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A. INTRODUCTION

In being tasked with investigating the collapse of insurance giant HIH, Royal Commissioner Justice Neville Owen was directed to explore whether undesirable corporate governance practices contributed to the group's failure.[1] In conducting his inquiry, Commissioner Owen examined not only the duties attaching directors, but those related to other corporate agents.

While suggesting these non-directors' duties should be functionally oriented – that is, concerned with the task performed, not the status of legal relationship between actor and company – Commissioner Owen focused on three classes of personnel, suggesting it unfortunate were they excluded from the duties' operation.[2] This paper reviews that assertion, and considers whether these groups should be so bound. It concludes that some, but not all, of the examined actors require further control.

B. THE SETTING

The non-directors' duties examined by Commissioner Owen were those contained in Part 2D.1 and s 1309 of the *Corporations Act 2001* (Cth) ('the Act').[3] Extending in some instances to an 'employee', their chief application was to an 'officer of a corporation'.[4] That phrase, defined by s 9, included directors, secretaries and persons:

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[1] See Commonwealth of Australia, HIH Royal Commission, *The Failure of HIH Insurance* (2003) vol 1, 305. Hereafter referred to as 'HIH Royal Commission'.

[2] Ibid vol 1, 121-131.

[3] See *Corporations Act 2001* (Cth) ss 180-183, 1309.

[4] The duties outlined in ss 182(1), 183(1), 184(2) and 184(3) applied to both 'employees' and 'officers', while those established by ss 180(1), 181(1) and 184(1) applied only to the latter group.

> (i) who make, or participate in making, decisions that affect the whole, or a substantial part, of the business of the corporation; or
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> (ii) who have the capacity to affect significantly the corporation's financial standing; or
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> (iii) in accordance with whose instructions or wishes the directors of the corporation are accustomed to act …[5]

In Commissioner Owen's belief, the range of personnel subject to these duties was inadequate – consultants and contractors,[6] 'middle' management, and personnel acting for a group company other than that by which they were (primarily) engaged[7] were, in his opinion, all likely excluded from the duties' operation.[8] That this was felt unsatisfactory flowed from the role of each in HIH's demise.

Advocating a more functionally-oriented approach, he proposed the employee-related duties instead apply to 'all persons performing functions for and on behalf of corporations'.[9] Likewise, duties intended to apply only to senior personnel should take 'being concerned or taking part in the management of the relevant entity' as their standard.[10]

In response, legislation was passed extending several duties not examined by Commissioner Owen, and s 1309, to employees.[11] As regards a functionally-

[5] *Corporations Act 2001* (Cth) s 9.

[6] Hereafter referred to as 'consultant-contractors'.

[7] Hereafter referred to as 'group personnel'.

[8] HIH Royal Commission, above n 1, vol 1, 121-2, 126-7, 129.

[9] Ibid 126.

[10] Ibid.

[11] So as to correct perceived definitional anomalies: see *Corporate Law Economic Reform Program (Audit Reform and Corporate Disclosure) Act 2004* (Cth) Schedule 9; Department of

based descriptor scepticism was expressed, 'concerned in management' singled out as 'not easily definable' and susceptible to judicial vacillation.[12] Despite this, the Corporations and Markets Advisory Committee was asked to consider whether excluding the above categories from the duties' operation was problematic.[13] A Discussion Paper will be released in June 2005.[14]

C. A THEORETICAL FRAMEWORK

Given the above, it is appropriate to examine whether the groups identified by Commissioner Owen should be unambiguously brought within the Part 2D.1 duties' scope. In this respect, the insights of Ronald Coase are useful.

Coase asserts that the firm emerges as a mechanism to minimise the burden of transaction costs.[15] Although production may be accomplished in a fully decentralised manner by way of discrete contracts between individuals, the 'search and information costs, bargaining and decision costs, policing and enforcement costs' inherent in such a method generally militate against its practice.[16]

An organiser-producer will instead prefer to enter longer-term, broadly-phrased agreements with suppliers, characterised by the surrender of (a degree of) the latter's autonomy, to the former, in exchange for specified remuneration.[17] The

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Treasury and Finance, *CLERP (Audit Reform & Corporate Disclosure) Bill – Commentary on the Draft Provisions* (2003) 139.

