CURRENT TAKEOVER LAW

BY COLIN HOWARD*

[The method employed by the legislature in the Takeovers Code to regulate the ever increasing incidence of company takeovers is of great significance in the commercial sphere.

The author examines and clarifies the complexities which arise from the legislation in this article. He describes the initial prohibition upon share acquisitions tending to confer control of a company and outlines the adjustments necessary to this due to the statutory definitions and exceptions. This is followed by a comprehensive analysis of the mechanical procedures involved in the methods allowed by the code for attempting a takeover, notwithstanding the initial prohibition.

In particular, the author focusses on the carefully structured mechanism of the takeover scheme as the most distinctive single feature of the code and finally compares it with the procedure of the takeover announcement.]

A. INTRODUCTION

A takeover is the acquisition of control of a company by another company[1] through the mechanism of buying up a sufficiency of its voting shares.[2] The purchase need not necessarily be done by paying cash. Other common methods are the offer of shares in the purchasing company[3] in return for shares in the company being acquired or a mixture of cash payment and shares. There is no reason why these various mechanisms should not be on offer on the same occasion in the alternative. Similarly, if all or part of the consideration consists of shares, different kinds of shares can be offered in the same package, and so on with other combinations of securities.

* LL.D., Hearn Professor of Law in the University of Melbourne.

** The following abbreviations are used:
A.A.S.E.: Australian Associated Stock Exchanges.
ACLC: Australian Company Law Cases (CCH 1982 on).
ASLC: Australian Securities Law Cases (CCH).
C.C.: Companies ([Name of State]) Code.
CLC: Australian Company Law Cases (CCH 1971-1981).
I.C.: Companies and Securities (Interpretation and Miscellaneous Provisions) ([Name of State]) Code referred to as the Interpretation Code.
N.C.S.C.: National Companies and Securities Commission.
T.C.: Companies (Acquisition of Shares) ([Name of State]) Code referred to as the Takeovers Code.

[1] T.C. s. 6 refers to C.C. s. 5(1) for the definition of company: a company incorporated or deemed to be incorporated under C.C. or under any corresponding previous law. A listed public company is defined by T.C. s. 6 as a company that has been admitted to the official list of a stock exchange and has not been removed from that official list. Acquisition of a company by way of takeover does not necessarily have to be by another company but this is the normal case and the only one of commercial significance. Incorporation under the C.C. means under the legislation of a participating jurisdiction. Hence although the code has extraterritorial operation, T.C. s. 10, the applicable law is that of the jurisdiction of incorporation of the company being taken over. The code does not apply to takeovers of foreign corporations even if they have an Australian stock exchange listing.

[2] A share which confers an unqualified right to vote. Defined in full in C.C. s. 5(1).

[3] Otherwise known as the offeror, defined in T.C. s. 6 as a person, or more than one person acting together, who dispatches or proposes to dispatch a takeover offer by himself or themselves or by an agent or nominee. Person is defined by I.C. s. 9 to include a body politic or corporate as well as a natural person.

Control or total acquisition of a company can be achieved also by buying up its assets rather than its shares, but the circumstances under which this would be the preferable course of action are not frequent. The asset or assets in question would have to be easily transferable, as might be the case for example if they were items of intellectual property like patents, designs or copyrights. Anything more in the usual line of commercial trading would be likely to involve the transfer of a multitude of contractual and other legal relationships. Moreover if the directors of the target company[4] oppose being taken over it is possible to acquire control by share purchase notwithstanding their opposition, but it is self-evidently impossible to buy an asset if those responsible for running the company's business decline to sell. Takeover by share acquisition offers a number of other advantages: it will usually be cheaper and therefore more profitable than purchase of assets; taxation considerations usually work out in its favour; absolute control requires only one more than half of the voting shares instead of all of them; and a company which is the object of a takeover bid will often be so at least partly because in terms of its assets its stock market quotation is too low, which means that control by share purchase brings the assets with it at bargain price.

Two other common reasons for attempting a takeover are so-called vertical and horizontal mergers or integration. A vertical merger is one which reduces the number of separately controlled events in a productive sequence. An example would be where a company whose business lies somewhere along a line starting with the supply of a raw material and ending with the distribution of a manufacture to consumers acquires another company whose business lies either before it or after it along the same line. A horizontal merger is one between two companies whose business is the same or closely related. In either case the basic reason for the acquisition may well be a reduction of costs through the amalgamation of resources rather than an immediate profit through the cheap purchase of a valuable asset. A variant of the horizontal merger idea which has been popular in recent years, but the ultimate commercial and economic benefits of which remain unproved, is the takeover of a company in an entirely different line of business in order to diversify. The theoretical advantage is a spreading of the commercial risk and a concomitant widening of the opportunities to develop. In practice such ventures have often encountered difficulty in realizing the theoretical advantages owing to the managerial problems inherent in combining several unrelated commercial activities into a single group operation. Nevertheless, successful or not, diversification ranks as a substantial cause of takeovers.

A general benefit offered by the availability of the takeover is the incentive it provides to management not to allow a company's affairs to drift into a situation in which it becomes vulnerable to acquisition. This can be the case where in a structural sense the company's financial affairs have not been kept up to date. The relation between its share capital and its loan capital, usually referred to as its gearing, may no longer be related in the most effective way to its trading

[4] T.C. s. 6 defines target company as the shares in a company, or the company itself, depending on the grammatical context, which are proposed to be acquired under the various ways contemplated by the code.

operations, thereby creating an opportunity for better management by new controllers. A policy of undue caution may have been followed in the declaration of dividends. This can have the result that the market price of the company's shares reflects accurately enough their current worth as an income producing item of property but does not correspond to their basic value in terms of the company's assets. The potential benefit of a takeover to both the acquiring company and the target's shareholders in such situations is obvious. A variant on the theme is the case where fixed assets have increased substantially in value but this is not reflected in the company's published accounts because its managers have neglected to keep valuations up to date.

From these points of view the phenomenon of the takeover can be seen as an instance of the beneficial operation of a competitive market system. The relation between shares as an independently marketable item of property and shares as a means of controlling the management of the company which issues them, a relationship without which the buying and selling of commercial companies could hardly exist as a market force, can be seen as one of the most influential stimulants of social and economic change ever developed by the law. It would however be simplistic to see this as the whole story. Some of the side-effects of takeovers need to be mentioned, if only because they give rise to much difference of opinion.

The consequences for employees of the target company can be serious, particularly for the middle-aged manager whose job disappears in the shake-up. Especially in the case of the horizontal merger the result may be a substantial lessening of competition in a trading market. Whatever one's views on the virtues of commercial competition, such a consequence on any scale raises important questions of public policy. Similarly, economies of scale by merger may translate into substantial loss of employment in the general work force. There are differences too between a serious and well planned takeover offer, a speculative offer which is intended to be proceeded with only if the short term consequences of making it turn out to be profitable, and an offer which is designed not to succeed but only to produce an immediate cash profit by affecting share prices. A variant on the last of these themes is the tactic of merely spreading rumours that an offer is pending. Once again there is much room for difference of opinion about the best policy to adopt in the general public interest and whether it should be implemented by legislation or some less rigid form of regulation, as for example stock exchange rules.

Another question is whether the law should ensure that so far as possible all shareholders in the target company are treated equally in terms of the information made available to them and the opportunity afforded to them to make an unconstrained decision whether to sell their shares on the terms offered. Where such large amounts of money are involved as is nowadays necessarily the case with a major takeover, matters of relative detail can become financially critical. So for example there is a question whether, and if so to what extent, the directors of the target company can use the company's assets to mount a defensive publicity campaign against the proposed takeover. Also, since they themselves may well be facing unemployment if the takeover goes through, some position has to be taken

about conflict of interest. The acceptability has to be considered of such other possible defensive measures by the directors of a target company as the swift declaration of a dividend or bonus issue, or a counter attack by way of buying up shares in the company attempting the takeover, or restructuring designed to thwart compliance with statutory requirements. Then the question arises, to what extent can a company which believes that it may become the target of a takeover even though, or perhaps precisely because, its affairs are well managed and profitable take additional measures which might not be warranted except as a form of forward defence against takeover? And so on. The list of consequential policy questions which can arise out of takeovers is no doubt endless.

It is hardly surprising that takeovers are now closely regulated by legislation and subordinate mechanisms, although whether all the policy decisions which have been taken are the best ones is a matter of continuing debate. The major part of the legislative framework is referred to as the takeovers code. Although it is clearly desirable with takeovers, as indeed with every other significant aspect of the law relating to commercial companies, to treat Australia as a single unit subject to one law, doubts about the scope of Commonwealth legislative power have combined with reasons of policy to produce a cooperative legislative scheme. The central feature is the Companies (Acquisition of Shares) Act 1980 of the Commonwealth. This statute has direct application only in the Australian Capital Territory but fulfils the function of providing a standard text for adoption in the other Australian jurisdictions. It has in fact been adopted by each of the States in a uniform Companies (Acquisition of Shares) (Application of Laws) Act. The State Acts are not absolutely uniform with each other or with the Commonwealth statute but the variations are only minor and local in character.

Two Commonwealth statutes, the Foreign Take-overs Act 1975 and the Trade Practices Act 1974, which are of general application, become relevant respectively if the acquiring company is not Australian or if the takeover may reduce competition. The takeovers code has not been adopted in the Northern Territory but Commonwealth statutes of general application necessarily apply there in the same way as anywhere else. The N.C.S.C. has delegated its administrative functions to the State and A.C.T. corporate affairs commissions. The takeovers code is to be read with the companies code and the interpretation code.[5] The takeovers code came into operation on 1 July 1981.

B. ACQUISITIONS: PROHIBITIONS AND DEFINITIONS

The law relating to takeovers starts in s. 11 of the code by addressing itself to the results of an acquisition of shares and distinguishes two situations: where the result is that a person[6] who was entitled to less than 20% of the voting shares in the company concerned becomes entitled to more than 20%;[7] and where the result is that a person who was entitled to 20% or more of the voting shares, but less than

[5] Companies and Securities (Interpretation and Miscellaneous Provisions) Act 1980 as adopted by the States in application of laws Acts 1981.
[6] I.C. s. 9.
[7] Note that this is precisely what s. 11(1) says. The prohibition is on more than 20%, not on 20%.

90%, becomes entitled to a greater percentage than he already has. Each of these results is forbidden, together with the making of any offer or invitation which would lead to the same result. Nevertheless if an acquisition of either of the forbidden characters does take place, it is not invalidated by reason of the contravention of the section. The figure of 20% is specified in the section itself but it can be replaced by a lower percentage by regulation. The prohibitions of s. 11 are modified in various ways by the immediately succeeding sections of the code. Before turning to them some s. 11 interpretational points arise.

