SOME LEGAL ASPECTS OF COMPANY TAKEOVERS IN AUSTRALIA

Introduction

A "take-over" is in essence a transaction whereby one company acquires control over the assets of another company.[1] Take-overs are an essential feature of the economic growth and development of Australia. Both in theory and in practice there is nothing inherently undesirable in the public interest in a "take-over" and there are a number of sections in the Uniform Companies Acts (which hereinafter will be referred to as the Act) which facilitate the take-over, notably sections 183 and 270.

Due to the financial advantages which may flow from a take-over the procedure has on occasions been abused. The Act thus contains provisions which are designed to limit the risk of some possible abuses which can result from take-overs, notably sections 124, 129 and 184.

To appreciate the part played by the Act in connection with take-overs it should be understood that the Act is not designed to deal with or touch the broader economic and social questions which can arise as the result of a take-over.

The transfer of control from one company to another is the essence of a take-over and the Act recognising the advantages which control gives to the controllers of a company seeks to prevent the controllers from abusing these advantages. Apart from those sections of the Act which deal specifically with abuses which may flow from take-overs, controllers who abuse their powers may be faced with an application to the court brought in terms of Section 186 which provides a remedy in cases of oppression.

The concept of control is one of the most fundamental aspects of corporate personality and the concept must be viewed in relation to the fact that in Australia many of the shareholders in companies are either persons or institutions who invest capital in a company and thereafter take no direct interest in the management of that company.

The Act when seeking to regulate the powers of controllers has to deal with the various forms of control met with in practice. These forms are:—

(a) Ownership of all shares in a Company
(b) Control exercised by persons holding the majority of the voting shares.

1. This definition of a take-over is in the widest possible terms and includes that type of transaction where all that is taken over is the "undertaking" of the company. It is designed to cover cases such as are referred to in Section 129 of the Uniform Acts.

(c) Control exercised by a minority holding a block of the voting shares where the shareholding in the company is widely dispersed.

(d) Control by the managers who have de facto control of the proxy voting machinery.

The take-over will be effected when control has been achieved in one of the four forms mentioned in the previous paragraph. Normally it is effected by the purchase of a sufficient number of shares to give control.

A sufficiency of shares can be obtained:—

(a) By purchasing them on the stock exchange

(b) As the result of a general offer made to the shareholders. Such an offer can be a cash offer, an offer of shares of the company taking over or a combined offer of cash and shares.

(c) As a result of a purchase from the existing controllers of their shareholding.

(d) By a combination of two or more of the above methods.

The form of take-over which has received the most publicity is that where the corporation making the take-over realises that the assets of the corporation being taken over can be acquired for less than their market value. This state of affairs arises because the company being taken over does not fully appreciate the value of its assets and is pursuing a policy of dividend restraint or because due to inefficient management, lack of ready capital or for some other reason the company is not utilising its assets to their best possible advantage. There are other reasons for take-overs including the trade advantages and economies which can flow from an increased scale of productions where a company takes over a company manufacturing or dealing in the same products as the company doing the take-over. Further reasons are the elimination of competition or the building up of an "Empire" of companies.

Prior to certain recent amendments in Income Tax Legislation, taxation advantages could be gained by taking over a company with an accumulated tax loss. A desire to obtain these advantages was the reasons for a large number of take-overs. As a result of the legislation these advantages will no longer be available and this type of take-over should become less frequent.[2]

Those sections of the Act which are intended to deal specifically with take-overs can be divided into four categories:—

1. The furnishing of sufficient information to enable all interested parties to make an informed appraisal of the proposed take-over. (Section 184 and the 10th Schedule). Section 184 also prevents the present controllers of a

2. Income Tax Assessment Act (No. 3) 1964 No. 110 (C'Wlth).

company from being taken by surprise before being deprived of control of the company.

2. To prevent the present controllers of the company about to be taken over from receiving special benefits from the transaction. (Section 129)
3. The prevention of the possibility of both majority and minority oppression:—
   (a) by enabling the take-over company where it so desires to purchase any shares not already held by it (Section 185) and,
   (b) by enabling minority shareholders to compel the take-over company to purchase their shares. (Section 185)
4. To ensure, where possible, that the take-over transaction does not offend against what should be regarded as a fair business deal.

The carrying out of the policy of the Act with regard to the fourth category is left to the Courts when they are asked to interpret or enforce the relevant provisions of the Act.