[12] Department of Treasury and Finance, above n 11, 141.

[13] See Corporations and Markets Advisory Committee website, <http://www.camac.gov.au>, accessed 30 March 2005.

[14] Interview with Lenny Nigro, Department of Treasury and Finance, 8 April 2005.

[15] See Ronald Coase, 'The Nature of the Firm' (1937) 4 *Economica* 386, Ronald Coase, 'Industrial Organisation: A Proposal for Research' in Victor R. Fuchs (ed), *Policy Issues and Research Opportunities in Industrial Organisation* (1972), Ronald Coase, *The Firm, the Market and the Law* (1988).

[16] Ronald Coase, *The Firm, the Market and the Law* (1988) 6-7.

[17] Ronald Coase, 'The Nature of the Firm' (1937) 4 *Economica* 386, 392-3.

firm surfaces as the set of such relationships under the control of a particular organiser-producer.[18]

The limit to a firm's size is reached where the cost of organising a transaction 'internally' is equal to that of conducting it through the market.[19] That is to say, as a firm expands, it becomes a less efficient device for administering transactions. A key factor in this regard is the phenomenon of agency costs.

Jensen and Meckling define agency costs as those associated with the divergence of interests between agent and principal.[20] Though the applicability of a principal-agent framework to the relationships structuring corporations has been criticised,[21] delegation of decision-making abilities remains a hallmark of the matrix of company-employee and employee-employee relations.[22]

Attendant with delegation is supervision, and it is the resources spent monitoring an agent that, amongst other factors, limits a firm's size: as the number of agents increases, so does the required level of supervision.[23] The monitoring load imposed on a firm thus shapes its internal configuration.[24]

This is the traditional rationale for imposing duties on company directors – by specifying behavioural standards and a means of redress if those standards are

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[18] Ibid 393.

[19] Coase, above n 16, 7.

[20] Michael C. Jensen and William H. Meckling, 'Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure' (1976) 3 *Journal of Financial Economics* 305, 308.

[21] See, eg, Margaret M. Blair and Lynn A. Stout, 'A Team Production Theory of Corporate Law' (1999) 85 *Virginia Law Review* 247.

[22] R. P. Austin, H. A. J. Ford and I. M. Ramsay, *Company Directors: Principles of Law and Corporate Governance* (2005) 59; see also *Corporations Act 2001* (Cth) s 198D.

[23] Jensen and Meckling, above n 20, 308-9.

[24] In fact, in Jensen and Meckling's model monitoring costs are merely one element of agency costs, the others being 'bonding costs' and 'residual loss'. For discussion of these topics, not relevant to present concerns, see Michael Whincop, 'Of Fault and Default: Contractarianism as a Theory of Anglo-Australian Corporate Law' (1997) 21 *Melbourne University Law Review* 187, 191-2.

breached, agency costs are lowered and the gap between the archetype stockholder 'owners' of the company and its board is lessened, allowing the company to further expand and productive efficiency in the broader economy to increase.[25]

While such a model is oversimplified, its relevance holds where the interest in ensuring a specific result remains divorced from the ability to oversee its realisation. The extent to which a stakeholder-operative divide emerges, and to which existing behavioural controls are adequate, will thus guide our analysis of whether the Part 2D.1 duties should be extended to definitively include the three aforementioned categories of personnel.

As such, the behavioural controls applying to these actors will first be examined.

D. EXISTING BEHAVIOURAL CONTROLS

While both legal and non-legal controls are relevant to our analysis, only the former will be discussed here.[26] These arise in contract, tort and equity, and under statute.

(i) Contract

Unless inconsistent with the terms of the bargain, all contracts contain an implied duty to co-operate.[27] This exists as both a positive obligation to do all things reasonably necessary to secure its performance,[28] and a negative

[25] See Adolphe Berle and Gardiner Means, *The Modern Corporation and Private Property* (1932); see also Adam Smith, *The Wealth of Nations* (1776) 700.