The initial prohibition operates where a person acquires shares. Section 7 (1) limits the meaning of acquisition of shares in a company to two situations. One is where the person 'acquires a relevant interest in the shares concerned as a direct or indirect result of a transaction entered into by him or on his behalf in relation to those shares, in relation to any other securities of that company or in relation to securities of any other corporation'. The other is where a person acquires any legal or equitable interest in securities, either of the company issuing the shares or of any other corporation, and as a direct or indirect result of that acquisition someone else acquires a relevant interest in the shares concerned. These definitions of the meaning of acquisition of shares for the purpose in hand give rise in turn to consequential questions of interpretation, particularly in relation to the expressions 'transaction' and 'relevant interest'.

A share transaction includes, by s. 8 (7), the exercise of an option to have shares allotted. In addition to this particular point the sub-section makes clear that the concept of a share transaction is intended to be both wide and flexible. Without being limited to the following, a share transaction includes, in relation to shares, becoming a party to any 'agreement, arrangement, understanding or undertaking,' formal, informal, express or implied. The general tenor of this phraseology suggests that the code does not contemplate an unsolicited gift of shares as a transaction, but the point cannot be regarded as self-evident. The intended donee is clearly not a party and does not enter into the gift at the time when the donor makes it or attempts to do so. It is possible to argue nevertheless that the donee converts the unsolicited gift into a transaction into which he has entered if he decides to accept it. Even if an unsolicited gift is not a transaction, the shares must be counted in calculating his percentage shareholding, for this is based on what relevant interests he actually has and not on how he came by them.

The definition of relevant interest is taken up in s. 9 of the code. It introduces the concept of control, which is ultimately what takeovers are all about. Fundamental though the concept of control is, the word itself tends to be used in a variety of ways. This has the effect of modifying its meaning according to the context. So for example the regulation of takeovers by law is often called control of takeovers. This has nothing to do with the control of a company which is the object of any given takeover. The latter is the most usual general context in which the word appears in company law but even there several quite different phenomena may be referred to. There are substantial legal and practical differences between, at one end of the spectrum, an almost total ownership of the voting shares, which necessarily confers power to control as an incident of the ownership, and, at the

other end, the ownership of a small percentage of shares in a large company which is capable of conferring control if combined with some such other circumstance as the directors' managerial power over the distribution of information and proxies. There is a comparable distinction between control which either arises out of or is in part dependent upon direct share ownership and control which arises through the power to direct how the people who actually own the shares use their votes.

The indefinite variety of ways in which effective control of a company can be exercised is a major influence in takeover planning and corporate policy in relation to it. Whether a takeover is a practical proposition depends on what form of control is aimed at. This in turn will depend on the size, structure and ownership of the existing shareholding. Since both this type of control and control in the legislative regulation sense have to recognize that arrangements extending well beyond the simple ownership of a share have to be taken into account, we arrive at the concept of a relevant interest in a share which is the concern of s. 9 of the code.

Under the section a person has relevant interest in a share if the controls its disposal. If the share is a voting share he has a relevant interest also if he controls the exercise of the right to vote attached to it. It is immaterial whether these powers of control are express, implied, formal, informal, exerciseable only jointly with others, subject to restrictions or cannot be related to any particular share. In conformity with this emphasis on the substance of the matter as opposed to its form (a general characteristic of the modern law of securities regulation), the meaning of power or control in this context encompasses all manner of 'agreements, arrangements, understandings and practices,' enforceable or not, even where the control is exerciseable through their breach rather than their observance, or in the case of a trust a revocation.[8] The term 'controlling interest' is not defined but includes for the purpose in hand any interest which gives rise to control in the foregoing sense.

The intention manifested by the statutory text that the code should be given a wide range of operation received support from *T.V.W. Enterprises Ltd v. Queensland Press Ltd (No. 2)* in 1983.[9] Queensland Press Ltd and John Fairfax Ltd each owned nearly 15% of the voting shares in Herald and Weekly Times Ltd. After the takeovers code had come into force Fairfax sold to Queensland Press about 12% of its Herald shares. This brought the Queensland Press holding to nearly 27% of Herald, well over the 20% prescribed limit. Queensland Press contended that the code had not been contravened because it had held a relevant interest in the shares it bought from Fairfax since a date before the code came into force. The interest was said to have arisen from an agreement reached by exchange of correspondence between Fairfax and Queensland Press. Each party had undertaken upon request to execute in favour of the other a further formal agreement for the sale of shares in Herald. It was held that the correspondence agreement was not a purported contract to make a contract, and therefore ineffective, but a binding agreement by each of the parties not to sell its Herald shares without first giving the other the

[8] T.C. s. 9(3).
[9] (1983) 1 ACLC 874.

opportunity to request execution of the formal agreement. The effect was to confer upon the parties a right of first refusal.

Although it could be said that this agreement in itself conferred no more than a limited power to make a decision whether to purchase shares or, even more strictly, to make a request for the execution of a further agreement, the result was nevertheless held to be that Queensland Press had acquired an interest within the meaning of the takeovers code. Since the acquisition of that interest antedated the code, it was not caught by the code and there was no contravention. It was argued also that even if the correspondence agreement were effective to give a measure of indirect control over the disposition of the Herald shares, it was too limited or qualified to come within the complete or effective or actual control contemplated by the code. It was held that there was no warrant for restricting the meaning of relevant interest in this way, particularly since the same expression with the same definitions appears also in the companies code,[10] where it is if anything even clearer that a wide scope for the concept is intended.

The foregoing is instructive on the general definition of relevant interest but the facts of the case meant that the same conclusion could be reached also by alternative statutory routes. The meaning of relevant interest extends to the case where a person has a right relating to an issued share which is enforceable in the future on the fulfilment of a condition and the result of enforcing it would be to give that person a relevant interest as previously defined.[11] It was held that the correspondence agreement had precisely this effect. Yet another way of arriving at the same result turned on what is meant by entitlement to shares, as distinct from the acquisition of the relevant interest which leads to the entitlement. The code provides[12] that the shares to which a person is entitled include not only shares in which that person has a relevant interest but also[13] shares in which an associate of that person has a relevant interest. Although the statutory definition of associate[14] was characterized as 'very vague indeed',[15] it was held to be wide enough to support the conclusion that by reason of the correspondence agreement Fairfax became an associate of Queensland Press, with the consequence that Queensland Press thereby became entitled to the Herald shares which ultimately changed hands.

Although the result in that case was superficially paradoxical in that the share transaction escaped the operation of the takeovers code because it fell within its terms, it illustrates well the width of the net cast by the code.[16] The extension of the

[10] C.C. s. 8.
[11] T.C. s. 9 (6).
[12] T.C. s. 7(3).
[13] Both the main rule and its extension to associates are subject to certain exceptions detailed below.
[14] T.C. s. 7(4)-(7). See further N.C.S.C. Release 105, 30/7/1981, revised 1/1/1983, paras 11-25. The N.C.S.C. can remove a nominee corporation from the scope of associate: T.C. s. 7(8). Such a corporation is one the principal business of which is the holding of marketable securities as trustee or nominee: C.C. s. 5(1).
[15] (1983) 1 A.C.L.C. 874, 889.
[16] *Cf. Re Adelaide Holdings Ltd* (1982) 1 ACLC 543, where an agreement for a put option was entered into before the code came into force but exercised later. Held that the exercise was not caught by the code because the relevant interest arose from the pre-code agreement. To similar effect *Nicholas v. Wade* (1982) 1 ACLC 459.

meaning of relevant interest to antecedent agreements, options and rights, whether enforceable immediately or in the future and even if subject to a condition, which have the effect of giving a person a relevant interest is clearly intended to publicize as early as possible the coming into existence of a situation which could lead to a change in the effective control of a company. Just as the existence of the relevant situation in this sense can be concealed by an anterior agreement not yet carried fully into effect, or by operating through an associate, so can it be concealed by working through another corporation. Hence the code provides[17] also that where the power of disposition of a share or exercise of a vote lies with a body corporate, the power for relevant interest purposes lies with any person who can effectively control the exercise of the power by the body corporate, even if the situation is only that its directors are accustomed to act in accordance with his wishes. This provision extends to any person who controls not less than 20% of the voting shares in the body corporate.[18]

There is a possible argument that these precautions against concealment by operating through one corporation do not cover the case where more than one corporation is interposed between the person concerned and the relevant interest. Thus if A has the necessary effective control of corporation B and corporation B has a relevant interest in corporation C, it is clear that the code attributes that relevant interest to A. If however corporation B has effective control over corporation C and corporation C has a relevant interest in corporation D, the code does not deal in so many words with the question whether A has a relevant interest in corporation D. There is however nothing inconsistent in the wording of the code with the attribution of the relevant power or interest as far back along the line of control as one wishes, provided that at each step the required conditions exist. It would be in the spirit of the legislation and in accordance with the judicial approach to it hitherto for no implied limitation to be placed on this part of the code if its terms do not positively require such a reading. Moreover this appears to be an appropriate context for the application of the rule that a relevant interest in a share is not to be disregarded by reason only of its remoteness or the manner in which it arose.[19]

In accordance with the standard drafting style of the takeovers code, the wide scope thus given to the concept of relevant interest is followed by a series of exceptions for relevant interests which the code is not intended to catch.[20] These are relevant interests held by the following: a moneylender by way of security held in the ordinary course of his business; the holders of certain prescribed offices of an official character;[21] a trustee if he is either a bare trustee or the beneficiary can acquire the relevant interests by the exercise of an immediately enforceable and unconditional right; a sharebroker in the ordinary course of his business who can exercise his relevant interest powers only on instructions; an unpaid proxy for a particular meeting.

[17] T.C. s. 9 (4), (5), (7).
[18] T.C. s. 9 (11).
[19] T.C. s. 9(10).
[20] T.C. s. 9(8).
[21] Companies (Acquisition of Shares) Regulations, 5(1). Treasurers, commissioners for corporate affairs, public trustees, masters and registrars of courts, and the like.