There are numerous sections of the Act other than those dealing solely with take-overs which have a greater or lesser impact on every take-over. Although it is not intended to deal in detail with any of these sections in this article the provisions of two such sections should not be overlooked where certain types of take-overs are contemplated.

These sections are:—

(a) Section 60 which provides that where shares are issued at a premium the amount of the premium must be transferred to an account called the "Share premium account". Thus, if for example, there is a take-over involving a share for share exchange, any excess in the true value of the shares acquired over the nominal value of the shares issued by the take-over company will probably have to be transferred to a share premium account.

(b) Section 67 which prohibits a company from dealing in its own shares. The provisions of this section can cause problems when the take-over company proposes to use the resources of the company being taken over to assist in financing the transaction.

As has already been indicated there are various methods which the take-over company can adopt when purchasing the requisite shares. Similarly, there are various methods which can be adopted in what may be termed the 'mechanics' of the transaction. The methods which will be adopted will depend upon a variety of factors. For example, there will be an appreciable

difference in the procedure which can be adopted when it is desired to effect the take-over of a large public company as opposed to the proposed take-over of a family proprietary company.

Where, for instance, the company to be taken over has a small number of shareholders the transaction may be relatively speedily and simply completed by utilising the provisions of Sections 181, 182 and 183 of the Act. These are the sections of the Act which are primarily designed to deal with arrangements and reconstructions but they can be effectively used in certain types of take-overs. The use of these sections is most obvious and beneficial where there is a purchase of the undertaking of the company to be taken over in exchange for shares in the take-over company. So too, Section 270 of the Act is specifically designed to enable the liquidator of a company which is being voluntarily wound up to transfer or sell the whole or part of the business of a company to another corporation and to receive in compensation for the transfer or sale, share debentures, policies or other like interests in the corporation for distribution among the members of the company being wound up. By the use of sections 181 and 270, compliance with the onerous provisions of Section 184 can be avoided. By utilising Section 183, the expense of the transfer of the assets and liabilities can be obviated and there is no necessity to wind up the company.

The mechanics to be adopted will be varied to suit the needs of each particular transaction. The type of take-over with which the legislature would appear to have been concerned when framing the provisions of the Act in regard to take-overs was the take-over of the large public company as the result of a general offer made to the shareholders of that company. It was in regard to this type of take-over that it was necessary to legislate to remedy possible abuses and this article will concern itself mainly with this legislation.

There are very few Australian reported decisions dealing with the subject of take-overs, possibly because many of the provisions of the Act dealing with this subject were only incorporated into the Acts in recent years. Many of the Australian provisions have no counterpart in the English companies Act notably Sections 124 and 184 of the sections already referred to. In regard to certain other provisions there are material differences between the two countries. As a result, the guidance which can be obtained from English sources is limited.

The only legal English text book devoted entirely to the subject of take-overs is that written by M. A. Weinberg entitled

"Take-Overs and Amalgamations",[3] L. C. B. Gower in the second edition of his work, "The Principles of Modern Company Law",[4] deals with the subject in a reasonably comprehensive manner.

In Australia, the subject has received only scanty treatment in both legal text books and law journals.

THE LEGISLATION

It has already been suggested that the legislation with regard to take-overs can be divided into four categories. To deal with each of these categories in turn:—

1. *The provision of sufficient information to enable all interested parties to make an informed appraisal of the merits of the proposed take-over, and the prevention of the present controllers from being taken by surprise before being deprived of control of the company.*

Section 184 and the Tenth Schedule of the Act set out the information which is required to be disclosed in regard to a proposed take-over. The requirements of the Act in this regard are onerous but are in conformity with the trend of Company legislation which has always been to demand the disclosure by the company of more and more information of its activities. The information required to be disclosed is additional to that general information which a company is always required to provide to satisfy the concept that publicity affords the best protection to the public and to members of the company against possible fraudulent acts by the controllers of the company.

The general purposes of Section 184 and the Tenth Schedule are to require a take-over offer to be submitted to the board of the company proposed to be taken over before the offer is submitted to the members of that company, to compel both the take-over company and the company to be taken over to disclose certain relevant information, and to prescribe certain formalities in connection with the offer itself.

