be drawn between them and companies within a corporate group. This in turn enables the general law principles that were developed by courts in respect of directors of companies within corporate groups prior to the introduction of s 187 to apply to the directors of dual listed companies.

Consider once again the position of the directors of an Australian company, which has brought itself within a dual listed company structure with a foreign company, and assume that the general law principles governing the position of directors of group companies can be applied by analogy to the position of directors of dual listed companies. It can now be said that the directors of this company will be able to act in its best interests where they can identify a derivative benefit to the company in acting in the best interests of the dual listed companies as a whole, or even just in the best interests of the foreign counterpart. If such a derivative benefit can be identified, the directors of the Australian company will discharge their statutory duty to act in that company's best interests, and their duties under the constitutions of both dual listed companies to take into account the best interests of the whole. No conflict will arise because the interests of the two companies will be consistent (although the interests of one may be contingent upon the interests of the other). Furthermore, the directors will have considerable latitude in determining whether or not there are derivative benefits to the Australian company in taking a decision, because according to the *Charterbridge* principle, their determination will not be impugned where they can point to reasonable grounds for having made it. Naturally, the directors will need to turn their minds to the question of derivative benefits when taking a decision that is not primarily in the best interests of the Australian company, and will need to satisfy themselves that such reasonable grounds for recognising derivative benefits exist, if they are to have the protection of the *Charterbridge* principle. However, the fact of the dual listed company structure and the fact that the dual listed companies operate as a single economic entity will assist the directors in being satisfied that such reasonable grounds exist.

Such an application of existing general law principles governing conflicts of interest of directors of companies within corporate groups alleviates to a very substantial degree any conflict of interest problems that directors of dual listed companies may face due to their unique position. However, there remains the potential for certain 'hard cases' that may not be adequately addressed by the application of existing principles. For instance, what would the directors of DLC1 do if it were in the best interests of DLC1 taken alone to resile from the contractual arrangements that bind it to DLC2? What would they do if DLC1 had to decide whether to entertain a takeover offer which was not extended to DLC2 as well? The takeover offer might be very attractive to DLC1's shareholders, but its realisation might cause detriment to DLC2 which would be 'cut adrift' of its dual listed status with DLC1 as a result. To a large extent, these difficult situations would be dealt with by the dual listed company structure itself. If DLC1 sought to resile from its dual listed company contractual obligations to DLC2, then DLC1 would almost certainly be exposed to liability to pay damages to DLC2 for breach of contract. It is difficult to see how exposing DLC1 to such liability could be consistent with acting in its best interests. Similarly, it will be all but impossible for a dual listed company to find itself the target of a takeover offer that is not also directed at its counterpart, because dual listed companies customarily have constitutional provisions ensuring that takeover offers must be made to both companies within the dual listed company structure. Also, modifications of the takeovers provisions of the *Corporations Act* can be, and have in the past been, granted by the Australian Securities and Investments Commission to bolster protection against takeover activity.

Nonetheless, the possibility remains that in the rare and difficult case where a dual listed company seeks to resile from its obligations under the contracts that have established and continue to maintain the dual listed company structure, the interests of it and its dual listed counterpart may be impossible to reconcile. In such a case, the directors, as directors of one company, will be unable to identify derivative benefits for that company in acting in the best interests of the dual listed companies as a whole, or in the best interests of the other company. Nor will they even be able to look to the interests of the whole, because in a sense there will be no interests of 'the whole'. The 'no conflict' rule will be insurmountable.

Such a situation is a frontier case for which there is no adequate provision according to established principles. It is a frontier case because it arises in circumstances where a decision must be made as to the utility of the dual listed companies continuing as a single economic entity at all. Therefore, no appeal can be made to the fact of single economic existence in order to support an analogy with the treatment of corporate groups. New principles are required in order to address this type of situation. However, the new principles cannot be developed until a proper understanding is reached of the utility of dual listed companies remaining within a dual listed company structure in such circumstances. For instance, if, as a matter of policy, it is seen as important to ensure that the directors of dual listed companies must always aim to preserve the dual listed

company structure, whatever the cost to (one of) the individual companies within that structure, then it will be necessary to compel the directors of dual listed companies to disregard the interests of the individual companies within the structure in taking decisions that will ensure the continued survival of the structure as a whole. If greater emphasis is placed on the contractual structure of dual listed companies, then it might be appropriate to permit the directors of each company within the structure to revert to a traditional view of the best interests of the individual companies in a 'hard case', the result of which may be the dissolution of the dual listed company structure itself. This will require an exception to the general rule that the interests of dual listed companies as a whole be taken into account by the directors of each company within the dual listed company structure. Either way, principle must follow policy, and must be developed with the unique position of directors of dual listed companies in mind.

VII CONCLUSION

This article has examined the conflict of interest issues that arise in connection with the management of dual listed companies. It has aimed to identify the unique conflicts of interest that relate to the directors of dual listed companies. These arise due to the directors' duties to act in the best interests of each of the companies within the dual listed company structure, and in the best interests of the dual listed companies as a whole, while all the time avoiding a breach of the 'no conflict' rule of equity. It has been argued that in practically all cases where a real and substantial possibility of conflict exists, the conflict may be overcome by the application of principles that courts have developed in response to the special position of directors of companies within corporate groups. However, in the rare case where one dual listed company seeks to resile from its obligations under the dual listed company structure, it is concluded that new principles may need to be developed notwithstanding protections built into the dual listed company structure, having regard to the utility of dual listed companies preserving their form in frontier cases. This may eventually occur through legislation, as happened when the CLERP saw the introduction of s 187 of the *Corporations Act*. Alternatively, it might be for the courts to continue their tradition of relaxing the equitable rules relating to fiduciary obligations, in order to recognise rapidly changing commercial realities that often run far ahead of the law.