[26] For discussion of non-legal controls, see Jensen and Meckling, above n 20, and Eugene F. Fama, 'Agency Problems and the Theory of the Firm' (1980) 88 *Journal of Political Economy* 288.

[27] *Butt v McDonald* (1896) 7 QLJ 68, 70-1 (Griffith CJ).

[28] *Secured Income Real Estate (Aust) Ltd v St Martins Investments Pty Ltd* (1979) 144 CLR 596, 607 (Mason J).

obligation not to impede or cause a contemplated benefit to be undermined.[29] Though not as expansive as the Part 2D.1 'good faith' and 'proper purposes' duties,[30] an overlap nevertheless exists.

Patently, consultant-contractors and middle management will normally be bound by such a term. Evidencing contractual relations between group personnel and a given company may also be possible, though corporate authority and certainty of terms issues loom as hurdles.[31]

If an employment relationship can be shown, further duties may be implied. Not only will the Part 2D.1 'use of position' and 'use of information' obligations be triggered,[32] analogous contractual duties will ordinarily be imputed as standard terms.[33] A duty of care and skill at least as broad as its sibling Part 2D.1 obligation will usually also be implied.[34]

Consonant with Coasean analysis, the touchstone for identifying such relationships has been the concept of 'control'.[35] Though now only a single indicium, the existence of 'lawful authority to command' remains, however, the

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[29] *Telstra Corporation Ltd v Australis Media Holdings Ltd* (1997) 24 ACSR 55 (McClelland CJ).

[30] See *Corporations Act 2001* (Cth) s 181.

[31] The nature of such engagement usually being largely informal and often dictated by the whims of senior management without consideration for legal niceties: see HIH Royal Commission, above n 1, vol 1, 129; see also vols 2, 3 generally.

[32] See *Corporations Act 2001* (Cth) ss 182-3.

[33] *Concut Pty Ltd v Worrell* (2001) 75 ALJR 312, 317-18 (Gleeson CJ, Gaudron and Gummow JJ), 321-2 (Kirby J). For discussion, see Breen Creighton and Andrew Stewart, *Labour Law* (4th ed, 2005) 357-64.

[34] *Lister v Romford Ice and Cold Storage Co Ltd* [1957] AC 555; *Williams v Printers Trade Services* (1984) 7 IR 82. Indeed, if the individual possesses a special skill identifiable by defined characteristics, such a (contractual) duty will apply regardless of employment status: see *Breen v Williams* (1996) 186 CLR 71. It may be argued the implied common law duty is broader than its statutory counterpart on account of the former's reference to 'care, skill and diligence' as compared with the latter's 'care and skill': see *Corporations Act 2001* (Cth) s 180.

[35] See Creighton and Stewart, above n 33, 284-93.

pre-eminent consideration.[36] Consultant-contractors in long-standing, immediate and loosely-defined relations with a company thus risk being classed as employees, HIH's external actuary, David Slee, a model case-in-point.[37] Group personnel and other consultant-contractors appear to be less exposed, owing to their greater autonomy.[38]

(ii) Tort

Even without an employment relationship, consultant-contractors will likely owe an identical duty of care and skill in tort, based on the standard expected of a reasonably competent individual in the consultant-contractor's profession;[39] middle management employees thus owe this duty in parallel.[40] The position of group personnel is unclear.[41]

(iii) Equity

Similar obligations arise in equity. Group personnel found to be in a fiduciary relationship with a given company[42] will owe a duty of care and skill comparable to that at common law,[43] as will consultant-contractors and middle

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36 *R v Allan; Ex parte Australian Mutual Provident Society Ltd* (1977) 16 SASR 237, 248 (Bray CJ).

37 On Slee, see HIH Royal Commission, above n 1**,** vol 2, 296-303.

38 The model situation with regard to group personnel being a group executive acting with regard to a subsidiary company: see, eg, ibid vol 1, 57, vol 2, 71, vol 3, 290, 319.

39 *Rogers v Whitaker* (1992) 175 CLR 479.

40 *Permanent Building Society (in liq) v Wheeler* (1994) 14 ACSR 109.

