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NEW ZEALAND FOREST PRODUCTS AND WATTIE: IMPLICATIONS FOR NEW ZEALAND SECURITIES LAW

RESEARCH PAPER FOR THE LAW OF BODIES CORPORATE AND UNINCORPORATE LL.M (LAWS 523)

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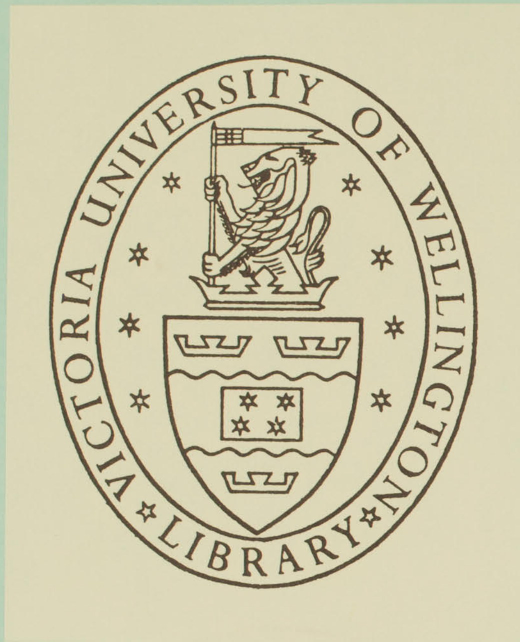
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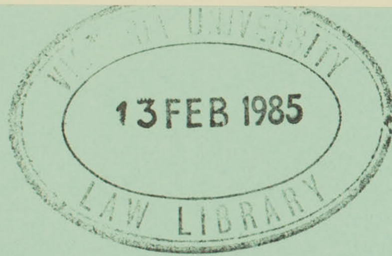
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1. INTRODUCTION

Company takeovers first emerged in the United States and the U.K. during the late 1940's as a technique for gaining control of a company without the need to negotiate a merger of the traditional kind with its directors. The last twenty years have seen a rapid increase in the number of takeovers taking place either as part of a contentious battle for control or as a convenient means of vesting control in the offeror, where the offeror and the controllers of the target company are in agreement.

The recent phenomenon of inflation pushing up asset values, without a corresponding effect on share prices has made the company takeover a convenient and cheap method of acquiring business assets and rationalising their use.

In recent years the use of takeovers has been growing rapidly. In the 1983-84 period 179 proposals were notified to the Commerce Commission and figures for June 1984 suggest a further increase for the 1984-85 period.[1] Takeovers are therefore becoming a more significant part of the economy's allocation of resources. Further, takeovers have become an important method of introducing foreign capital to New Zealand enterprise. Legislation to regulate takeover conduct was introduced in New Zealand in the Companies Amendment Act 1963. However, over the last twenty years the inadequacies of this statute have been realised and exploited with the result that most transfers in control now take place outside the scope of the Act and without any substantive control.

The recent New Zealand Forest Products Limited ("N.Z.F.P.") takeover offer for Wattie Industries Limited ("Wattie") demonstrated that there is no effective mechanism to ensure takeovers are conducted fairly. The unsatisfactory state of our laws governing company takeovers, particularly in relation to protection of investors, has become obvious.

In October 1983, the Securities Commission completed a review of the rules governing takeover activity and suggested extensive reforms of the rules. It is the aim of this paper to investigate the present

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situation of takeover control, by looking at the litigation surrounding the N.Z.F.P. offer, and to look at the suggested reforms in the light of the N.Z.F.P. offer and see what practical changes will result.