For the purposes of Section 184 and the Tenth Schedule, a Take-over Scheme is defined in Section 184 (1) as

> " a Scheme involving the making of offers for the acquisition by or on behalf of a corporation of
>
> (a) All the shares in another corporation or of all the shares of a particular class in another corporation.
>
> (b) of any shares in another corporation which (together with shares already held beneficially by the first named corporation or by any related corporation)

3. Sweet and Maxwell—London 1963.
4. Stevens and Sons Ltd.—London 1957.

> carry the right to exercise, or control the exercise of, not less than one third of the voting power at any general meeting of the other corporation."

For the same purposes a "take-over offer" is defined as "an offer or proposed offer for the acquisition of shares under a take-over scheme."

Section 184(2)(a) provides that a take-over offer shall not be made unless the offeror corporation has, not earlier than twenty-eight days and not later than fourteen days before making the offer, given notice in writing of the take-over scheme to the offeree corporation.

The notice is required to contain particulars of the take-over scheme together with a statement which fulfils the requirements laid down in Part B of the Tenth Schedule.

Part B of the Tenth Schedule requires that *inter alia* the following matters be set out therein. The names, addresses and descriptions of the directors of the offeree corporation its main activities, what marketable securities it holds in the offeree corporation. Any agreements made or compensation proposed to be paid by the directors of the offeree corporation, and whether, to the knowledge of the offeree corporation, there has been any material change in the financial position of the offeree corporation since the publication of its last balance sheet, and, if so, particulars, if any, of such change. If the shares are to be acquired for a consideration other than wholly in cash, the statement shall include full details of the financial position of the offeree corporation and its subsidiaries.

Section 184(2)(b) details certain requirements with which the take-over offer must comply. These requirements are set out in Part A of the Tenth Schedule and *inter alia* include the following:—

> The offer is to be dated and shall be despatched to the offeree within three days of its date. It shall state that except in so far as it and all other take-over offers made under the take-over scheme may be totally withdrawn and every person released from any obligation incurred thereunder it will remain open for acceptance by the offeree for at least one month from that date. It shall also state whether the offer is conditional upon acceptances of offers made under the take-over scheme being received in respect of a minimum number of shares and, if so, what number. Where the offer is conditional upon acceptances in respect of a minimum number of shares being received, the offer shall specify a date as the

latest date on which the offeree corporation can declare the offer to have become free from that condition and a further period of not less than seven days during which the offer will remain open for acceptance.

Section 184(2)(b) also requires that there should be attached to the offer, when it is despatched to an offeree:—

(1) A copy of the statement which has been drawn up in terms of Section 184(2)(a), (that is a statement which complies with Part B of the Tenth Schedule),

(2) a copy of the statement which complies with the requirements of Section 184(2)(b) (that is a statement drawn up in terms of Part A of the Tenth Schedule and (3) where applicable a copy of a statement which complies with the requirements of Section 184(3)(a) (that is a Statement drawn up in terms of Part C of the Tenth Schedule).

Section 184 (3) requires the offeree corporation where it has received the notices and statement which the offeror corporation was compelled to give it in terms of Section 184(2)(a), either to give or cause to be given to:—

(i) The offeree corporation within fourteen days of receipt of the notice and statement, or

(ii) To each holder of shares in the offeree corporation to which the take-over scheme relates within fourteen days after take-over offers have first been made, a written statement which complies with the requirements of Part C of the Tenth Schedule.

The receipt of written notice by the offeree corporation thus requires prompt and positive action to be taken by the corporation sought to be taken-over.

The Statement required to be drawn up in terms of Part C of the Tenth Schedule shall include *inter alia* the following matters:—

Whether or not the Board of Directors of the offeree corporation recommends the acceptance of the take-over offer, the number of shares in the offeree corporation held by each of its directors, whether or not each director intends to accept any offer made for the acquisition of his shares and details of any contract or agreement which that director has entered into with the offeree corporation. The statement shall also involve details of any sales of shares in the offeree corporation within the preceding six months if such shares are not listed in, or dealt in,

> on the stock exchange and, if there has been any material change in the financial position of the offeree corporation since the publication of the last balance sheet, particulars of such change.

The directors of the offeree corporation may in addition to the information which they are required to give in terms of Part C of the Tenth Schedule insert in the statement such additional information as they think fit. (Section 184(4))

Section 184(5) provides that the offeree corporation shall, where it has made a take-over offer forthwith give the offeree corporation notice in writing of that fact and of the date of the offer.