41 In theory, a group executive will owe a tortious duty to the subsidiary company s/he is acting with regard to, however the usually ill-defined nature of her/his role with respect to that company makes it hard to identify the duty's content, as compared with more regular circumstances.

42 Most likely under Mason J's 'undertaking' approach: see *Hospital Products Ltd v United States Surgical Corporation* (1984) 156 CLR 41, 96-7 (Mason J). See also the comments of Gibbs CJ in *Consul Development Pty Ltd v DPC Estates Pty Ltd* (1974-1975) 132 CLR 373 at 394.

43 *Daniels t/as Deloitte Haskins & Sells v AWA Ltd* (1995) 37 NSWLR 438.

management, if falling within a presumptive fiduciary category.[44] Whether such an obligation extends to middle management broadly, through their holding powers classically associated with senior management and the board of directors, remains unresolved.[45]

As fiduciaries, these actors owe additional duties, identical to or broader than their statutory equivalents: 'good faith' and 'proper purposes' duties mirrored in Part 2D.1, and 'no conflict' and 'no profit' duties, echoed in part by the 'use of position' and 'use of information' provisions.[46]

In fact, the 'proper purposes' duty likely extends to middle management generally,[47] also constrained, as employees, by a duty of fidelity approximating the 'use of position' and 'use of information' obligations.[48] Some consultant-contractors will accordingly also be bound. Equitable principles relating to breach of confidence further restrain all three groups.[49]

(iv) Statute

The possibility emerges that the Part 2D.1 duties already bind the studied classes. In *ASIC v Adler*,[50] Rodney Adler was found an 'officer' of wholly-owned HIH subsidiary Casualty & General Insurance Ltd ('C&G') by reason of

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[44] See *Hospital Products Ltd v United States Surgical Corporation* (1984) 156 CLR 41, 141 (Dawson J). An accumulation of case law leads to an argument that financial advisers may, in given circumstances, be added to this list: see, eg, *Commonwealth Bank of Australia v Smith* (1991) 42 FCR 390.

[45] See James Jackson, 'The Liability of Executive Officers Under the *Corporations Law*' (1991) 3 *Bond Law Review* 275.

[46] See Austin, Ford and Ramsay, above n 22, 227-400.

[47] Ibid 288.

[48] See Creighton and Andrews, above n 33, 359-62.

[49] See *Thomas Marshall (Exporters) Ltd v Guinle* [1978] 3 WLR 116; see also Austin, Ford and Ramsay, above n 23, 364.

[50] *Re HIH Insurance Ltd (in prov liq) and HIH Casualty and General Insurance Ltd (in prov liq); Australian Securities and Investments Commission v Adler and Others (No 3)* (2002) 41 ACSR 72. Hereafter referred to as 'ASIC v Adler'.

his membership of parent HIH Insurance Ltd's ('HIH') investment committee, it being primarily responsible for group company investment decisions.[51] Given the group's business model, such decisions 'clearly' affected the whole or a substantial part of C&G's business.[52] The same result followed from Adler's HIH board membership, this providing capacity to significantly affect C&G's financial standing.[53]

Beyond implying group executives owe duties to each company they act in respect of and not merely the ultimate holding company, *ASIC v Adler*'s importance rests in its functionally-based reading of the 'officer' definition: it was the centrality of investment decisions to C&G's operations that rendered Adler, as committee member, an officer of C&G. Logically, the two external consultant committee members could also have thus been classified.

Consultant-contractors, middle management, and group personnel thus appear capable of being bound by the Part 2D.1 duties. This remains, however, a supputation.[54] It fails, moreover, to answer the question of whether these actors *should* be so bound. The case thus only contributes to our analysis – it does not resolve it.

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Though only a survey, the above neatly summarises the legal controls applying to the three groups. While each is not internally homogenous, generalisations can nevertheless be made.

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[51] *ASIC v Adler* (2002) 41 ACSR 72, 100-1 (Santow J).

[52] *ASIC v Adler* (2002) 41 ACSR 72, 100 (Santow J).

[53] *ASIC v Adler* (2002) 41 ACSR 72, 101 (Santow J).