The mere fact that a trustee is entitled to remuneration does not necessarily make him a bare trustee.[22] From this it seems reasonable to infer that the intended meaning of bare trustee, which is not defined in the code, is one whose only connection with the trust is his trustee status and who must therefore transfer the legal title to the beneficiary on request. The class of persons principally affected would be professional and corporate trustees whose business is management of the property and investment affairs of others. Self-evidently the trustee exception does not apply merely because some form of trust relationship may have arisen in the course of a transaction. Hence it has been held that even if a wholly unpaid vendor of shares which have not yet been transferred to the purchaser becomes in some sense a trustee of the shares for the purchaser, and the agreement is specifically enforceable,[23] the right to vote conferred by ownership of the shares remains with the vendor as the beneficial owner of the shares until transfer and not in any trustee capacity.[24]

An interesting instance of the bare trustee exception being utilized to reach a commercially realistic result occurred in 1982 in *Scott v. H. S. Lawrence and Son Pty Ltd.*[25] Offers were made by Lawrence under a formal takeover scheme to purchase shares in the target company. Some of these offers were accepted. In the meantime market forces had pushed the price of the target companies shares up to a point where there was little prospect of the balance of Lawrence's offers being accepted. Accordingly Lawrence decided to withdraw its first offer and substitute a second offer at a higher price. Notices to this effect were sent to shareholders who had already accepted the first offer and their acceptances and share certificates were returned with the notice. When a question arose whether under these circumstances Lawrence had in the interval between the dates of the first and second offers acquired a relevant interest in the shares of the people who had accepted the first offer, it was held that in the events which had happened Lawrence could be regarded during that period as only a bare trustee of the relevant interests of the shareholders concerned. The reasoning was based on the proposition that if Lawrence had sought specific performance of the original contracts of acceptance in order to get the benefit of the lower price offered at that stage, no court of equity would have supported him.[26]

C. ACQUISITIONS: EXCEPTIONS TO THE PROHIBITIONS

A basis of extensive prohibition of takeover acquisitions having thus been set up, subject only to the foregoing adjustments of the part played by the relevant interest element, the code proceeds to modify it in several ways. The first is by carrying further the line of thought which makes exceptions for relevant interests which arise in the course of business transactions unconnected with takeovers. This requires a long list of acquisitions to which the general prohibitions do not

22 T.C. s. 9(9).
23 Neither point appears to be decided where less than the whole issued capital is in question.
24 *N.C.S.C. v. F.A.I. Investments Pty Ltd* (1982) 1 ACLC 358, 363.
25 (1982) 1 ACLC 238.
26 *Ibid.* 251.

apply.[27] The difference from the relevant interest exceptions is that the emphasis here is on the circumstances of the acquisition rather than on the status of the person to whom the relevant interest is transferred as a result.

The first category in the statutory list of such exceptions is an acquisition of shares by will or 'by operation of law'. Standard examples of the latter are the law of intestate succession, in relation to beneficiaries, and bankruptcy, in relation to a trustee in bankruptcy. A further instance, or at least close analogy, is the exception made in the code itself for an acquisition at auction of forfeited shares; and similarly an acquisition under circumstances prescribed by law. Complementing a relevant interest exception, here too there is a specific exemption for moneylenders.

Next there is a category of exemptions which derive from the concept of takeover itself. Takeover necessarily implies acquisition of control of a company which is already in existence and doing business. Hence an allotment by a company which has not started business or exercised any borrowing power does not cause a relevant acquisition by the recipients of the shares allotted. Similarly a promoter[28] makes no relevant acquisition of shares if they are allotted to him pursuant to an arrangement disclosed in the first properly registered prospectus issued by the company concerned. Again, acquisitions are not caught if they are made by an allotment or purchase pursuant to a duly registered prospectus for a public offering of shares or underwriting agreement or related sub-underwriting agreement. The takeover element which is missing in the case of public offerings otherwise than on initial incorporation is a vendor other than the company itself. Combined with the prospectus requirements this produces the result, ultimately aimed at in all contexts by the takeovers code, that in terms of knowledge and of opportunity to buy shares all potential purchasers start from the same position.

Clearly any event approved by a court has to be exempt if the code is to avoid contradicting itself. It follows that any court-approved compromise, arrangement or voluntary liquidation reconstruction pursuant to the companies code is exempt and that exactly the same reasoning exempts any acquisition approved by the N.C.S.C.[29] Another exemption derives from the reasonable basic proposition that there is no harm in a takeover if the shareholders in the target company agree to it. Indeed this situation can be seen as a further instance of an exemption which follows logically from the takeover concept itself. The exemption is for an acquisition by virtue of an allotment or purchase which the company itself has agreed to. It applies however only where certain precautionary features are present. These are that the manner of the agreement must be by resolution passed at a general meeting by a vote in which the person to whom the shares are allotted or, as the case may be, by or from whom they are to be purchased, or any associate of his, did not participate. The necessary protection of shareholders generally which is conferred by these precautions is obvious.

[27] All in T.C. s. 12. unless otherwise specified.

[28] C.C. s. 5(1) defines a promoter as a party to a prospectus who is not acting merely in a professional capacity.

[29] T.C. s. 12(o); N.C.S.C. Release 105, 30/7/1981, revised 1/1/1983, paras 30, 31.

Another exemption deriving from the concept of takeover itself is for acquisitions through proportionate allotments pursuant to rights and capitalization issues.[30] The former is where a company raises additional capital in the usual way by issuing additional shares but restricts the right to buy them to its existing shareholders. It is immaterial for the present purpose whether under the offer the right to purchase the additional shares can itself be traded or not. A capitalization issue takes place where the par value of a company's shares is disproportionately low in relation to their real value because in one way or another (perhaps by pursuing a conservative dividend policy) the company's assets have substantially increased in value but the increase has not been passed on to shareholders. In order to restore a less discrepant relationship between the par value and the actual value of its shares the company may make a bonus issue of shares to its members, thereby diluting the actual value of shares already issued but making up the difference to the shareholders by the bonus distribution.[31]

The common denominator of rights and capitalization issues offered or distributed to existing shareholders in proportion to their existing shareholdings is that if all the offers in a rights issue are taken up, both types of issue achieve their purpose without disturbing the existing voting position in the company. For this reason such issues do not conflict with the basic purposes of the takeover code and are therefore exempt from the limitations on acquisition. There is nothing in the wording of the exemption to exclude its application even if in the case of rights issues proportionate voting power changes either because some shareholders do not accept the offer or because they trade the rights. Such cases would probably be *de minimis*. Normally the question would not arise because a rights issue would be offered at a price favourable in relation to the current market price. Also the exemption includes the case where shares which are not taken up are acquired by an underwriter of the issue, an underwriting contract being a normal precaution.

Another exemption amounts to a considerable qualification of the code rule mentioned earlier that where a corporation has a relevant interest in a company, that relevant interest is attributed to anyone who effectively controls the corporation which has the relevant interest.[32] There is an exemption for this form of acquisition where the control of the intermediate corporation has resulted from the acquisition of shares in it which are listed for quotation on a stock exchange.[33] The exemption makes it possible for the control of the second company in the sequence to be changed without shareholders other than the first company having any say in the matter. Presumably the rationale of the exemption is that the application of

[30] T.C. s. 14.

[31] As a technical matter this can be done in two different ways but this is immaterial for the present purpose.

[32] T.C. ss 7(3), 9(1), (4).

[33] T.C. s. 6 defines stock exchange as a body corporate declared by the regulations to be a stock exchange for the purposes of the code. By contrast it defines a stock market as a place at which or a facility by which corporate securities are regularly traded. The Companies (Acquisition of Shares) Regulations, 4, declares the stock exchanges of Adelaide, Brisbane, Hobart, Melbourne, Perth and Sydney to be stock exchanges for the purposes of the code. The exemption referred to in the text is in T.C. s. 12(k).

takeover law to the first company provides a sufficient safeguard, even though ultimate control of the second company may well be the point of the whole operation.

Most of the exempt categories of acquisitions accommodate themselves straightforwardly enough to the main objects of the takeovers code. This one however seems to reflect some lack of coordination between the reasoning which supports the extension of the concept of entitlement to shares to the case where the relevant interest is acquired via an intermediate corporation and the reasoning which creates the exception to that rule. Perhaps limiting the exception to the case where shares in the intermediate corporation are publicly listed is thought to provide a sufficient publicity safeguard for all who may be consequentially affected. It could be said also that a takeover of the intermediate corporation might be prompted by considerations which have nothing to do with consequential control of the second company and should therefore not have to run the risk of failing through an irrelevant consideration; not that this is by any means a necessary result.

A further variant on the theme of acquiring shares in a company as the result of an acquisition of shares in another company occurs in relation to an exemption for acquisitions of shares in a company that either does not have more than 15 members or is a proprietary company the members of which have agreed in writing that the takeovers code should not apply to the transaction.[34] This exemption however is subject to the qualification that it does not apply if it would result in a contravention of the general prohibition on the acquisition of shares in a company through the mechanism of another intervening company. At first glance the proviso seems to eliminate the exemption. The explanation lies in the exemption just discussed, which permits the acquisition of shares in a company if that acquisition is brought about via the acquisition of shares in a public listed corporation. The effect is that the exemption for consenting proprietary companies and companies with not more than 15 members applies only where that acquisition does not result in the acquisition of a prohibited number of shares in a public listed company of more than 15 members or a non-consenting proprietary company. It seems to follow from the terms of the exemption itself that where the acquisition of shares in a company of not more than 15 members or in a consenting proprietary company results in the acquisition of an otherwise unlawful number of shares in another company of either of these descriptions, the transaction does not contravene the takeovers code. For the purposes of this exemption joint holders of shares are counted as one member in reckoning the size of the membership.[35]

Finally it necessarily follows that an acquisition made pursuant to one of the methods expressly allowed by the code for increasing a shareholding above the prescribed limit is not restrained by the basic prohibition. The distinction between acquisitions which fall into this category and the acquisitions just discussed, which are more conveniently regarded as exceptions to the prohibition, is that the latter either lie outside the scope of the very concept of takeover or have been placed

[34] T.C. s. 13(1).
[35] T.C. s. 13(2).

outside pursuant to the legislative policy adopted for the regulation of takeovers, whereas the former are part of the process of regulation itself. The adoption of a policy of regulating takeovers necessarily implies that the initial comprehensive prohibition of share acquisitions tending to confer control of a company is no more than the first step towards permitting them subject to official scrutiny, to publicity and to various conditions imposed by law. To these matters we now turn.

D. CREEPING TAKEOVER: 3% RULE

The least inroad made by the permitted takeover procedures on the initial prohibition of acquisitions over the prescribed 20% of the voting shares is the phenomenon known as creeping takeover. This is an exemption which allows anyone who already holds 19% or more of the voting shares in a company to acquire up to a further 3% every 6 months.[36] Since there are no restrictions on the manner of acquisition the assumption is that a takeover of this kind is so slow that anyone affected by it will have plenty of time to make decisions in his own interest notwithstanding that he may not have access to all the information which the code requires to be provided where a quick takeover bid is attempted. The same line of thought presumably applies where by virtue of his existing holdings the buyer is able to gain effective or absolute control with only one further 3% acquisition. At least six months will have had to pass during which others can evaluate the situation as it affects them.

One effect of the way in which this exemption is worded is that if the person concerned not only buys but also sells shares of the same kind during the relevant 6 month period, which is a continuous period of not less than 6 months immediately preceding the acquisition, the availability of the exemption may depend on the order in which he makes the purchases and sales. For example, if without at any stage allowing his holding to drop below 19% he first sells some shares and then buys a larger quantity, he retains the benefit of the exemption provided that the net result does not leave him with more than an additional 3% of the voting shares over and above what he had at the beginning of the 6 month period. But if the order of his transactions is reversed, so that for example he first buys an additional 10%, it is of no consequence that he may immediately afterwards sell 7%. The 10% acquisition is outside the exemption and nothing which happens subsequently can affect the situation as it stood at the time of that purchase.

This does not mean however that within any 6 month period in which there is both a sale and a purchase the sale should always precede the purchase. If the effect of a sale is temporarily to bring the shareholding below the 19% mark, the exemption is lost for a subsequent purchase which brings the shareholding over 20%. This is because at the time of the subsequent purchase the buyer is no longer in the position of holding the 19% which qualifies him for the exemption, but exceeding the 20% limit brings him within the scope of the general prohibition. Only if he finishes up with more than 19% but not more than 20% has he managed to avoid the complexities of the code.