The absence of legislation controlling the conduct of takeovers in relation to investor protection is in sharp contrast to legislation controlling takeovers in relation to the public interest. Approval, where required, of the Commerce Commission under the Commerce Act 1975 and the Overseas Investment Act 1973, safeguards the public interest which may be adversely affected by takeovers. This paper is however primarily concerned with protection of investors who may be unfairly treated in a transfer of control and may suffer substantial loss in their investment. Their interests are as equally in need of protection as the general public interest because, if no protection is given, the confidence and efficiency of the capital market will be affected resulting in profound effects on the national well-being. The size of the parties and the amount of money involved in the N.Z.F.P. offer adequately demonstrates this. The formulation of rules which adequately protect these interests is therefore important.

2. FACTUAL BACKGROUND

A. The Parties

New Zealand Forest Products Limited ("N.Z.F.P.") is New Zealand's largest public company in terms of capital and trading activity. It has shareholders funds in excess of $475 million and has 57,000 individual shareholders. It first obtained Stock Exchange listing as a public company in 1936.

On the 18th of January 1984 the executive of the New Zealand Stock Exchange attempted to suspend N.Z.F.P. from listing on the Exchange

for alleged breaches of the Exchange's Takeover Code. N.Z.F.P. were allegedly in breach of the code because of the terms of their takeover offer for Wattie Industries Limited ("Wattie"). Wattie is New Zealand's seventh largest company.

The original structure for stock exchanges in New Zealand was provided by the Sharebrokers Act 1908, whereby sharebrokers, licensed under the Act, could form associations and set up stock exchanges which could be registered under the Act.[3] Rules could then be made for the running of the Exchange in very much the same way as they are for any other incorporated society, except that they had to be approved by the Governor-General in Council and gazetted. A number of exchanges were in fact established[4] and it is still, in theory, possible that a new exchange could be registered under the 1908 Act. The members of the exchanges however, felt that some national body was needed to promote and regulate matters of common interest to the exchanges at a national level. The Stock Exchange Association of New Zealand was established in 1915 and registered under the Act. It was with this body that N.Z.F.P. executed its current listing agreement on the 9th of July 1976. When this agreement was entered into the listing manual had no stipulations about the conduct of takeovers, but the agreement did provide that N.Z.F.P. would comply with the relevant requirements and conditions as from time to time set out in the Listing Manual. On the 14th of October 1981, Parliament enacted the Sharebrokers Amendment Act 1981, which came into force on the 18th of July 1983 by order in Council. This Act created the New Zealand Stock Exchange as the successor of the Association and the Exchanges registered under the 1908 Act. The Exchange is a body corporate in very much the same way as any other incorporated society. Section 3(3) contains a number of provisions to facilitate the transition. The functions and powers of the Exchange are laid out in Section 4 of the Act. The Exchange is given power to make rules for the conduct of its members and the conduct of business on its exchange, its members being those licensed sharebrokers granted a seat on the Exchange.

These rules however must be approved by the Governor-General in Council and published in the Gazette.[5]

Rules were in fact made by the Association in anticipation of the transition, as provided for in Section 7(4) and were approved and gazetted on the 8th of July 1983.[6] These Rules deal with a number of matters including a section on listing of companies on the exchange. Rule 12.02 provides a right to suspend or cancel listings without reason. Rule 8.07 delegates to the executive of the Exchange all powers and functions of the Council not specifically reserved. Rule 8.08 gives power to make regulations, not inconsistent with Rules, governing matters of detail or administrative machinery. No mention is made in the Rules about takeovers.

In October 1978 a circular was sent to listed companies by the Stock Exchange Association in which the Takeover Code appeared for the first time. The code however was not stated to have effect. In 1981, the Association sent to listed companies what it called the "1981 Edition" of the Listing Manual. This document was said to incorporate over 70 changes from a draft sent the preceding April, as a result of submissions. This Manual was prepared in anticipation of the passing of the Sharebrokers Amendment Act.

B. Preliminary Buying

The Goodman Group Limited ("Goodman") as at November 1983 held 35 percent of the shares in Wattie and Wattie held 30 percent of the shares in Goodman.