[54] See, moreover, *Hunter Business Finance Pty Ltd v Australian Commercial & Equipment Finance Pty Ltd* [2003] NSWSC 122 (Unreported, New South Wales Supreme Court, Gzell J, 19 March 2003) [102], and the comments of Commissioner Owen: eg, HIH Royal Commission, above n 1, vol 2, 122, 256, vol 3, 32.

Middle management appear the most regulated, subject to equitable, tortious and contractual controls nearing, in combination, the content of the Part 2D.1 duties. Group personnel, though a diverse category, will often be similarly bound, the model situation a group executive, acting with regard to a subsidiary company, determined a fiduciary.[55] Even more assorted are consultant-contractors; unless in employment-like relations, a lawyer, or financial adviser resolved a fiduciary,[56] only the limited duties of co-operation, care and skill will apply.

Having charted the behavioural controls applying to each group, it is appropriate to assess their adequacy. This provokes the question: adequate for whom? If our stakeholder/operative model is to persist, the actors with an interest in our groups' behaviour – an interest the law should sanction, at least – require identification. A gap between need and ability to control will indicate a need for reform.

E. IDENTIFYING STAKEHOLDERS

All the above powers and duties are – rightly – held by or owed to the company, largely represented at law by the board of directors.[57] This may be unproblematic in smaller proprietary corporations, where agency costs are lower, but not in larger ones. As one judge has observed:

> [M]any companies today are too big to be supervised and administered by a board of directors except in relation to matters of high policy. The true oversight of the activities of such companies resides with … [s]enior management and, in the case of mammoth corporations, persons even lower down the corporate ladder … This necessarily means that, in the execution of policy, senior

[55] See n 38.

[56] See n 44.

[57] See Austin, Ford and Ramsay, above n 22, 55-137. For discussion of whom these duties might be owed to in the US, see Blair and Stout, above n 21.

> management is … exercising the powers of decision … which in less complex days used to be reserved for the board of directors.[58]

Should senior management be charged with the legal abilities currently held by the board? It is submitted not. Further to there being insufficient space within executives' day to absorb additional responsibility without acceptable cost, ensuring compliance with legal duties remains a matter of 'high policy'. The information costs associated with directorial decision-making in this context are, moreover, reduced by the equitable obligations attaching senior management.[59]

Are there others the law should empower? Creditors and shareholders are invariably mentioned, understandably; as the financiers of this mode of production, harms visited on the company are visited on them. Indeed the shareholder derivative action recognises this.[60] However their interests and the corporation's are not concentric – to so fully authorise sponsors would be to ignore the corporation's separate legal existence.

Rightly though, the above acknowledges that circumstances present where the board is unwilling and/or unable to be an effective corporate representative. It is here ASIC normally acts, representing company interests, those of shareholders and creditors, and the public more generally.[61] If considered plausible that boards could find themselves unwilling and/or unable to enforce the examined behavioural controls, there then emerge grounds for correspondingly empowering ASIC.

Such inertia appears common. Commissioner Owen's report describes advisers wrongly withholding information from company officers, subsidiary company

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[58] *AWA Ltd v Daniels t/as Deloitte Haskins & Sells and Others* (1992) 7 ACSR 759, 832-3 (Rogers CJ).

[59] See Jackson, above n 45.

[60] For discussion, see Austin, Ford and Ramsay, above n 22, 742-69.

[61] See, eg, *Corporations Act 2001* (Cth) ss 1317E, 1317J.

directors unable to oppose group executives' decrees, and middle management employees flagrantly distorting accounting figures.[62] While not to be imputed as typical corporate behaviour, the conditions triggering these actions were, likewise, not so unusual as to suggest the HIH debacle was spectacularly unique.[63]

ASIC should be enabled to act on the three groups. As its legitimacy is ancillary, it should act only where the corporation cannot or will not. Whether to legislate this requirement or entrust ASIC with discretion is debatable, though the latter appears wiser.

F. THE ADEQUACY OF EXISTING CONTROLS

Having identified our stakeholders, we can thus assess the adequacy of the surveyed legal controls. Such analysis will reveal whether the Part 2D.1 duties, under custody of ASIC, should be extended to definitively include the three aforementioned categories of personnel.