The provisions of Section 184 apply only to offers for the "acquisition" of shares, not to offers for the "disposal" of shares. If the offer to sell a controlling interest comes from the members of the company which is to be taken over it would not be necessary to comply with the provisions of Section 184 and of those of the Tenth Schedule. In Australia, particularly in the case of take-overs of small proprietary companies, a practice has developed whereby the shareholders of the company to be taken over offer to sell their shareholdings to the take-over company. This practice does away with the necessity of complying with the formalities prescribed by Section 184 and of disclosing the information required to be disclosed by the Tenth Schedule.

The present position in this regard is, it is submitted, not satisfactory. Although in most instances due to the limited nature of the transaction and the small numbers involved, all interested parties are probably in possession of adequate information, there is still the possibility of abuses arising. In theory it is also desirable that the legislation should be more certain in its application.

It would appear that the legislature contemplated that it might be necessary to grant exemptions from the requirements of Section 184 and Section 184(9) provided that regulations may be made granting exemption from all or any of the requirements of the provision of the section and of the requirements of the Tenth Schedule. Regulations should, it is submitted, be made exempting take-overs of small proprietary companies from requirements above set out. Some assistance as to the extent of the exemption to be granted can be obtained from Section 3 of the Companies Amendment Act 1963 of New Zealand which reads as follows:—

> The provisions of the Act shall not apply in respect of any scheme involving the making of offers for acquisition of any—
> (a) shares in a private company where all the offerees have consented in writing before the date of

the take-over offer to waive the requirements of the Act, or

(b) of any shares in any company if offers are made to not more than six members thereof. In the New Zealand Act a take-over is defined as including an invitation to make an offer.

Section 184 applies only to take-overs by corporations. An individual not acting on behalf of a corporation or proposed corporation making a cash offer to acquire a controlling shareholding is not required to comply with any of the provisions of the Section. In terms of Sections 2(1) and 10(1) of the New Zealand Companies Amendment Act (1963) it is clear that the definition of an "offeree" includes a natural person. In terms of the definition in the New Zealand Act offeree means a person who makes a take-over offer whether in concert or jointly with any other person.

The New Zealand equivalent of the Australian Tenth Schedule covers both the case of the offer being made by a company and by an individual. The English Licensed Dealers (Conduct of Business) Rules 1960 which contains the English provisions for regulating certain aspects of take-overs and which was almost certainly the inspiration for Section 184, regulates take-overs by individuals as well as take-overs by companies.

There would appear to be no logical basis to differentiate between a take-over by a company and a take-over by an individual. Although Section 184 provides for a take-over by or on behalf of a corporation as well as for an offer by a "proposed" corporation, the fact that the offer can be made by an individual allows for a possible loophole. It might in practice be difficult to establish when the individual subsequently transfers control to a corporation on whose behalf the offer was made or that it was "proposed" at the time that the offer was made. It is submitted that this is a loophole which should be closed.

A logical corollary of amending Section 184 to cover the case of an individual would be to amend Section 185 to give the individual the rights given by that section to compulsorily acquire the shares of the minority and to give to the minority the rights of disposal of their shares given by that section.

The report of the Company Law Committee (The Jenkins Report)[5] 1962 states that in the opinion of that Committee it would not be reasonable to give to an individual the power of compulsory acquisition which is designed to facilitate the merger of companies. With due respect to the views of that committee it is suggested that the section in question was not primarily designed to facilitate the merger of companies, but was designed

5. Her Majesty's Stationery Office, London.

to prevent oppression (both majority and minority), and that the possiblity of majority oppression exists to a greater extent when the take-over results in control being vested in an individual than when it is vested in a company.

If the offeree will control less than one third of the voting power at a general meeting of the company to be taken over, it is not necessary when making the offer to comply with the provisions of Section 184. It would appear that the figure, one third, was chosen in an arbitrary manner. The fact that a figure of less than one half was chosen is a recognition of the part that is presently played in Australia by minority control (or "working control" as it is sometimes called). If the shareholding is sufficiently dispersed the acquisition of less than one third of the voting power may achieve control and it may be thought worth while in order to avoid compliance with Section 184 to make an offer which will result in control of less than one third of the voting power. It remains to be seen whether the figure, one third, in practice is sufficiently high.[6]

As presently provided by the Tenth Schedule the offer can be conditional but any acceptance thereof becomes unconditional. This can result in the position that if the offeree varies his offer by increasing his price an acceptor of the initial offer will receive a lower price than that received by subsequent acceptors. It is submitted that this can lead to inequity and that the Act should be amended to accord with the recommendations of the Jenkins Report that where an offeror varies the terms of his offer by increasing his price, the offeror should be required to pay the higher price for shares accepted on the initial, as well as the amended offer.