In November 1983 Wattie and Goodman acquired 24.9 percent[7] of the shares of N.Z.F.P. This was done using an equally owned subsidiary, Dominion Industries ("Dominion"). This buying took place over a period of three trading days by "standing in the market".[8] The operation was commenced, as most takeovers seem to be, on a Friday, the 18th of November. At this stage N.Z.F.P. was in the middle of

an unsuccessful takeover of Odlins Limited, a takeover later completed by the Brierley Group. Further, Wattie/Goodman were not the only buyers in the market at the time and the operation developed into somewhat of a buying spree of N.Z.F.P. shares. On the Friday approximately 13.4 million N.Z.F.P. shares were traded. Heavy trading continued on the following Monday and Tuesday. Dominion had achieved a 24.9 percent holding in N.Z.F.P. and a second buyer finished the day with a three percent holding. Altogether 28 percent of N.Z.F.P.'s shares had changed hands in three days of trading. One could forgive N.Z.F.P. had they jumped to the conclusion that they were the victim of an as yet unannounced takeover bid. At this time the share market was in a state of boom, it was also a time of general monetary liquidity for the share market. At the same time T.N.L. were being foiled by Dominion Breweries in their attempt to takeover Mount Cook Airlines. Further Wattie/Goodman had just completed their merger with Waitaki-NZR. November 1983 was a highly active month for takeovers.

On the 22nd of November Wattie/Goodman made the statement that its holding in N.Z.F.P. "would ensure that New Zealand corporate interests held a strategic investment in an industry which was vital for the long-term growth of New Zealand".[9] Further, that Dominion Industries supported the Board and management of N.Z.F.P. and that there was "no threat to the company". Buying was merely "further long-term investment in the processing of New Zealand's natural resources".

This however cannot have impressed N.Z.F.P. because on Monday the 19th of December N.Z.F.P. launched a week of defensive buying, with a stated object of achieving a 24.9 percent holding in Wattie. As the week progressed Wattie shares rose in price from $4.50 to $5.00 each. At the same time N.Z.F.P. began buying Goodman's shares and on the 24th were reported to have bought a 6.3 percent holding in Goodman.[10]

What exactly the motives of N.Z.F.P. were for their buying spree is unknown. Brokers in the market found the buying spree hard to understand and their only explanation was that it was to break up the Wattie/Goodman holding in N.Z.F.P.[11] A substantial holding in Wattie would certainly have controlled the Wattie-Goodman influence on N.Z.F.P. Neither company was seen as having great development potential and therefore unlikely for takeover or investment. On the 21st of December the then Labour Party spokesperson, David Caygill, made the comment that "the N.Z.F.P. counter-attack showed the deep malice in New Zealand industry". However if the move was purely malicious it was an expensive investment of shareholders funds to undertake so lightly.

On Friday the 23rd N.Z.F.P. announced that they had achieved their target of 24.9 percent of Wattie shares at a cost of approximately $115 million.

C. The Takeover Offer

After trading closed on the 23rd N.Z.F.P. announced that they would be making a written takeover offer for Wattie through its subsidiary Alfred Quaife (NZ) Limited, which later became known as N.Z.F.P. Investment Limited. At the time of making the offer Mr Lynn Papps, Chairman of N.Z.F.P., said that N.Z.F.P. had been for some time considering a move into another New Zealand resource based industry, in expectation that following C.E.R. there would be growing opportunities for the export of primary resources, such as feed, pulp and paper, to the Pacific Basin. N.Z.F.P. considered Wattie a compatible, strong, well-managed company with good growth prospects of gains in dividend income. The merger would provide greater access to off-shore capital and expanded trading opportunities. All in all the N.Z.F.P. offer could have cost around $300 million and so significant returns should be expected.

The consent of the Examiner of Commercial Practices, required under the Commerce Act 1975, had however not been obtained and was not expected for at least 39 days. The reason for N.Z.F.P.'s failure to get consent prior to announcing the offer, as is the normal practice, seems to be that the decision to make the offer was only made in mid-December after consideration had been made of all aspects of the existing situation and the success of the "standing in the market" for Wattie shares. This would seem to cast some doubt on the forward planning of the takeover offer.