In measuring adequacy, the company's integrity should be our lodestar – whether agency costs are so lowered as to enable it to function efficiently and profitably. Our model's flip-side also needs remembering, however: over-regulation of the three groups will stymie entrepreneurial activity, harming the company's productivity.

(i) Middle Management

It was noted middle management are heavily regulated. This stems from their role as employees, and latterly, from increasing recognition that many exercise

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[62] See, eg, HIH Royal Commission, above n 1, vol 1, 57, vol 2, 4, 7, 71, 128, 159, vol 3, 27, 30-3, 62, 290, 319, 339.

[63] Ibid vol 1, xiii-xxxix.

real corporate power. The law, in this respect, appears to lag behind other disciplines.[64]

Whether existing constraints are adequate rests on whether such personnel can, like directors and senior management, be classed fiduciaries.[65] While Welling suggests the law will proceed not by looking for the label 'senior', but by 'fixing the duty … on those ... who, as a matter of fact, exercise genuine power over … corporate destiny',[66] practice suggests acceptance will be more incremental.

Even supposing such acceptance, extension of the Part 2D.1 duties is preferable. As previously suggested, middle management are already subject to controls nearing, in combination, the Part 2D.1 duties. Given the desire to empower ASIC then, applying the statutory duties would not be a further burden.

Indeed, aligning the duties of senior and middle management makes eminent sense, given the continuity of operational responsibilities between them; ss 189 and 190 of the Act, in essence, suggest as much.[67] Comments that such a move would blur liability across management strata may be refuted – far from dictating organisational structure, reform would merely ensure those with authority can be held commensurately accountable.

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[64] B. Welling, *Corporate Law in Canada: The Governing Principles* (2nd Ed, 1992) 372.

[65] The fiduciary test being the classic measure of the ability of one person to affect the affairs of another: see, eg, *Hospital Products Ltd v United States Surgical Corporation* (1984) 156 CLR 41, 139-45 (Dawson J).

[66] Welling, above n 65, 375.

[67] Respectively concerned with directorial reliance upon, and delegation to, subordinates (and others), ss 189 and 190 implicitly acknowledge that real corporate power may be exercised by senior management and those below it. In interacting with the sections of the Act applying behavioural controls to senior management then, ss 189 and 190 anticipate similar regulation of 'middle' management.

(ii) Group Personnel

Owing to their diversity, the position of group personnel is less straightforward. However while potentially varied, a group executive acting with regard to a subsidiary company is, as mentioned, the usual scenario, for often inescapable reasons.[68]

As suggested, these individuals will often be classed fiduciaries. However, group executive–subsidiary company is not an established fiduciary category; being a factually-based investigation, some may not be so graded. Whether this is satisfactory turns on the group structure involved.

Where wholly-owned subsidiaries are essentially being run as divisional units, as with HIH,[69] arguments emerge for strong behavioural controls. Where ownership structure is more diffuse things are trickier – exercise of ultimate holding company power may, in certain situations, be argued less significant, given existence of countervailing forces.[70]

At first, this appears contrary to our model, separation of ownership and control classically being the justifier for behavioural regulation.[71] However the darker side of corporate groups has long been recognised – while effective risk-spreading devices, the lure of limited liability ensures their openness to abuse.[72]

Commissioner's Owen advocacy of a functional orientation surfaces as here relevant – the pertinence of ownership structure to group executive capabilities means a fiduciary test is less effective in identifying those requiring robust

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[68] See the discussion of *ASIC v Adler* above.

[69] HIH Royal Commission, above n 1, xxvi-xxvii; HIH Royal Commission, *Background Paper No 1 – Introduction and Corporate Chart* (2001).

[70] This will not be the case though, where, for example, ownership is so diffuse as to make the company's senior management the most influential actors: see Welling, above n 65, 373-5.

[71] See Berle and Means, above n 25.