Section 184(6) makes it a criminal offence to make a take-over offer which contravenes the provisions of the Act. It is submitted that if any offer is made which contravenes the provisions of Section 184 and the Tenth Schedule such contravention is merely a criminal offence and would not found an injunction.

Section 184(7) applies the provisions of Sections 46 and 47 of the Act to the statement which the offeror corporation is required to provide in terms of Section 184 (2)(a). As a result of the application of these sections every director of the offeror corporation is both civily and criminally liable for any false statements in the statement provided in terms of Section 184(2)(a) as if these false statements had been made in a prospectus and any reference in Sections 46 and 47 to a statement in a prospectus shall

6. The 1963 New Zealand amendment has adhered to the normal concept of control and the offer to fall within the terms of that Act must confer more than half the voting power at any general meeting of the offeree company.

apply to a statement in the statement provided for by Section 184(2)(a).

Section 184(8) provides for the making of Regulations varying or adding to the Tenth Schedule.

Section 184(10) provides for the making of regulations requiring that copies of any statements referred to in Section 184 be lodged with the Registrar or with a Stock Exchange.

A Regulation has been made in terms of Section 184(10) in all the Australian States requiring that a copy of the notice and of the Statements referred to in Sections 184(2)(a) and 184(3) shall be lodged by the offeror corporation with the Registrar and with each Stock Exchange on which the Shares of the offeror corporation are listed on the same day as the take-over offer is made.[7]

The Australian Association of Stock Exchanges has laid down certain requirements with which listed companies must comply when involved in a take-over. These requirements include the following:—

> (a) Where a listed company receives a notice of intention to make a take-over offer, the directors shall immediately advise each exchange on which the company's securities are quoted.
>
> (b) The offeree company shall send to all holders of other classes of share and convertible notes in the company, whether or not such securities are covered by the take-over offer a copy of all documents which it is required by law to send to the holders of the shares subject to the take-over offer.

One of the purposes of Section 184 is to protect the present controllers of the company about to be taken over from being taken by surprise. Section 184(2)(a) gives these controllers at least the fourteen days referred to therein to take any defensive measures which they deem fit.

The scope of defensive action open to the controllers at this stage is very limited. If they announce increased dividends or disclose information about the financial affairs of the company which seeks to prove that the take-over is inadequate, they are faced with the difficult position that the dividends should have been increased or information disclosed before the take-over bid was made.

Nevertheless these defensive measures may succeed in causing the offeror to increase his bid and the members of the company may benefit from any competition which might be entered into between the take-over offeror and the existing controllers.

7. Regulation No. 14.

2. *The prevention of the present controllers of the company from receiving special benefits from the take-over transaction.*

This is an aspect of take-overs which is especially difficult to control by legislation. A perusal of Chapter III of the Jenkins Report and the recommendations made therein indicates some of the difficulties in this regard.

At the time of writing, legislation amending the provisions of the Act dealing with this subject is being drafted in some Australian States and it is not proposed to deal at any great length with the existing provisions of the Act.

The position of the present controllers of the offeree company in regard to any special benefits which may result from a take-over scheme is governed partly by the general law applicable to persons who occupy fiduciary positions and partly by certain sections of the Act. The sections of the Act applicable are sections 124 and 129. These sections are in addition to those sections of the Act which require directors to disclose their financial interests in a company and are also additional to Section 130 which contains provisions regulating a director's right to assign his office.

Section 129 provides that it shall not be lawful:—

> (a) for a company to make to any director any payment by way of compensation for loss of office or as a consideration for or in connection with his retirement, or
>
> (b) for any payment to be made to any director of a company in connection with the transfer of the whole or part of the undertaking or property of the company, unless particulars with regard to the proposed payment have been disclosed to the members of the company in general meeting.

When any payment has been made unlawfully to a director the amount received by him is regarded as held in trust by him for the company.