The terms of the offer were however complicated because of the complex system of cross shareholdings. As previously mentioned Goodman held a 35 percent share of Wattie. The consideration for N.Z.F.P.'s offer was four fully paid N.Z.F.P. shares and one dollar in cash for every five ordinary shares in Wattie, with variations for the different classes of preference shares.[12] Therefore if the offer was extended to those shares held beneficially by Goodman or its subsidiary, the result would be an increase in Goodman's holding in N.Z.F.P.. When added to the 24.9 percent holding already held by the Goodman/Wattie nominee, Dominion, the extension of the full offer to Goodman could result in a reverse takeover situation. Assuming that Goodman would take half of the Dominion holding in N.Z.F.P., and assuming that Goodman sold all their Wattie shares to N.Z.F.P., the result would be that Goodman would hold approximately 30 percent of the shares in N.Z.F.P. This is considered by most to be a controlling interest and is at least enough not to be considered in the best interests of N.Z.F.P. shareholders.[13] The offer was therefore limited to those shares not beneficially held by Goodman or its subsidiaries and meant that the offer was aimed at only 41.1 percent of the shares in Wattie to achieve a 65 percent holding for N.Z.F.P.

This however gave rise to further problems for N.Z.F.P. Because N.Z.F.P. were seeking such a small percentage of the total shareholding, it only required a third party, friendly to Wattie/Goodman or interested in Wattie's independence, to acquire 16 percent of Wattie

shares to block the takeover. It should also be noted that while N.Z.F.P. were assembling their 24.9 percent holding in Wattie other unnamed parties had been active in the market. Such a "white knight" manoeuvre had recently been used by Dominion Breweries to save Mount Cook Airlines from the T.N.L. Group.

Further conditions to N.Z.F.P. offer were, that it was conditional on attaining a maximum 90 percent acceptance from those to whom offers were made, or a minimum of 20 million acceptances. The offer was therefore not only made to part of the Wattie shareholding, loosely termed a "partial" offer, but also conditional on a stated minimum acceptance. The offer was further conditional on the granting of consent by the Examiner of Commercial Practices unconditionally or on a condition acceptable to N.Z.F.P. on or before the 14th of May 1984. Acceptances closed on Wednesday the 29th of February. There was therefore the possibility that acceptors would have their shares tied up for two and a half months before they knew if N.Z.F.P. were bound by their acceptance.

D. <u>Reaction to the Offer</u>

The initial reaction of Wattie to the takeover offer was negative. The Board of Wattie wrote to its shareholders and advised them not to accept. They said the consideration was "grossly inadequate" and was unfair since it was not extended to Goodman.[14] This reaction Mr Lynn Papps called "rather defensive".[15]

N.Z.F.P.'s chances of success were however not highly rated. The general feeling was that the bid had sprung from the reaction to the Wattie/Goodman holding in N.Z.F.P. rather than a carefully thought out business expansion strategy.[16] As for the possible outcome three predictions were made; that a Wattie/Goodman's "friend" would buy up 16% holding in Wattie and frustrate the offer, that a takeover move would be made for N.Z.F.P. itself, or a legal challenge would hold the offer up for some months. Gordon Wattie

however said that he would not be surprised if the bid was successful. These mixed feelings led some financial observers to question the future of the N.Z.F.P. management.[16] It was claimed that if this bid, coming so closely on the heels of the unsuccessful bid for Odlins, proved to be a failure, questions might be raised about the management. This rather sensationalist view, while adding to the general atmosphere, proved to be unfounded.