[72] Simon Haddy, 'A Comparative Analysis of Director's Duties in a Range of Corporate Group Structures' (2002) 20 *Company and Securities Law Journal* 138, 139.

regulation.[73] While the proper standard remains arguable, it is submitted ability to exercise real corporate power over company affairs is apposite.[74] In this way, individuals effectively acting as directors, senior and middle management of the subsidiary would be ensnared.

As to actual controls, substance-over-form arguments posit comparable behavioural standards should apply. This is endorsed correct. The Part 2D.1 duties should hence be extended to group personnel acting as if a director, senior or middle manager of the subsidiary company. Conversely, only the duties applying to employees should cloak other, less influential group personnel.

(iii) Consultant-Contractors

Consultant-contractors are the most varied of the three groups, their range limited only by the corporation's activities. Indeed, an increasing number of these activities are being performed by them.[75] As with group personnel, this makes determining adequate, across-the-board behavioural standards difficult.

Certainly, the outsourcing of corporate functions should not be discouraged; associated efficiency gains are welcome. Consultant-contractors need differentiation according to their centrality to corporate affairs, however. This is again a question of function, and again should the eminence of the fiduciary standard, as the tightest control the law knows, be emphasised. As noted, only lawyers and, in some instances, financial advisers, are caught under current principles.

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[73] On account of equity's focus on the actor and its lesser concern for the environment in which s/he is to operate.

[74] This is in accordance with Federal Government policy: Commonwealth of Australia, *Commonwealth Submission to the HIH Royal Commission* (2002) 97.

[75] HIH Royal Commission, above n 1, vol 1, 126-7.

Whether this is adequate turns on the nature of the engagement. Where an opinion, and not advice, is given, lesser standards should apply.[76] Similarly, where the relationship is on-going, and not one-off, controls should be firmer. While ability to exercise real power over company affairs remains the relevant touchstone, the surety associated with specifying given roles is to be preferred.

Lawyers, auditors, accountants and financial advisers are those most central to company operations.[77] In their role as advice-givers, these actors require heaviest regulation; that not all are cast as fiduciaries is unwelcome. Others, like remuneration consultants, business analysts and corporate strategists should, if in longer-standing relations with a company, be correspondingly controlled. Remaining personnel should be held only to existing duties of co-operation, care and skill.

While a statutory version of fiduciary controls would be apposite, the Part 2D.1 duties have the advantage of being practically as strong, and already subject to judicial interpretation. Consistency of regulation is desirable too; these controls should thus apply to the listed professionals in the circumstances given. ASIC should also be enabled to enforce the duties of co-operation, care and skill limiting other consultant-contractors, on behalf of companies unwilling or unable.

G. CONCLUSION

It may be thought the above is an unnecessary ‘clobbering’ of corporate personnel with legal controls. However, while the individuals examined have not traditionally been as regulated as the reforms in this paper desire, history should not act as dogmatic restraint. Indeed, corporate governance laws have long struggled to keep pace with organisational innovation. It is submitted decentralised companies, corporate groups and outsourced personnel are today all in need of greater control.

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[76] *Pilmer and Others v The Duke Group Ltd (in liq)* (2001) 107 CLR 165.

[77] See HIH Royal Commission, above n 1, vols 2 and 3 generally.

It should be clarified that in extending the Part 2D.1 duties to the above groups, it is intended they also have the benefit of protective provisions like ss 180(2), 189 and 190 of the Act.[78] To allow otherwise would be to promote risk-averse behaviour, and as the Federal Treasurer has noted, 'the moment you legislate against risk, you legislate against the opportunity to return profit'.[79]

By advancing investor confidence stronger corporate governance standards can actually advantage jurisdictions. This in turn promotes a race to the top, leading to more sustainable business environments. In this regard, s 126(1) of the *Companies Act 1993* (NZ) should be our model.[80] Extending the Part 2D.1 duties to the suggested classes furthers this objective.

[78] Known respectively as the business judgement, reliance and delegation rules: see *Corporations Act 2001* (Cth) ss 180, 189, 190.

[79] The Hon Peter Costello MP, 'Corporate Governance – Strengthening Conditions for Investment', Presentation to the OECD Forum, 28 April 2003, 1.

[80] See *Companies Act 1993* (NZ) s 126.