[36] T.C. s. 15.

E. TAKEOVER SCHEMES[37]

It goes without saying that the 3% rule holds no attractions in the usual case where the commercial reasons for attempting a takeover make sense only if the move is made quickly. The code tries to reconcile a commercial need for speed with the equal protection of shareholders in two ways: takeover schemes and takeover announcements. The one most often adopted in practice is the formal takeover scheme.[38] In its elaborate concern not merely for the protection of shareholders but for their equal protection the formal takeover scheme is the most distinctive single feature of the entire code.

(i) *Chronology*

A takeover scheme starts with the preparation of two documents: a Part A statement[39] and a formal offer to buy shares. The purpose of the Part A statement is to amplify the circumstances of the offer by disclosing all facts which may be reasonably regarded as having a bearing on it. A copy of each of these documents then has to be sent to the N.C.S.C. for registration.[40] The sanction for a Part A statement or proposed offer which does not comply with the statutory requirements is refusal by the N.C.S.C. to register them,[41] which stops the scheme in its tracks, for it is registration which starts time running for the staged occurrence of subsequent steps in the takeover scheme procedure.

Upon registration the offeror has 21 days[42] to serve copies of the same documents on the target company.[43] On the same day as service the N.C.S.C. has to be notified that service has been effected[44] and copies of the Part A statement and proposed offer have to be served on the target company's home stock exchange if it is a listed public company.[45] Service on the target company has the effect that if the takeover bid is for all the target shares which the offeror does not yet have, the offeror can start buying shares of that class beyond the 20% limit on the stock exchange at once.[46] He can do this only for the next 28 days unless during that time

[37] The expression 'tender offer' is sometimes used by non-lawyers. It is an American ellipsis for an invitation to shareholders to 'tender' their shares for purchase *pro rata* at a guaranteed price. Hence it resembles an Australian formal takeover scheme but with the difference that, unlike schemes, it operates outside the normal securities trading system. There is no Australian equivalent.

[38] T.C. s. 16.

[39] Defined in T.C. s. 6 to mean a document that complies with Part A of the schedule to the code and with T.C. s. 16(2A).

[40] T.C. s. 18(1).

[41] T.C. s. 18(2).

[42] T.C. s. 18(1).

[43] Note the resolution and recording requirements of T.C. s. 16(2)(d)(i)(A) and T.C. s. 51.

[44] T.C. s. 16(2)(e)(i).

[45] T.C. s. 6 defines home exchange in relation to a listed public company as the stock exchange designated to the company as its home exchange by A.A.S.E., which is the same definition as appears in the A.A.S.E.'s listing requirements.

[46] T.C. s. 13(3), (4). Note also that under s. 13(4)(b) the code limits the conditions which may be included in such an offer without N.C.S.C. consent to a 90% minimum entitlement and the non-eventuation of a prescribed occurrence. Prescribed occurrences are defined in T.C. s. 6 and amount to a list of ways in which the target company's structure or circumstances might be substantially changed in a manner adverse to the offeror. They are detailed below under F(iv), withdrawal of takeover announcement offers.

he sends out the offers to shareholders, in which case he can continue buying on the stock exchange for as long as the formal offers sent out to shareholders remain open.

After service on the target company the offeror must leave a further interval of at least 14 days but not more than 28 days before sending the offers to shareholders. The date of the offer must be uniform, cannot antedate their dispatch by more than 3 days and cannot postdate their dispatch.[47] This means in practice that, having decided to send the offers out, the offeror must do so within a 4 day period. In the meantime he has to remember to notify the home stock exchange of the target company, before 9.30 am on the next trading day after service of the Part A statement on the company, of his existing entitlements to shares of the class he is seeking to acquire.[48] He must continue to supply this information in the same way on a daily basis thereafter.[49] On the same day as the last of the offers is sent out the offeror must serve notice on the target company that the offers have gone out and of their date, 'lodge' a copy of this notice with the N.C.S.C. and, if the target company is a listed public company, serve a copy of the notice on the target's home stock exchange.[50]

The circulation of the Part A statement imposes a timetable on the target company as well. Either 14 days after receiving the Part A statement or 14 days after receiving the notice that the offers have gone out the target company must produce a Part B statement and 'give' it to the offeror.[51] If the latter, the target company must also give a copy of the Part B statement to each shareholder who has received the offer to which the Part A statement relates.[52] The Part B statement is the reaction to the offer of the directors of the target company, or of the liquidator or official manager if its affairs are in such hands, supplemented by factual information about the target company's securities. For obvious reasons service of the Part A statement also imposes an obligation on the target company to furnish to the offeror, on request, the identities, addresses and holdings of persons who hold its shares, options or convertible notes.[53]

During the same period of 14 days after the offers have been dispatched the takeover offer cannot be withdrawn without the consent of the N.C.S.C.[54] If a takeover offer is withdrawn, anyone who has already accepted has a month to decide whether to exercise his statutory right to avoid the contract and, if he wishes to do so, to give notice in writing to the offeror to that effect.[55] If it is not withdrawn the offer remains open until the closing date specified in it, which must be not less than one month or more than 6 months after the date of the offer itself.[56]

[47] T.C. s. 16(2) (f)(i).
[48] T.C. s. 39(2)(a).
[49] T.C. s. 39(2)(b).
[50] T.C. s. 24.
[51] T.C. s. 22(1). A Part B statement is defined in T.C. s. 6 as a document that complies with Part B of the schedule to the code.
[52] T.C. s. 22(1)(b)(ii).
[53] T.C. s. 36.
[54] T.C. s. 21(1).
[55] T.C. s. 21(2).
[56] T.C. s. 16(2)(f)(ii). This may be varied by extension under s. 27(8), (9), (11), and *cf.* s. 28(5)(b).

If the takeover offer is subject to a condition, the condition usually being that the offeror succeeds in acquiring a specified number of the target shares, the offer must include also a specified date for the publication of a notice saying what has happened about the condition. This date must be not more than 14 days but not less than 7 days before the closing date of the offer.[57] The notice has to say whether the offeror has declared the offers to be free from the condition; whether, where the condition is of the usual kind in that it specifies a number of shares to be acquired, the condition has been removed by operation of law through acquisitions otherwise than under the takeover offer;[58] and whether, so far as the offeror knows at the time of lodging the notice, the condition has been fulfilled.[59] As a general rule an offeror can declare an offer to be free from a condition if it is a term of the offer that he can do so, if all offers under the same scheme are treated equally, whether accepted or not, and provided that the declaration is made not less than 7 days before the closing date.[60] Conditions are returned to in more detail later.

By the closing date of the offer the offeror may have become entitled in one way or another to 90% of the target shares. In this situation reciprocal rights of acquisition arise. The offeror is obliged to notify remaining holders of shares in that class of the extent of his own entitlement.[61] Thereupon the remaining shareholders have 3 months to require him to acquire their shares as well, on the terms set out in the Part A statement as they stood immediately before the offer closed.[62] If the takeover was directed at acquisition of all the shares in the relevant class, and the offeror had either no such shares or less than 10% before the takeover, he has one month in which to notify holders of the outstanding shares that he wishes to compulsorily acquire them.[63] Such a notice does not have to be sent to all outstanding shareholders but can be done on a selective basis.[64] If the offeror reaches the 90% mark but started out with more than 10%, the power of compulsory acquisition is available only if in addition he has become entitled to the holdings of three quarters of the offerees, whether acquired under the takeover scheme or otherwise.[65]

This completes the basic timetable of a straightforward takeover scheme. The code recognizes that this carefully constructed sequence of events may fail to be of much assistance to the securities market if it remains possible nevertheless to publicly announce proposed takeovers without any intention of carrying them into effect, or to purport to carry them into effect without any reasonable ground for believing that the obligations imposed by law can be fully complied with. Such activities are accordingly prohibited.[66] Since it cannot be known when an announcement is first made whether it is genuine or not, there is a requirement that

[57] T.C. s. 16(2)(f)(v).
[58] T.C. s. 30.
[59] T.C. s. 28(4)-(8), (10).
[60] T.C. s. 28(2), for notices s. 28(3).
[61] T.C. s. 53(1), for notices s. 43(4)-(7).
[62] T.C. s. 43(2), (3).
[63] T.C. s. 42(2).
[64] T.C. s. 42(2), s. 43(1).
[65] T.C. s. 42(2)(b). If he starts with exactly 10% and becomes entitled to 90% the situation has by definition resolved itself.
[66] T.C. s. 52. For the N.C.S.C. view of how this section should be applied see N.C.S.C. Release 113, 1/1/1983.

the offers must go out within 2 months or such longer period as the N.C.S.C. permits.[67] No offence is committed however if the person concerned can demonstrate such a change in circumstances that he cannot reasonably be expected to proceed.

Another incidental time requirement of which the initiator of a formal takeover scheme should be aware arises under the companies code. Anyone who becomes what is called in that code a substantial shareholder in a company is required to give notice to the company within 2 business days after he attains that status of the details of his identity and interest.[68] The definition of substantial is not less than 10% of any class of voting shares.[69] Subsequent changes in a substantial shareholder's interests must be similarly notified to the company within 2 business days of the event.[70]

(ii) *Failure to Comply*

The takeovers code includes a general offence of failing to comply with any of its provisions.[71] This includes timing requirements,[72] which is not surprising having regard to the importance of the timetable to the scheme of control where takeovers are permitted. Precise compliance with the complexities of the time specifications is not always easy. The interpretation code[73] deals with a few obvious questions by providing that where time is to be measured from a specified date, act or event, that date, act or event is not to be included in the calculation, and that when the last day of a relevant period falls on a weekend or a public holiday the next normal day following is to be the last day of the period.

Liability for non-compliance is to be distinguished from the effect, if any, of a failure to observe a time limit upon other aspects of the takeover. The code provides that an acquisition made in breach of the basic prohibition on acquiring more than 20% of the voting shares of a company is not invalidated by that breach.[74] This rule does not in terms apply to any other part of the code. Nevertheless it becomes of general application on the reasoning that if a person fails to comply with any requirement forming part of an exception to the basic prohibition, he puts himself outside the scope of the exception and so necessarily is subject to the prohibition. Hence an acquisition made under these circumstances falls within the proviso that it remains valid even though it has followed from or been associated with a contravention of the basic prohibition. There is also a power in the court to declare 'any act or matter' not to have been invalidated by a non-compliance.[75] This power does not arise unless the court is 'satisfied' that the

[67] T.C. s. 52(2).
[68] C.C. s. 137.
[69] C.C. s. 136(1), (9).
[70] C.C. s. 138.
[71] T.C. s. 53(1).
[72] Apart from being obvious anyway, this is implicit in the cases on T.C. s. 48 where a time breach has been held not to invalidate some act or matter: *Scott v. H. S. Lawrence and Son Pty Ltd* (1982) 1 ACLC 238; *Wright Heaton Ltd v. P. D. S. Rural Products Ltd*(1982) 1 ACLC 341.
[73] I.C. s. 36.
[74] T.C. s. 11(5).
[75] T.C. s. 48(1).

non-compliance ought to be excused. This declaratory power does not arise in relation to a share acquisition which is saved by the special rule previously mentioned, for such an acquisition is then valid anyway and needs no further declaration to make it so.