From the 29th of December a series of "detailed negotiations" took place between N.Z.F.P., Wattie and Goodman representatives to discuss the takeover. The negotiations were aimed at, and looked likely to result in, an agreement under which N.Z.F.P. and Goodman would have been restricted to a limited but equal shareholding of Wattie, thus preserving Wattie's independent position. W.T. Morriss, Chairman at Wattie, blamed the collapse of these negotiations on Goodman being unprepared to proceed.[17] Goodman denied responsibility for the breakdown, however its reluctance to agree can be understood in the light of later developments.

The talks broke down on the 17th of January and the Wattie Board issued a revised letter of advice to shareholders.[18] On the 9th the formal offer was distributed and a letter from Messrs G.P. Shirtcliffe and P.H. Goodman, the Goodman nominees on the Wattie Board, was also distributed.

The letter to shareholders from the Wattie Board, excluding the Goodman nominees, reverses the initial advice and recommends acceptance of the offer. The previous statement from Wattie that the consideration was "grossly inadequate" is explained away in the letter as "adopting a defensive approach in order to facilitate discussion with N.Z.F.P.". In the light of N.Z.F.P.'s statement that no increase in consideration was possible and private discussions between N.Z.F.P. and Goodman, which contained proposals which would have had "serious consequences for Wattie and its shareholders", the Wattie Board recommended acceptance of the offer. However, the letter went on to recommend that shareholders not

accept the offer until the decision of the Examiner of Commercial Practices was known and thus not lose the power to deal with their shares in the intervening period. Hope was still held that the takeover would eventually be unsuccessful and Wattie's independence would be preserved. Most Wattie shareholders did follow this advice and only approximately 1000 shareholders accepted N.Z.F.P.'s offer.

The Goodman nominees directors understandably did not agree with this recommendation. In their letter to Wattie shareholders[19] they query the reversal of the Board's recommendation. The adequacy of the consideration is questioned by examining some of the calculations used in the N.Z.F.P. valuation of Wattie. Attention is also drawn to the restrictive voting rights enjoyed by N.Z.F.P. shares[20] and the conditional nature of the offer.

This letter was however only a small part of Goodman's opposition to the offer. They also wrote to the New Zealand Stock Exchange seeking the support of the Exchange for opposition. Finally Goodman's board members arranged a protective buying campaign for Wattie shares to block the takeover.

E. The Defensive Tactics

If the takeover had gone ahead in its stated terms, it would indeed have resulted in a serious loss for Goodman. The Goodman holding of 35 percent in Wattie would have been substantially reduced in value. Goodman would have been reduced to holding a 35 percent minority in a private company where the remainder of the shares were held in one 65 percent controlling block. Goodman would have had no say in the future of Wattie and any premium paid by Goodman to reflect the control potential of their interest would have been lost by the takeover. As the Goodman Board said in a statement on the 17th of June:[21]

> "Goodman's shareholding in Wattie is its largest single investment and a key element in the group's ability to

provide strong commercial leadership and impetus in the food industry."

Goodman argued that not only would the investment, which was worth approximately $28 million, be seriously reduced in value but also that Goodman's position as a leader in the food industry would have been lost and the market would have reacted accordingly.

Further to this loss, Goodman's interest in N.Z.F.P. itself, held through Dominion, would lose value, due to the massive issue of N.Z.F.P. shares required to complete the takeover. Altogether it was estimated by professional advisors that a successful bid by N.Z.F.P. would have reduced Goodman's market capitalisation by at least $120 million. It is therefore understandable why the Goodman Board considered it crucial to the interests of Goodman's shareholders that Wattie remain a listed, independent company.

In pursuance of this the Goodman Board made a protective arrangement with Brierley Investments Limited (Brierley). Brierley bought Wattie shares on the market and thus attempted to block the N.Z.F.P. offer. The shares were then sold to the Dairy Board which had intended to acquire closer links with Wattie but not at the inflated price prevailing on the market at the time. Goodman made up the difference between the market price at which Brierley bought the shares and the below market price at which they were sold to the Dairy Board. Together with fees for Brierley and financing costs the scheme cost Goodman approximately $20 million. The Securities Commission is at present investigating this and other aspects of the takeover. In the end Brierley managed to warehouse approximately 11.7 percent of Wattie's total shareholding. A further 2 percent was sold to friendly parties with the help of two other companies, suspected to be the Saudi Corporation, a merchant Bank; and T.N.L. of which Goodman owns a 20 percent holding.[22] Brierley was paid for its efforts by a special issue of 4.7 million ordinary Goodman shares, which were eventually sold to third parties by Brierley.