By virtue of Section 129(4) any amount which a director has been paid for the sale of his shares in connection with the take-over, in excess of the price which could have been obtained by other shareholders, is deemed to be a payment in terms of Section 129.

Section 124 of the Act was introduced into the Act *inter alia* to overcome the difficulties created by the decision in *Percival* v. *Wright*.[8] This case decided that the directors of a company owe no fiduciary duties to the individual members of the company as such. The fiduciary duties of directors are thus owed to the company and to the company alone and a director may therefore

8. [1902] 2 Ch. 421.

purchase shares in a company of which he is a director without disclosing to the vendors of those shares any "inside information" which the director has acquired as a result of his position as a director, and which has the result of enhancing the value of the shares in question. Such "inside information" would include a director's knowledge of a pending take-over of the company.

The relevant portion of Section 124 is subsection (2) which reads as follows:—

> "An officer of a company shall not make use of any information acquired by virtue of his position as an officer to gain directly or indirectly an improper advantage for himself or to cause detriment to the company"

Section 124(3) imposes a criminal liability for contravention of the provisions of Section 124(2). If a director is convicted of a contravention of Section 124(2) he is, in terms of Section 124(3), liable to pay to the company any profit made by him.

It is doubtful whether section 124(2), as presently framed, does prevent a director from using his "inside information" and the Jenkins Report contains recommendations for a more appropriate section. The fact that the company is to receive any profit made by the director would be but scant consolation to the seller of the shares, the person who has actually sustained the loss. This is a further defect in section 124 in so far as it applies to take-overs.

It is generally appreciated that further legislation is needed to prevent abuses in this regard and as has been stated above, such legislation is presently contemplated in some Australian States.

3. *The power to compulsorily acquire the shares of a minority and the rights of minority shareholders to have their shares purchased by the take-over company.*

Section 185 of the Act in certain prescribed circumstances gives the take-over company the power to acquire compulsorily any shares in the company taken over which it has not already managed to acquire and also gives the minority shareholders in the company taken over a right to compel the take-over company to buy their shares.

As a result of the take-over scheme there may be a minority of shareholders who could constitute a source of embarrassment to the take-over company, and on the other hand there may be a minority of shareholders in the company taken over whose position has become unsatisfactory as a result of the take-over.

The necessity for the section arose from the considerations set out above and the section has the dual purpose of preventing the possibility of both minority and majority oppression.

Section 185 gives a take-over company whose bid for shares in another company has within four months been accepted by the holders of not less than nine tenths of the nominal value of those shares, power to acquire compulsorily any remaining shares. The take-over company if it wishes to acquire the remaining shares has two months to give notice of acquisition to those shareholders. The form of the notice has been prescribed in the Regulations (Form 52). Any shareholder who desires to oppose the acquisition has the right to make application to the Supreme Court and the court may if it thinks fit "order otherwise". Unless there has been an application to court and the court has ordered otherwise the take-over company shall within one month of the giving of the notice be entitled and bound to acquire the shares on the same terms and conditions as those under which it has acquired the shares of the approving shareholders.

If the take-over company already holds more than 10% of the normal value of that class of shares in the company to be takenover, the compulsory acquisition procedure shall not be available unless the accepting shareholders constituted three fourths in number and hold 90% in nominal value of the shares involved. In computing the necessary 90%, shares which are already held by the take-over company are not counted.

When the takeover company has given notice to any dissenting shareholder that it desires to acquire his shares the dissenting shareholder is entitled to be supplied with the names and addresses of other dissenting shareholders.

Section 185 provides that within one month of any company, its nominee, or its subsidiary having acquired, as the result of a take-over scheme or contract, nine tenths of the nominal value of any class of the shares of another company, the take-over company is required to give notice of that fact to the holders of the remaining shares, or of the remaining shares of that class, who have not assented to the scheme or contract. Any shareholder who has received such notice may within three months of the giving of that notice require the acquiring company to purchase his shares. The take-over company is entitled and bound to acquire the shares on the terms on which under the scheme or contract the shares of the approving shareholders were transferred to it, or on such other terms as are agreed, or as the court, on the application of either the take-over company or the shareholder, thinks fit to order.

Both the shareholders whose shares can be compulsorily acquired and the shareholders who can compel the company to purchase their shares are referred to in the section as "dissenting shareholders". Section 185(9) defines a "dissenting shareholder" as "including any shareholder who has not assented to the scheme or contract and any shareholder who has failed or refused to transfer his shares to the transferee company in accordance with the scheme or contract."