Although it has been said that the discretion conferred by the declaratory power is wide and should not be unnecessarily limited by implication,[76] it is clear from its express terms that it relates only to the validity of the act or matter concerned and is not a power to excuse the non-compliance.[77] Power to excuse for non-compliance is to be found in the wide powers of the N.C.S.C. to exempt from compliance[78] and to modify the application of the code in particular cases. There is nothing in either of these powers to prevent their being used with retrospective effect on appropriate facts.[79] Although the power to modify the application of the code in particular cases seems at first sight to be a delegation of legislative power, it has been held that this is not the case.[80] This presumably means that the effect is only to confer a discretion upon the N.C.S.C., although the discretion is remarkably wide nevertheless. It is no doubt for this reason that it has been said that the extent of action which may be lawfully taken by the N.C.S.C. under it 'may be a matter which will have to be determined at some stage.'[81]

A question of validity certainly arises. Validity might be established by reading the discretion down[82] in some way. Nevertheless the section is drafted in terms[83] which strongly suggest an attempt to confer upon the N.C.S.C. an at least quasi-legislative power to suspend or modify the operation of an Act of Parliament. Although the High Court has in the past upheld some very wide delegations of legislative power,[84] this particular one must raise a doubt.

Assuming that non-compliance difficulties do not arise and that there is no occasion for the N.C.S.C. to exempt from the code or modify its application, each of the steps in the foregoing outline of a formal takeover scheme needs to be taken up in more detail.

(iii) *Part A Statement*

The code specifies with some particularity the information which must be included in a Part A statement.[85] What it amounts to is a disclosure of all the facts which might reasonably be regarded as having a bearing on the takeover bid and its

[76] *N.C.S.C. v. F.A.I. Investments Pty Ltd (No. 2)* (1982) 1 ACLC 381, 382.
[77] *Ibid.*
[78] T.C. s. 57(1).
[79] *Cf. F.A.I. Investments Pty Ltd v. Mercantile Mutual Holdings Ltd* (1982) 1 ACLC 434, 436.
[80] *O.P.S.M. Industries Ltd v. N.C.S.C.* (1982) 1 ACLC 479.
[81] *Ibid.* 482.
[82] On the technique of construction of statutes known as reading down see Howard, C., *Australian Federal Constitutional Law* (3rd ed.), 28.
[83] The text of T.C. s. 58(1) is as follows: The Commission may, by instrument in writing, declare that this Code shall have effect in its application to or in relation to a particular person or persons in a particular case as if a provision or provisions of this Code specified in the instrument was or were omitted or was or were modified or varied in a manner specified in the instrument, and, where such a declaration is made, this Code has effect accordingly.
[84] Howard, C., *Australian Federal Constitutional Law* (3rd ed.), 232-38.
[85] T.C. s. 6 for definition; s. 16 (2A); schedule Part A; Companies (Acquisition of Shares) Regulations, 5A.

surrounding circumstances, or, as it has been put judicially, information which might reasonably affect the decision of an offeree whether to accept the offer.[86]

This includes for instance the period during which the offer is to remain open; in the usual case where the bidder is a corporation, the activities both of itself and of any group of which it is a part; whether the bidder holds shares or other securities in the target company, with details including recent transactions with them; particulars of other related offers made or proposed for other classes of securities in the target company; payments or benefits to be gained by individuals as a result of the transaction, particularly directors in the target company; details of securities which form part of the consideration for the shares in the target company; the bidder's general intentions with respect to the conduct of the target company if the takeover is successful; and the catch-all requirement, 'any other information material to the making of a decision by an offeree whether or not to accept an offer'.[87]

With the best will in the world it can never be guaranteed that a Part A statement is correct in every particular. To deal with the case of the excusable error the code does not provide for amendment of a Part A statement but for validation of it notwithstanding the fault. This power resides in the court, to which application can be made by the offeror. If the court is satisfied that the non-compliance ought to be disregarded, the usual grounds contemplated being inadvertence, mistake or circumstances beyond the offeror's control, but without being limited to them, it may make an order retrospectively validating the Part A statement as it stands.[88] A power in these terms clearly contemplates immaterial errors or omissions. Having regard to the purpose to be served by a Part A statement, it would be legislative self-contradiction to permit the uncorrected validation of an incorrect material statement.[89] The case may be different where the non-compliance is a failure to disclose a material fact and that fact has in the meantime been widely publicized.[90]

As an alternative to simply validating a defective Part A statement as it stands the court also has a general power to declare 'any act or matter' not to be invalid by reason of excusable non-compliance.[91] The expression 'any act or matter' would include a Part A statement. The precondition for the exercise of this general power is that the court be satisfied that the non-compliance should be excused. The specifically Part A one requires the court to be satisfied that the non-compliance should be disregarded. This difference appears because the general power has primary reference to persons but the Part A one to documents. For practical purposes it seems to be immaterial. It is to be noted that a Part A statement may not include forecasts of the profitability of the target company.[92]

[86] *Re Rossfield Group Operations Pty Ltd* (1981) CLC 33, 147 at 33, 149.

[87] T.C. Schedule Part A, para. 4(f). On materiality under this sub-para see *Re Rossfield Group Operations Pty Ltd* (1981) CLC 33, 147; *Re Evans Deakin Industries Ltd (No. 2)* (1981) CLC 34, 425.

[88] T.C. s. 48(3).

[89] *Cf. Wright Heaton Ltd v. P.D.S. Rural Products Ltd* (1982) 1 ACLC 341, 348.

[90] *Kinwat Holdings Pty Ltd v. Platform Pty Ltd* (1982) 1 ACLC 194, 195-6, but it is not clear whether the order in that case was made under T.C. s. 48(3) or s. 48(1). For a further instance of T.C. s. 48(3) see *Re Comeng Holdings Ltd* (1982) 1 ACLC 380.

[91] *Wright Heaton Ltd v. P.D.S. Rural Products Ltd* (1982) 1 ACLC 341.

[92] T.C. s. 37(1).

(iv) *Part B Statement*

The purpose of a Part B statement is reciprocal to the Part A statement which calls it forth. It therefore consists to a large extent of the same kind of information about the target company and its transactions as the Part A statement does about the offeror.[93] There are two particularly important features of a Part B statement. One is the recommendation of each director in the target company to the shareholders with respect to the takeover bid, or the reason why he is not making a recommendation.[94] The other arises where the offeror already has not less than 30% of the voting shares in the target company; or where any component of the offeror has a director in common with any component of the target.[95]

In either of these latter cases the Part B statement must be accompanied by a report from an expert who is associated with neither side. The report must say whether in his opinion the takeover offer is 'fair and reasonable', with reasons. It must include also full disclosure of any connection he may have with either side and the terms on which he is being remunerated for the report. Except with N.C.S.C. consent such a report may not include profit forecasts or any valuation of assets which differs from the book values of the target company. This is to keep the expert's report in line with the prohibition on such assertions in the Part B statement itself.[96] The N.C.S.C. has given details in this context of what it understands by an expert, by association with offeror or the target company, by the fair and reasonable criterion and by specialist.[97] Part B statements are to be written in ordinary commercial language.[98]

(v) *Offers: Conditions*

As mentioned already under the chronology of a takeover scheme, the general rule is that an offer may be made subject to conditions. This accords with the logic of allowing takeovers at all, for there is no point in preventing an offeror from withdrawing if it becomes apparent that his bid is not going to succeed. All that is required by a policy of investor protection is that third parties be not prejudiced. Both aims are furthered, at least in principle, if the offeror can reserve the right not to proceed unless certain conditions are fulfilled but at the same time the offerees are precisely informed of the intitial conditions and kept informed of subsequent developments.

Two code requirements to this end are customarily referred to as prohibited conditions, although only one of them is a true negative. This is a prohibition on including in an offer a requirement that the offeree consent to monetary or other

[93] T.C. s. 22 and schedule Part B. A similar materiality requirement is to be found in Part B, para. (k).
[94] Part B, para. 1(a), or in the case of liquidators or managers para. 1(b).
[95] T.C. s. 23.
[96] T.C. s. 37(2), s. 38(2).
[97] N.C.S.C. Release 102, 1/7/1981, revised 27/8/1981 and 19/2/1983.
[98] *Scott v. H. S. Lawrence and Son Pty Ltd* (1982) 1 ACLC 238, 252. Although this observation was in the immediate context of a Part B statement it is obviously of general application in this part of the law to documentation the point of which is to reveal commercial realities.

compensation being made to a director, secretary or executive officer of the target company, or of a corporation related to it, for loss of office.[99] Of course this does not prevent such people from being so compensated if the occasion arises after the takeover. It seeks to remove both the substance and the appearance that a recommentation to shareholders by the directors of the target company has been influenced by the offer of a golden handshake to the officers mentioned, particularly the directors themselves. There is a comparable prohibition also on inducements to individual offerees outside the terms of the offer.[1]

The more positive so-called prohibited condition is the requirement that where the offer is subject to a condition that the offeror acquire a number of shares, the number or proportion contemplated be specified with precision.[2] Otherwise it might be open to the offeror to adopt some arbitrary limit during the currency of the offer which would change the situation in his own favour. This prohibition, or requirement, has to be accommodated to the power to declare that a conditional offer has become free from the condition.[3] A condition that a minimum number of shares be acquired imposes no inhibition on acquiring more than the minimum. Hence the purpose of the procedure for removing that condition is to enable the offeror to take up the shares he has been offered if he wishes to to so notwithstanding the failure of his offer to reach the minimum. From this it appears as a matter of logic that the purpose of the prohibition on unspecific conditions is aimed at the prevention of an upward revision of a minimum and not at a downward revision of it. The only reason which suggests itself why this precaution may be thought desirable is the possibility that the offeror may change his mind during the currency of the offer and seek to escape from it by keeping his minimum at all times above the number of acceptances.

The most usual condition in practice is that the offeror become entitled to not less than 90% of the shares subject to offer. The reason for this is that usually a takeover scheme envisages acquisition of all the shares of the class subject to offer. Once the 90% mark is reached the compulsory acquisition sections of the code come into operation for the remaining 10%. Under most circumstances it would be impracticable, and therefore unacceptable to the N.C.S.C. and the stock exchanges, to take the superficially simpler course of specifying a 100% acquisition condition in the first place. The number of shareholders in a public listed company can be very large. All kinds of accidents of life, death and eccentricity can lead to a small percentage of shares still being outstanding when the offer closes. The 90% threshold is high enough to justify compulsory acquisition of the remainder but at the same time prevent a disingenuous offer being protected by an unrealistic 100% acquisition condition. The prohibition on unspecific conditions noted above serves a similar purpose.