F. Withdrawal of the Offer

On Friday the 17th of February N.Z.F.P. withdrew its offer and reached an agreement with Goodman. This agreement involved Board representation in Wattie for N.Z.F.P. and Board representation in N.Z.F.P. for Dominion Industries, the equally owned subsidiary of Wattie/Goodman. Further agreements were reached on the question of limiting cross-shareholdings between the companies. N.Z.F.P.'s holding in Wattie subsequently fell to 23.7 percent and Dominion's holding in N.Z.F.P. fell to 23.6 percent. On the same day the application for consent was withdrawn from the Examiner of Commercial Practices. Further, the Securities Commission announced a full inquiry into all dealings with the three companies' shares as far back as the 1st of June 1980.[23]

The reason for the withdrawal of the offer is unclear. Mr Shirtcliff said[24] subsequently, that it was the result of Goodman's defensive tactics. This may not be strictly true, as a 16 percent holding was required to absolutely block the success of the takeover, however Brierley's buying must certainly have slowed acceptances for N.Z.F.P.'s offer. The three Wattie nominees on the Goodman Board, Messrs W. Morriss, J. Haworth and C. Lyon, said in a statement[25] that they were not parties to, and did not know of, the action to involve Brierley. Further Mr Haworth said that it was not accepted that the offer was withdrawn because of the Brierley action. He said:

> "In the opinion of the Wattie Board the N.Z.F.P. bid failed primarily because of Wattie's opposition and the refusal of the Examiner of Commercial Practices to give consent."

What exactly is meant by "Wattie's opposition" is unclear, however the truth of the matter may well be that a combination of factors resulted in the frustration of the offer, these factors being the Brierley buying reducing the number of available acceptances, the reluctance of Wattie's shareholders to make early acceptances, the

intervention of the New Zealand Stock Exchange, the lack of an answer from the Examiner and the prospect that the case was highly likely to go to a hearing of the Commerce Commission. With the NZ Growers Association and the trade unions calling for a Commerce Commission hearing, N.Z.F.P. must have seen the possibility of waiting for months before a decision was made either way.

G. The Stock Exchange Suspension

On the 23rd of December, the day that N.Z.F.P. announced its offer, it also advised the Stock Exchange of the offer. On the 30th of December the Executive Director of the Exchange, Mr R.B. Gill, sent a telex to the Managing Director of N.Z.F.P., Mr W. Hunt, asserting that the offer, by restriction to only Wattie shareholders other than Goodman or its subsidiaries, appeared to be in breach of Clause 612 of the Takeover Code of the Exchange. N.Z.F.P. were requested to explain why all shareholders were not being treated equally. Clause 612 which was inserted into the Listing Manual in 1981, reads:

> "All shareholders of the same class shall be treated similarly by the offeror except that allotments of less than a marketable parcel of shares may be satisfied by cash. The amount shall be stated in the offer documents."

Mr Hunt replied on the same day, asserting that N.Z.F.P. were not in breach of Clause 612 and pointing out that the Companies Amendment Act 1963 places no obligation on the company to make offers to all shareholders of the target company. The N.Z.F.P. offer was in fact fully within the terms of the 1963 Act. Mr Hunt's view was that Clause 612 meant only that those shareholders of the same class to whom an offer was made had to be treated similarly and not that a similar offer had to be made to all shareholders in the class.