It is submitted that a minority shareholder has the right to insist that his shares be taken over even if the company has acquired its nine-tenths shareholding as a result of purchases on the stock exchange, and not as the result of any take-over scheme. This right flows from the use of the words "or contract" in section 185(4). Shares acquired as the result of a purchase on the stock exchange would be shares acquired as the result of a "contract".

The provisions of Section 185(4) which provide that the price at which the shares of the minority shareholder are to be taken over, can be fixed by agreement or by the court after an approach by either the company or the shareholder, would cover the case where the majority shareholding has not been acquired by the company as the result of a take-over scheme.

The fact that the terms "take-over scheme" and "take-over offer" as defined in Section 184 are stated to apply only to that section and to the Tenth Schedule, is also some indication that the words "scheme or contract" as used in Section 185, do not have the same meaning as that given to them by Section 184.

It could be contended that as in Section 185(4)(a) the company acquiring the nine-tenths shareholding is required to give notice to those shareholders who have not assented to the Scheme or Contract, and as the rights of the minority shareholders given in Section 185(4)(b) are rights given to shareholders referred to in 185(4)(b), that it would not be correct to describe shareholders to whom no offer has been made as persons who have "not assented". It is submitted however that a shareholder to whom no offer has been made could perfectly correctly be described as a person who has not assented and the use of the word "includes" in the definition of dissenting shareholder already referred to appears to support the submission when interpreting section 185(4).

If the submission made in this regard is correct then any company who acquires the nine-tenths shareholding required by Section 185, no matter how it acquired that shareholding, is obliged to give notice in terms of Section 185(4). If such notice is not given the company would be committing an offence in

terms of Section 379 of the Act, the section which contains the general penalty provisions.

Whether the legislature intended that minority shareholders should have the rights, which it is submitted they have, of disposing of their shares, is extremely doubtful. In principle, it would appear desirable that a minority shareholder should have the right to dispose of his shareholding whether the take-over company has acquired its nine-tenths shareholding as the result of a "take-over scheme" or as the result of purchases on the stock exchange. In both instances there is the same possibility of majority oppression.

It is also difficult in theory to differentiate between the power of compulsory acquisition given to the company where the differentiation depends solely upon the method by which it acquired its majority shareholding.

4. *To ensure where possible that the take-over transaction does not offend against what should be regarded as a fair business deal.*

The power given to the Courts to intervene in take-overs in order to ensure that the transaction is a fair business deal is limited to those sections of the Act which provide for an approach to the Courts.

Where the take-over is being carried out by utilising the sections which provide for the arrangement or reconstruction of a company the arrangement or reconstruction has to be approved by the Court Section 181(3) provides that the Court may grant its approval subject to such alterations or conditions as it thinks just.

The most authoritative statement of what the Courts have held that their functions under these sections are, appears in the following Statement:—

> "It is plain that the duties of the Court are twofold. The first is to see that the resolutions are passed by the Statutory majority in value and number at a meeting or meetings duly covered and held. The other duty is in the nature of a discretionary power. . . . In my opinion, then, so far as this second duty is concerned what I have to see is whether the proposal is such that an intelligent and honest man, a member of the class concerned and acting in respect of his interest, might reasonably approve."[9]

In practice the courts have found that their discretion can only be exercised in an unsatisfactory and limited manner. The

9. Per Maugham J. in *Re Dorman Long* [1934] 1 Ch. at pp. 655-7.

courts are ill-equipped to investigate into and interfere with the indoor management of a company and in most cases take refuge in the rule enunciated by Lindley L. J. in Re English Scottish and Australian Chartered Bank,[10] which can be summarised as, "Investors and creditors know best".

There are a number of reported Australian cases dealing with these sections and the attitude of the Australian Courts is substantially similar to that set out above.[11]

If the provisions of Section 270 are being utilised there can be an approach to the Court, because as there has to be a liquidation before the provisions of the section can be invoked, the Court has a general power of control over liquidators.

Section 185 provides for an approach to the Court in two instances:—

(1) where a dissenting shareholder wishes to oppose the compulsory acquisition of his shares, and,

(2) where a minority shareholder has given notice requiring the company to acquire his shares.