It will be recalled from the chronology of a takeover scheme that where the bid is for all the target shares which the offeror does not yet have, he can start buying

[99] T.C. s. 20(1). Note however that directors of the target company can recover from the company expenses reasonably incurred 'in relation to' a takeover: T.C. s. 41.
[1] T.C. s. 40(1).
[2] T.C. s. 20(2), (3).
[3] T.C. s. 28(2), (3).

shares of that class beyond the 20% limit on the stock exchange as soon as the Part A statement and the offer have been served on the target company.[4] If he sends out the offers to shareholders within the next 28 days he can continue to buy in the market as long as the offer remains open. There is however a danger in this where the offer is subject to a minimum entitlement condition. It could happen that the offeror acquires enough shares by his now unrestricted buying in the market to gain control of the target company without proceeding with his offer. Indeed, if the minimum entitlement condition were the usual 90%, or anywhere near it, any significant buying in the market would render fulfilment of the condition attached to the formal offer impossible. Whatever the precise figures the offeror would be in a position to let the time run out on his offer and then return any acceptances received. The offer would have served only the purpose of freeing him from the code's basic prohibition of acquisitions above 20%. In the meantime the unfortunate acceptors would have been unable to opt out of the changed situation by disposing of their shares elsewhere if they so wished.

The code seeks to prevent this sequence of events by a rule that where an offer is subject to a minimum entitlement condition and the offeror acquires, otherwise than by acceptances of the offer, more than 20% of the voting shares in the target company, other than shares he already has at the date of the Part A statement service, 'the offer shall be deemed to be free from that condition.'[5] The effect is intended to be that the offeror loses the protection of his condition if he uses his offer as a means of buying over 20% of the shares he wants in the market, for as soon as the additional 20% mark is passed he becomes obliged to take up the acceptances he has received under the scheme. Moreover if he pays a higher price in the market than he is offering under the scheme, any acceptances already received must be taken up at the higher price.[6] If the offeror acquires additional relevant shares but not more than 20%, these shares are to be counted towards fulfilment of the minimum entitlement condition in the same way as if they had been acceptances under the scheme.[7] The result aimed at by the code is that the offeror seeking 100% acquisition of voting shares can pursue them simultaneously in the market and under a formal scheme but not at the expense of the shareholders.

Without affecting the foregoing there is yet another rule that where an offer is subject to a minimum entitlement condition which would bring the offeror's holding of the the target company's voting shares to more than 50%, the offeror cannot declare the offer to be free of the condition until he actually is entitled, by whatever means, to more than 50% or at least would be, by reason of acceptances received, if the condition were removed.[8] It will be recalled from the chronology of a takeover scheme that as a general rule an offeror can declare an offer to be free from a condition if it is a term of the offer that he can do so, if all offers under the same scheme are treated equally, whether accepted or not, and provided that the

[4] T.C. s. 13(3), (4).
[5] T.C. s. 30(1).
[6] T.C. s. 31(1), (2).
[7] T.C. s. 30(2).
[8] T.C. s. 29.

declaration is made not less than 7 days before the closing date of the offer.[9] The 50% rule is intended to prevent an offer which, by reason of a high minimum entitlement condition, can be seen to be aimed at gaining control of a company from being rendered free of the condition before control is actually achieved. The reason is that shareholders might be induced to accept the offer precisely because it is conditional on a change of control and would not sell their shares otherwise. If the condition were removed before the offeror passed the 50% mark they would have been misled but could not recover their shares.

It is to be noted that where a minimum entitlement condition is expressed as a percentage higher than 50%, as opposed to simply quoting the number of shares which the percentage formula produces, it does not necessarily follow that the offer is predicated on a change of control. In *Scott v. H. S. Lawrence and Son Pty Ltd*[10] in 1982 the condition in the offer was 'not less than 51% of the total number of ordinary shares . . . issued at the date of this offer'.[11] Although expressed as a percentage of the issued voting shares, this formula produced at all times an exact and unvarying number of those shares, for it was tied to a date: the date of the offer. If the total number of voting shares had remained unchanged, fulfilment of the condition would in fact have produced control. In the event further issues of ordinary shares in the target company were made during the currency of the offer. The offeror acquired the number of shares produced by the formula in the condition but by that time this number had become less than 50% of the the issued ordinary shares. His condition being numerically fulfilled, the offeror declared his offer to be free of the condition. It was objected that the declaration was ineffective because by reason of the reference to 51% the offer was to be construed as predicated upon a change of control. It was held that the date by reference to which the percentage entitlement contemplated by the takeovers code was to be calculated was necessarily the date of the declaration that the offer was free from the condition. This was different from the date precisely specified in the condition for calculating the minimum number of shares to be acquired by the offeror. Hence the offer was not predicated on a change of control nor misleading and the declaration was effective.

A somewhat technical interpretation was made in *Gerard Co. of Australasia Ltd v. Johns Perry Ltd*,[12] also in 1982, of the effect of the code where at the expiry of the offer a 65% minimum entitlement condition had neither been fulfilled nor removed by declaration. Acceptances had been received which took the entitlement to 59%. Before the offeror had taken any further action the target company applied for an order restraining it from treating the acceptances as conferring rights to the shares concerned. Evidently control of the target company turned on the outcome of the litigation. The argument for the plaintiff was simple: since the condition had been neither fulfilled nor removed the purported acceptances were ineffective. The 65% minimum entitlement was expressly stated in the offer however to be a condition subsequent which did not prevent a contract for the sale

[9] T.C. s. 28(2).
[10] (1982) 1 ACLC 238.
[11] *Ibid.* 244.
[12] (1982) 1 ACLC 646.

of shares arising from an acceptance of the offer and the benefit of which was exclusive to the offeror. In other words the offeror, if the 65% were not reached, could either refrain from applying the condition and enforce the contract of acceptance or apply the condition to rescind the contract of acceptance, depending on whether it wanted the shares or not. Such an outcome might well be thought contrary to the intention of the code but the first question was whether it was contrary to its terms.

The power of an offeror to declare a takeover offer free of a condition operates on the basis of initial prohibitions, otherwise than in accordance with the code, on declaring an 'offer or any contract resulting from the acceptance' of it free from a 'prescribed condition'; and on treating such an offer or contract as free from such a condition.[13] A prescribed condition is defined as one that will 'result in the rescission of, or entitle the offeror to rescind, a contract that results from an acceptance of the offer' or 'prevents a binding contract from resulting from an acceptance of the offer unless or until the condition is fulfilled'.[14] In the present case the condition was a prescribed condition because it entitled the offeror to rescind and it remained in effect because it had not been declared removed. Since it did not of itself avoid the contract of acceptance nor prevent it arising, because it was a condition subsequent which could be activated by the offeror alone, it was neither a condition precedent nor self-executing; and the offeror had not activated it. Therefore there was nothing to prevent the acceptances being acted upon according to their tenor.

It was objected nevertheless that to do so would be a breach of the code because the effect would be to treat the offer or the resultant contracts as free of the condition otherwise than in accordance with the code. This argument failed on the ground that nothing was being treated as free of the condition. If the offeror sought registration of itself as owner of shares covered by acceptances it would only be refraining from enforcing the condition. Freeing an offer from a condition under the code contemplated a change in the legal relationship between offeror and offeree created by an acceptance. Here there would be no such change unless the condition subsequent were activated by the offeror to dissolve the contract created by an acceptance.

Not surprisingly the final point was taken that such a result nevertheless would 'drive a coach and four'[15] through the code by, for example, enabling the offeror to pick and choose among acceptances instead of treating all equally. The response was that if the offeror under such circumstances were to treat some shareholders as bound by their acceptances, he might well be held, should the question directly arise, to have waived his right to exercise the condition subsequent against the others. The inadequacy of this state of the law in relation to the weakness revealed in the code need not be laboured. In July 1984 the N.C.S.C. published a commentary[16] on conditions attached to takeovers in which it observed[17] that 'offerors have been able to enhance or safeguard their own decisions in ways which result in

[13] T.C. s. 28(1).
[14] T.C. s. 6.
[15] (1982) 1 ACLC 646, 650.
[16] N.C.S.C. Release 407, 2/7/1984.
[17] *Ibid.* para. 3.

a considerable degree of unfairness to shareholders of the target company' and that in this respect the code had had little effect. Proposed amendments reached the stage of an exposure draft for an amending bill.

Although minimum entitlement is the most common type of condition there is no rule against other commercially relevant conditions being utilized where appropriate. In *Garden City Shopping Centre Pty Ltd v. Woolworths Ltd*[18] in 1982 Woolworths included in an offer for a 51% minimum additional conditions that between specified dates, for which the target's trading results were not yet available at the date of the offer, there should not be 'any change in the financial position' of the target which in the opinion of Woolworths was 'materially adverse' or 'any event' which in the opinion of Woolworths had a 'materially adverse effect on the business or profits' of the target. When the figures became available they showed an 82% drop from the corresponding period in the previous year and a 26% drop over the whole financial year from the previous year. Although reduced, a profit had nevertheless been made by the target. Notwithstanding the marked element of both having one's cake and eating it, Woolworths was held entitled to rescind in reliance on its clearly stated conditions.

(vi) *Over-acceptance*

The requirement that if an offer is subject to a condition that a given quantity of shares be acquired, the number or proportion must be precisely specified, applies equally to a maximum as to a minimum acquisition. If the condition however is that the offeror proposes to buy shares of the relevant class only up to a specified maximum, there has to be some rule for deciding how to deal with an excess of acceptances. One obvious possibility would be to treat them on a first come first served basis. The code does not adopt this solution because it has a potential for putting pressure on shareholders to make up their minds in a hurry at the expense of sufficiently careful consideration of their own interests. In accordance with the general code policy of investor protection, all acceptors are treated equally, the offeror in the case of over-acceptance being required to take up only the same proportion of the shares included in each acceptance as the maximum proposed acquisition bears to the number of available shares.[19] For the purposes of this rule the number of available shares is the total number of shares covered by the acceptances.[20] This is subject to an upwards adjustment formula to avoid an acceptor being left with what are known as odd lots.[21] An odd lot for the purposes of the code is a number of shares in a listed public company which for stock exchange purposes is less than a marketable parcel.[22]

[18] (1982) 1 ACLC 801.
[19] T.C. s. 26(1), (2).
[20] T.C. s. 26(1) (b).
[21] T.C. s. 26(3).
[22] T.C. s. 8(5). The size of a marketable parcel depends on the price of the shares: the lower the price the larger the minimum parcel: A.A.S.E. listing requirements, definition of marketable parcel. A public listed company is not obliged to register an odd lot except in the name of an A.A.S.E. approved odd lot broker's nominee company: listing requirement 3D(3)(c)(iv).