When this reply was received on the 4th of January Mr Greene, Vice President of the Exchange, attempted unsuccessfully to contact Mr

Hunt by telephone and talk N.Z.F.P. into amending the terms of the offer in a way that would be acceptable to the Exchange. Mr Hunt however did not reply to Mr Greene's attempts to contact him.

On the 9th of January Mr Gill sent a further telex to N.Z.F.P. reiterating its view of Clause 612. On the 13th of January N.Z.F.P. despatched the written offer and on the 16th confirmed to the Exchange that the takeover was proceeding. Goodman representatives confirmed that Goodman was not a party to this exclusion from the offer.

On the 18th of January 1984 a meeting of the Executive of the Exchange was convened and as a result Mr Gill sent a telex to the Chairman of N.Z.F.P., Wattie and Goodman, and later to the regional exchanges and to the media. This telex re-affirmed the Exchange's interpretation of Clause 612, asserted the Exchange's duty to protect minority shareholders in target companies and advised that quotation of N.Z.F.P.'s shares on the New Zealand Stock Exchange would be suspended from Monday the 23rd of January, and similar action would be sought from Australian Stock Exchanges, until such time as N.Z.F.P. complied with Clause 612. The telex noted that the Securities Commission's review of the law and practice on takeovers specifically proposed giving Clause 612, as interpreted by the Exchange, the force of law.

The suspension was to be indefinite and the Exchange hoped it would result in bringing pressure to bear on N.Z.F.P. to comply with the Takeover Code. The Exchange considered that there had been a serious breach of the Takeover Code resulting in a loss of free-dealing and discriminatory treatment of shareholders. The delay in implementation of the suspension was to avoid some of the undesirable effects on small shareholders; those small shareholders of a mind to sell would have the chance to do so before the suspension took place.

N.Z.F.P. replied through its chairman, Lynn Papps, that it expected the suspension to have little effect on the takeover, as shares would continue to be traded off-market.[26] On January the 21st however, three days before the suspension was to have effect, N.Z.F.P. made an ex parte application for an injunction restraining the Stock Exchange. This application was granted. Lynn Papps stated that the application was made because:[27]

> "We want more time to discuss with the Stock Exchange."

On the 26th of January the matter was given a full hearing before Barker J. and on the 7th of February judgment was delivered upholding the injunction.[28] The Stock Exchange appealed this decision to the Court of Appeal for a declaratory judgment on questions relating to the legal status of the Listing Manual, which contained the Takeover Code. This appeal was heard on the 11th and 12th of July and judgment was delivered by Woodhouse P. on the 30th of July[29] finding for the Exchange on the questions put to the Court. By the time the appeal was heard however N.Z.F.P. had withdrawn its takeover bid and had withdrawn from the proceedings. The appeal was defended by the Listed Companies Association Inc. and an amicus curiae acting in place of N.Z.F.P.

3. N.Z.F.P. v. NEW ZEALAND STOCK EXCHANGE

The Stock Exchange's action and the ensuing litigation raised some interesting points concerning the status of the Exchange's controls of the securities market, in particular the status and interpretation of the New Zealand Stock Exchange's Takeover Code.

A. Preliminary Points

The case was first argued in the High Court before Barker J. who delivered a lengthy oral judgment. Before beginning to study the

issues of the case in hand Barker J. made a clear statement that the Court would not be concerned with commercial considerations, the desirability of the takeover, or the public interest considerations of the case. The judgment of the case was isolated to the law in its present state, despite the considerable debate on the adequacy of the law in this area, and was isolated to the necessary legal questions only.

Two further necessary preliminary points were made. Firstly it was clearly stated that the offer was fully within the requirements of the 1963 Companies Amendment Act. Nothing in this Act requires an offer to be made to all shareholders of the target company. Section 2 of the Act clearly contemplates partial acquisitions of a company's capital. There is however more than one method of making a "partial" offer. There is the limiting of eligible offerees, as took place in this case, and there is the extension of offers to all shareholders and pro-rating of acceptances to the level of shareholding required. The latter type is the only type of "partial" offer permitted in many jurisdictions. Whether or not either type of partial offer should be permitted was however not a question for the Court.