There are no reported cases dealing with the second instance. As regards the first instance it would appear that the Court has no right to vary the terms upon which the shares are sought to be acquired. The court can order either the shares be acquired or that they be not so acquired. The section gives the Court no assistance as to how it is to arrive at its decision. What has been already said with regards to the functions of the courts in respect of reconstructions and amalgamations is applicable to the functions of the Court when dealing with an application brought under Section 185(1) but there are certain additional considerations which operate against the applicant shareholder.

The Courts have held that it follows from the wording of the section that the onus is on the applicant to show why it should not order the compulsory acquisition.

It has been shown that where the courts are required to aprove of a scheme under Section 181 their discretion in practice is extremely limited. It is further limited when the approach to the courts is in the nature of an appeal as it is in terms of Section 185(1).

In practice the courts dealing with an application under Section 185(1) approach the matter by seeking to discover whether the scheme as a whole is fair or unfair. If the applicant can show that it is unfair he will succeed. As a large majority of shareholders have approved of the scheme, "prima facie" it is a fair scheme.

10. [1893] Ch. 385 at p. 409.
11. See e.g. *In the matter of Chevron (Sydney) Ltd.* [1963] V.R. 249.

An indication of the approach by the Courts appears from the case of *In re Sussex Brick*,[12] where Vaisey J. says

> "I think that the applicant is faced with the very difficult task of discharging an onus which is undoubtedly the heavy one of showing that he, being the only man in the regiment out of step, is the only man whose views ought to prevail."[13]

It has been said that in England before the Courts will interfere the applicant will have to show that the scheme was so unfair as to amount to a "fraud on the minority".

In Australia, due to the presence of Section 184 of the Act, once it has been shown to the Court that the provisions of that section have been complied with, an applicant would have a still greater onus to discharge. Due to the onerous provisions of Section 184 and of the Tenth Schedule the tendency of the Court to accept Lindley L.J.'s doctrine that "Investors and Creditors know best" would be reinforced by the presumption that whatever actions the majority had taken were based on adequate information.

Conclusions

In the main, the take-over transaction is regarded as necessary and desirable for the economic growth and prosperity of the country. However there is a deep rooted suspicion at the back of many people's minds that the persons who receive the greatest financial benefit from take-overs are the controllers of the companies involved. It is perhaps due to this ambivalence that it can be said that Australian Company Legislation has not made up its mind whether to encourage or discourage the take-over of one company either by another company or by an individual.

The sections of the Act with regard to take-overs have grown piecemeal and in a haphazard manner. The trend of the legislation has been that, where at any particular time it has become patent that the take-over transaction is being abused, the legislature has tried, by amending the act, to prevent this abuse.

The draftsman of the amending sections has always been faced with the position that any proposed interference should be as limited as possible. Added to this, the majority of the controllers of companies are honest and act in the best interests of their companies. It is obviously undesirable to penalise the great majority for the sins of a minority. The legislation is imprecise and uncertain in many important respects but the factors mentioned above, account, to a large extent, for these defects.

12. [1961] Ch. 289.
13. *Ibid*, at page 291.

Section 184 and the Tenth Schedule are primarily designed to regulate that type of take-over which is the most important in the general interest. These provisions should have a salutary effect.

The controllers of a company are often faced with a situation where there is a conflict between their duty and their personal interests. When there is a pending take-over the fact that the controllers have prior knowledge of the transaction and that vast profits can be theirs for the taking must be a great source of temptation to them. It would appear that, unless and until it is generally accepted that it is both dishonest and immoral for the controllers to take these profits, only the most stringent legislation will have any real effect. Many directors feel that such profits are perquisites of office.

Section 124 is of no real assistance in remedying the difficulties inherent in the situation. A section on the lines of the recommendation in paragraph 99(b) of the Jenkins Report should assist in practice. Paragraph 99(b) reads as follows:—

> "A director of a company who, in any transaction relating to the securities of his company or of any other company in the same group, makes improper use of a particular piece of confidenial information which might be expected to materially affect the value of those securities, should be liable to compensate a person who suffers from his action in so doing unless that information was known to that person".

A minority shareholder will have to accept the position that it is possible for a majority shareholder, where there has been a take-over, to expropriate his shareholding. Section 185 provides for such an expropriation and there is little or no possibility that the courts will assist the minority shareholder. If it is thought desirable as a matter of policy, that the rights of a minority shareholder in this regard should be altered, the provisions of Section 185 will have to be amended accordingly.

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