(vii) *Third Party Acceptances*

It is possible that at the time when a takeover offer is made to a shareholder someone else has become entitled to his shares. In that event the takeover offer operates as an offer to the third party in respect of the shares to which he has become entitled and an offer to the original shareholder only in respect of any shares of the relevant class which has retained.[23]

(viii) *Offers: Variation*

Once a takeover scheme has been set on its way all kinds of consequences can follow. Some of them may require a revision of the original commercial judgement by way of variations in the offer. A common instance is the making of a competing offer which has to be met by an improvement in the consideration for the shares in the target company, but this is by no means the only contingency. Once again the code has to recognize commercial realities without losing control of the carefully structured mechanism of the formal takeover offer. The scheme adopted is to specify a number of situations in which an offer may be varied without any special consents and leave the rest to the N.C.S.C. At least, this seems to be the intended effect of the code although it does not say so in so many words.

One possibility, variation in accordance with regulations passed for the purpose,[24] can be put aside because there are as yet no such regulations. Otherwise the code says that an offeror may not vary an offer without the written consent of the N.C.S.C except in accordance with the relevant section.[25] The power of the N.C.S.C. to consent to a variation is general and may be exercised with or without conditions.[26] This presumably means that where the code permits a variation without N.C.S.C. consent if certain procedures are followed, exemption from the procedural requirements can be gained if N.C.S.C. consent is sought with the condition that those requirements need not be complied with. However this may be, the general power to authorize variations in an offer does not encompass the separate power to defer the date specified for payment of the consideration for shares in the target company.[27]

In the situations where an offeror may vary without the N.C.S.C.'s consent the variation must apply uniformly to all the offers which have not yet been accepted but does not necessarily apply to those which have been.[28] Whether offers which have already been accepted are affected depends on the nature of the change. Thus the offeror is free to increase the consideration offered, or to add a cash or non-cash alternative, provided that in the former case the increase is given also to offers which have been accepted already and that in the latter case the opportunity to take the alternative consideration is made available to offers accepted already.[29] The

23 T.C. s. 25.
24 T.C. s. 27(1)(b).
25 T.C. s. 27(1)(a).
26 T.C. s. 27(2).
27 T.C. s. 19(1), 27(17).
28 T.C. s. 27(3).
29 T.C. s. 27(4)-(7).

other kind of variation available to the offeror without the consent of the N.C.S.C. is extension of the time during which the offer remains open, subject to the limitation that the total period of the offer cannot exceed 12 months.[30] Notices of variations must be served on the target company, the N.C.S.C., persons affected and the home stock exchange if the target is a listed company.[31] Where a conditional offer which was originally open for not more than 6 months is extended beyond that period, an offeree who has already accepted has one month from receiving the notice of extension in which to withdraw his acceptance.[32] As elsewhere in the code, an acquisition of shares is not invalidated by reason only of non-compliance with a variation requirement.[33]

The question can arise whether an offeror who wishes to make a change in a takeover scheme as originally presented should seek to do so by way of variation or by way of starting a new scheme. It is inherent in the policy structure of the formal takeover scheme, requiring as it does that there be a separate scheme for each different class of shares affected but that each such scheme may be varied under certain conditions, that there should not be concurrent offers from the same offeror for the same class of shares.[34] It follows that if the offeror cannot, or does not wish to, vary his scheme but to start another one, he can do so only if he is in a position to withdraw the first one.

(ix) *Withdrawal of Offers*

No takeover scheme offer can be withdrawn within 14 days after being sent out to shareholders in the target company without the consent of the N.C.S.C.[35] The standard code rule then applies that all offerees must be treated equally, so that it is not open to the offeror to withdraw individual offers on a selective basis.[36] It follows that the situation has to be evened up between offers which prima facie can be withdrawn because they have not yet been accepted and offers which prima facie cannot be withdrawn because they have been accepted already. The code does this by providing that offers which have not been accepted can be withdrawn but that offerees have one month after withdrawal in which to decide whether to avoid the contract of acceptance or enforce it.[37] Otherwise the only restrictions on the withdrawal of an offer are the need to comply with the usual notices.[38]

It is inherent in the investor protection aspect of the code that an offeror should not be able during the currency of his offer to dispose of shares in the very class which he is seeking to acquire. Hence there is an express rule to this effect,[39] the only exception being where another independent takeover bid has been made after the offeror's Part A statement has been served. The prohibition on disposal applies

[30] T.C. s. 27(8), (9).
[31] T.C. s. 27(10), (11),(13)-(15).
[32] T.C. s. 27(12).
[33] T.C. s. 27(16).
[34] Cf. *Scott v. H. S. Lawrence and Son Pty Ltd* (1982) 1 ACLC 238, 250.
[35] T.C. s. 21(1). A s. 46(1)(f) court order offer also needs N.C.S.C. approval for withdrawal: s. 21(5).
[36] T.C. s. 21(2).
[37] T.C. s. 21(2)(a), 21(4). The offeror cannot contract out of this option: s. 21(2)(b).
[38] T.C. s. 21(3), (4).
[39] T.C. s. 35(1).

to 'the period during which' the takeover offers 'remain open'. There is a question what this period is when there has been a withdrawal. Although the withdrawal closes the scheme off for all offers which have not been accepted, shareholders who have already accepted have another month in which to decide whether to rescind. As a practical matter this means that the offer remains open as far as they are concerned either for another month or at least until the last of such acceptances has been rescinded. Having regard to the scheme of the code this appears to be the better interpretation.

F. TAKEOVER ANNOUNCEMENTS

The third method allowed by the code for attempting a takeover notwithstanding the initial prohibitions of s. 11 on share acquisitions is the takeover announcement.[40] As with the 3% rule and the takeover scheme, this may be utilized either in the alternative to or in conjunction with the other two methods. Like the formal scheme it differs from the 3% rule in offering less regulation but more speed. In practice it is less favoured than the takeover scheme because the latter has a number of commercial advantages for the offeror. Points of comparison are noted at the end of this section of the text. They arise mostly from the inherently different characters of the two procedures. Although a takeover scheme permits simultaneous normal buying on the stock exchange, its essential feature is the written offer sent direct to every holder of target shares. By contrast the takeover announcement operates throughout on the open market, individual shareholders being sent relevant information but not being sent offers. It necessarily follows that the announcement procedure is available only where the target is a listed public company.[41] It follows also that this procedure is often referred to as an on-market bid and and the bidder as an on-market offeror, the latter expression being adopted by the code itself.

(i) *The Announcement*

Takeover by announcement starts, as one would expect, with the announcement. This has to be made on the home stock exchange of the target company by a member of that stock exchange.[42] He offers on behalf of one or more persons acting together to buy all the shares in a specified class at a stated cash price per share.[43] The code does not in terms limit the procedure to voting shares[44] but these would be the only ones giving rise to takeover questions because non-voting shares are not within the initial prohibitions of s. 11 of the code. Buying pursuant to the announcement cannot start until the first trading day[45] after an interval of 14 days from the announcement but must then continue for at least one month.[46] Monthly

[40] T.C. s. 17.
[41] T.C. s. 17(1).
[42] T.C. s. 17(2), (4), (18), (19). The stockbroker who makes the announcement is a deemed principal for contractual purposes: s. 17(15).
[43] T.C. s. 17(2).
[44] Or to quoted shares, a point taken up below under acceptances.
[45] Defined in rather obvious terms in T.C. s. 6.
[46] T.C. s. 17(2).

extensions of the offer can be made up to a maximum buying period of 6 months.[47] If the offeror or any component of it is already entitled to 30% of the target's voting shares, or any class of them, such an announcement can be made only with the consent of the N.C.S.C.[48]

(ii) *Part C and D Statements*

On the same day as the announcement is made the on-market offeror must serve on the target company and its home exchange a Part C statement[49] and 'lodge' a copy of it with the N.C.S.C.[50] The contrast is with the Part A statement of a takeover scheme, which has to be registered with the N.C.S.C. and registration of which can be refused or allowed only on conditions. Within the 14 day non-buying period the on-market offeror must 'dispatch in a manner approved by' the N.C.S.C. a Part C statement to each target shareholder.[51] Such a statement serves the same purpose as the Part A statement of a takeover scheme and includes the same kind of information. The parallels between the two procedures continue with a Part D statement[52] from the target company which, within the same 14 day non-buying period after the announcement, it has to serve on its home exchange and on the same day 'lodge' with the N.C.S.C. and 'give' to the on-market offeror.[53] Such a statement serves the same purpose as the Part B statement of a takeover scheme and includes the same kind of information.

(iii) *Share Price*

The price per share specified in a takeover announcement is of necessity a minimum price, for otherwise there would be no point in requiring a price to be named at all. The on-market offeror is not wholly free to choose his initial price offer. If he or an associate has bought shares of the target class in the 4 months immediately preceding the announcement, the price specified in the announcement cannot be less than the highest price paid for any such purchase,[54] and if the agreement for such a purchase provided for a price increase, it cannot be less than the price as so increased.[55] In accordance with this guaranteed minimum price philosophy the offeror may start buying shares of the target class on the market as soon as his announcement is made, provided that he buys them at a price higher than the price specified in the announcement;[56] but if that happens, the higher price is deemed to be the one specified in the announcement.[57] This effect continues

[47] T.C. s. 17(12), (14).
[48] T.C. s. 17(3).
[49] T.C. s. 6, s. 17(17), schedule Part C.
[50] T.C. s. 17(10)(a).
[51] T.C. s. 17(10)(b).
[52] T.C. s. 6, schedule Part D.
[53] T.C. s. 6 32(1), (4).
[54] T.C. s. 17(6).
[55] T.C. s. 17(7).
[56] T.C. s. 13(3)(b), s. 17(8).
[57] T.C. s. 17(8).

every time the offeror buys target shares at a price higher than the previous one, but his freedom to do so ends 5 clear trading days before the expiration of the announcement offer.[58]

Such a price structure in protection of existing shareholders creates considerable financial risks for the offeror unless it is modified under certain circumstances. One safeguard is that, in accordance with normal market operation, once a shareholder of target shares has sold them to the offeror, whether pursuant to the announcement offer or not, he cannot retrospectively claim the benefit of a later price rise. Any deemed alteration of the announcement price has prospective effect only. The reason why price rises can be incorporated into takeover schemes, so that a shareholder who has already accepted the offer gets the benefit of them,[59] is precisely that during the currency of the formal offer the projected sale of the shares to the offeror remains uncompleted and can therefore have its terms altered by operation of law.

An on-market offeror locked into an obligation to purchase at a minimum and possibly escalating price is vulnerable to defensive measures by the target company which reduce the individual value of its shares. In three such situations the code provides for a reduction in the offer price. These are where the target company, during the currency of the announcement, makes an allotment of, or grants an option to subscribe for, any of its shares, or agrees to do so; or issues convertible notes, or agrees to do so; or declares a dividend. The first two possibilities contemplate a dilution of individual share value by increasing the number of issued shares. The third arrives at the same result by a distribution of assets to shareholders. All three are in themselves legitimate responses to a takeover bid, the first two by increasing the number of shares needed for control and the third by reducing an asset value which may be the reason for the takeover, but there would be no point in providing the takeover announcement procedure in the first place if it could be so easily defeated by making the offer financially ruinous. Hence the code provides that in any of these events the offeror may, with N.C.S.C. consent, make a further announcement reducing the offer price.[60] Statutory deemed price escalation then operates on and from the new price.

(iv) *Withdrawal of Offer*

Notwithstanding safeguards designed to maintain a fair balance of interest during the currency of an on-market offer, situations can eventuate in which withdrawal from or termination of the offer is the least unsatisfactory outcome. In certain events there is an automatic termination of the offer by operation of the code. This happens where the offeror is or includes a natural person and that person dies, becomes bankrupt or is declared by a court to be incapable of managing his affairs.[61] Announcement offers which have not been accepted by the date of the relevant event are deemed to have been withdrawn on and from that date. There is a

[58] T.C. s. 17(8), (9).
[59] T.C. s. 31(1), (2).
[60] T.C. s. 17(11).
[61] T.C. s. 33(3).

corresponding provision for corporations.[62] Where the offeror is or includes a corporation which during the currency of the offer is placed under official management, ordered by a court to be wound up or has a liquidator appointed, the same consequence follows. Having regard to the rule that a stockbroker who makes a takeover announcement is deemed to be a principal for stock exchange contractual purposes,[63] there is a further such automatic termination provision to cover the case where the broker becomes bankrupt, is ordered by the exchange to cease business, dies or is declared by a court to be incapable of managing his affairs.[64]

Voluntary withdrawals fall into two categories. The first, which is not available to an on-market offeror who already has control of the target company by reason of being entitled to more than 50% of its voting shares at the relevant date,[65] depends on the happening of a prescribed occurrence. Prescribed occurrences fall into two categories:[66] actions taken by and events which happen to a target company or its subsidiary. They are of a familiar character in that they materially alter the situation to the possible inequitable prejudice of the offeror.

Actions taken by the target or its subsidiary which are prescribed occurrences are alteration of its share capital in any of the ways permitted by the companies code by ordinary resolution;[67] resolving to reduce its share capital; allotting shares or options, issuing convertible notes, disposing of, or charging, all or a substantial part of its business or property, or agreeing to do any of these things; or resolving that it be wound up. Events which happen to a target company or its subsidiary and are prescribed occurrences are the appointment of a provisional liquidator, a court order for winding up, being placed under official management, or the appointment of a receiver for the whole or a substantial part of its property. On the happening of any of these prescribed occurrences the offeror may withdraw by means of an announcement to that effect on the appropriate stock exchange.[68]

The second way in which an on-market offeror may withdraw, which applies also to the stockbroker who made the takeover announcement, is by a stock exchange announcement to that effect with the consent of the N.C.S.C.[69] This consent is not to be forthcoming unless the N.C.S.C. 'is satisfied that in all the circumstances it is just and equitable to permit the withdrawal'. The N.C.S.C. regards the just and equitable limitation as requiring it to be even-handed as between offeree and offeror and his broker.[70] The circumstances must be excep-

[62] T.C. s. 33(4).

[63] T.C. s. 17(15), inserted no doubt from an abundance of caution. Although the point does not appear to have been expressly decided, it must surely be the case that a broker is personally liable for the contracts he enters into. So held for the Sydney Futures Exchange in the context of an evident assumption that the rule is general: *Option Investments (Aust.) Pty Ltd v. Martin* (1980) ASLC 86, 142 at 86, 145; *Dalton v. A.M.L. Finance Corporation Ltd* (1980) ASLC 86, 171 at 86, 172.

[64] T.C. s. 33(5).

[65] T.C. s. 33(2).

[66] T.C. s. 6.

[67] C.C. s. 121. These are: increase by creation of new shares; consolidation and division into shares of larger face value; conversion of paid-up shares into stock, or vice versa; subdivision into shares of smaller face value; and cancellation of shares which have been forfeited or not taken up.

[68] T.C. s. 33(1).

[69] T.C. s. 33(6).

[70] N.C.S.C. Release 105, 30/7/1981, revised 1/1/1983, para. 27.

tional. A mere 'change in general economic, industrial or political circumstances or circumstances within the control of the offeror' is not enough.[71]

Although a takeover announcement has to be made in normal trading on the relevant exchange, and in the usual course of things acceptances would be notified in the same way, the code provides for off-market acceptances where it is not possible to proceed in this fashion.[72] Two reasons why this might happen are specially mentioned: absence of the announcement broker, or his representative, from the exchange on the day of the intended acceptance and suspension by the exchange of trading in those shares on that day. In these events the acceptor can serve on the exchange written notice of his acceptance and the exchange is obliged to notify the broker of the acceptance 'as soon as practicable'.[73]

The circumstances under which this way of accepting becomes available are not confined to the situations specifically mentioned. The code wording is 'if the offers cannot be accepted at a particular meeting' of the relevant exchange for those reasons 'or otherwise'.[74] The scope of 'otherwise' is unclear but the context suggests that it operates only where an acceptance has been determined upon, and can be manifested in writing, and that the reason why it cannot be communicated to the offeror in normal trading has to do with some circumstance arising out of the working of the relevant exchange. It has been noted already that although a takeover announcement has to be made on the exchange, and although the general features of the ensuing procedure clearly contemplate on-market transactions as the normal case, the actual wording of the code governing the content of the announcement is that it be made in relation to 'shares in a listed public company'[75] and is not limited to quoted shares. It is possible therefore that the 'or otherwise' formula covers the case where all or some of the shares the subject of the announcement cannot be acquired in normal trading because they do not have a stock exchange quotation. Whether the non-quotation of shares is more properly regarded as a matter related to the exchange than to the company is a moot point which could well vary with the facts.

The only other matter affecting acceptances which needs mention is that at any time during the currency of the offer the offeror or his broker may apply to the N.C.S.C. for an order that acceptances be suspended.[76] Such an order does not stop time running so far as the statutory duration of a takeover is concerned. Since the power arises on the application of the offeror, the purpose is presumably to give the offeror time to adjust the terms of his announcement, particularly the original or subsequently deemed share price, in response to an adverse change of circumstances recognized by the code or the N.C.S.C. as such. Until the offeror has had a reasonable time to decide what to do, and do it, this method is available to him for temporarily halting unwanted acceptances without indirectly lengthening the duration of his offer beyond the statutory maximum. Should there be any apparent

[71] *Ibid.*
[72] T.C. s. 17(2)(b).
[73] T.C. s. 17(5).
[74] T.C. s.17(2)(b).
[75] T.C. s. 17(2).
[76] T.C. s. 34.

mileage for the offeror in using such an order to indirectly shorten the duration of the offer, the N.C.S.C. would be in a position to control the situation.

(v) *Schemes and Announcements Compared*

The provisions of the code which apply to both takeover schemes and takeover announcements, *mutatis mutandis*, have been dealt with already under the former. They are: restrictions on disposal of target shares by offeror;[77] target's obligations to provide information, including acquisitions and disposals of shares;[78] profit forecasts and asset valuations;[79] benefits to offerees;[80] expenses of target directors;[81] and compulsory acquisition of outstanding target shares.[82]

It has been mentioned already that in practice less use has been made of the takeover announcement than of the takeover scheme. An announcement seems to offer only two particular facilities to the bidder that a scheme does not. One is the logical consequence of its on-market character that price increases can be prospective only, whereas price increases under schemes are retrospective. This may not have much practical significance since a shareholder starts with the assurance of a guaranteed minimum price and can therefore normally afford to await developments instead of rushing to accept. The other facility is that a Part C statement merely has to be lodged with the N.C.S.C. on the same day as the takeover announcement, whereas a Part A statement and its related offer have to be registered by the N.C.S.C. before a takeover scheme can proceed. It is possible that a delay occasioned by the registration requirement could work to the disadvantage of the offeror, but here too the practical significance of the difference seems in general to be minimal.

As mentioned earlier, the real advantage offered by the takeover announcement to the bidder is more speed with less regulation. The lesson of experience appears to be that this is a lesser attraction, paradoxical though it may seem, than the wider range of choice open to the bidder when planning his tactics under the more deliberate and closely regulated procedures of the formal takeover scheme. Up to a point this in turn is because intended safeguards in the scheme provisions have largely failed of their purpose, conditions in partial takeovers being a notable example, but this is unlikely to be the whole explanation.

A takeover scheme offers the bidder considerably greater freedom of action than an on-market announcement, as well as saving brokerage fees for both offeror and offeree by operating outside the stock exchange. The two major advantages are that the offeror under a scheme is not obliged to place himself under an obligation to buy all the shares included in acceptances or to buy them for cash. His offer can be a partial bid only, limited by condition to a specified proportion of the target shares. The consideration for them can be cash or other securities or a combination

[77] T.C. s. 35(2).
[78] T.C. s. 36, s. 39.
[79] T.C. s. 37, s.38.
[80] T.C. s. 40.
[81] T.C. s. 41.
[82] T.C. s. 42, s. 43.

of the two, a choice which, if it suits him, the offeror can leave to the offeree. The market character of a stock exchange sufficiently explains why the consideration has to be cash under a takeover announcement. There is no totally compelling reason why an on-market bid should not be partial but a number of practical and policy points arise.

The equal treatment of shareholders is a basic policy aim of the code. An aspect of this is the avoidance of first come first served situations in relation to acceptances because they tend to stampede shareholders who do not want to risk being left in a minority under new management or miss out on an attractive offer. This is guarded against in the formal takeover scheme not only by the statutory timetable, which tries to ensure reasonable periods during which shareholders can make informed assessments of the their best interests, but more fundamentally by deferring completion of the contract of offer and acceptance by transfer of the target shares until such time as the outcome of the bid is known. Such a device is clearly inconsistent with the market character of the stock exchange and would cut across its normal operation. As an instance, it would not be easy for the exchange to accommodate its fluctuating price structure to such consequential mechanisms as proportional acceptances where there has been over-acceptance of a partial bid. Moreover there is no reason why such efforts should be made if it is practicable to attain the end in view by creating a takeover procedure which operates outside the market, however much it may influence the market indirectly. This is the function of the takeover scheme. The takeover announcement, which came in for the first time with present code, is best seen, in the events which have happened, as an experimental supplement to it.

Although its most significant manifestation is by way of specifying the number of target shares that the offeror wishes to acquire, the advantage of being able to attach approved conditions to an offer under a takeover scheme is general. Furthermore the entitlement to make a takeover offer in the first place is wider under schemes than under announcements, for the latter are subject to the 30% rule, whereby an offeror who already has 30% of the voting shares, or of a class of the voting shares, of the target company cannot make an announcement without N.C.S.C. consent. This freedom is carried through to withdrawal of an offer. Under a scheme the offer can be withdrawn after 14 days from being sent to shareholders, subject to the incidental requirements of the code. Under an announcement freedom to withdraw is not available to an offeror who has more than 50% of the target company's voting shares. Even if available to the offeror in principle, its exercise needs either the occurrence of a prescribed event or an N.C.S.C. consent which is itself available only subject to the fair and equitable requirement. Lastly, if there be any advantage in keeping an offer open as long as possible, the maximum under a formal scheme is 12 months but under an announcement only 6 months.