Secondly it was pointed out by the Court that vague allegations of the "spirit" of the legislation or rules do not provide any reliable basis for interpretation of a contract or legislation. The intention of the Exchange in seeking to protect the interests of small shareholders is no aid to interpretation. Barker J. quoted from McCarthy J. (as he then was) in the Court of Appeal decision Multiplex Industries Limited v. Speer:[30]

> "We must construe the Act as it is, not legislate by extending clear language."

B. Issues Before the High Court

Broadly two distinct legal questions were raised before the High Court. The first question raised was what power did the Exchange

have to suspend listing and what were the limitations or conditions imposed on this power? It was this question which was eventually taken to the Court of Appeal by the Stock Exchange. In this area Barker J. also made some interesting comments about the appropriateness of suspension as a sanction and the unsatisfactory state of the law governing company takeovers and investor protection. The Court's decision in this area has considerable effect on the scope of investor protection offered by law.

The second major question before the High Court was the interpretation of Clause 612. If the Exchange had a right to suspend listing, which was conditional upon the breach of this clause, then whether or not N.Z.F.P.'s actions breached the clause became crucial. The Courts decision on this point, though not taken to the Court of Appeal, also had implications for any proposed legislation.

C. Questions Removed to the Court of Appeal

Four questions were put to the Court of Appeal for a Declaratory Judgment under the Declaratory Judgments Act 1908. These questions arose from the High Court's findings on the status of the Listing Manual and the Exchange's power of suspension. Barker J. held that the Exchange was required by the Shareborkers Amendment Act to stipulate the conditions in the form of Rules of the Exchange and not as terms of the Listing Agreement, as had been done before the Act.[31] Alternatively it was held that if the Exchange could stipulate listing requirements by way of contract, then the Exchange's power to vary these requirements was limited.[32] The Exchange felt, for reasons which will be discussed later, that it was important to clarify these issues, even though N.Z.F.P.'s offer had been withdrawn. The questions before the Court of Appeal were therefore framed to resolve these issues and not to specifically address the matters in issue between N.Z.F.P. and the Exchange. The formal questions were as follows:

Question 1:

Do the provisions of Section 7 of the Sharebrokers Amendment Act 1981 require the New Zealand Stock Exchange to make, as Rules in terms of that section, the conditions and requirements to be complied with by incorporated companies if such companies are listed on the exchange operated by the New Zealand Stock Exchange?

Question 2:

Does the New Zealand Stock Exchange have jurisdiction to make as rules, in terms of Section 7 of the Act, provisions purporting to stipulate the conditions upon which incorporated companies will be granted official listing on the exchange operated by the New Zealand Stock Exchange?

Question 3:

Is the Listing Agreement binding on N.Z.F.P. and enforceable against it?

Question 4:

On its true construction does the obligation accepted by N.Z.F.P. under the Listing Agreement extend to and include an obligation to observe and perform all the provisions of the listing requirements as may be varied from time to time and forwarded to it by the New Zealand Stock Exchange?

D. The Exchange's Power of Suspension

On the First Issue before the High Court, the status of the Listing Manual and the Exchange's power of suspension, the Plaintiff (N.Z.F.P.) made two submissions which corresponded with the two possible sources of the Exchange's power. The thrust of both submissions was that the Exchange had, in this particular case, no power of suspension. Firstly it was submitted that N.Z.F.P. was not bound in contract by the provisions of the Takeover Code which did not form part of the Listing Agreement between the parties. Further it was submitted that the Takeover Code constituted "Rules" of the Exchange which had not been made in compliance with Section 7 of the Sharebrokers Amendment Act 1981. The Takeover Code was therefore invalid and not binding upon N.Z.F.P. Both these submissions relied upon the assumption that any power of suspension the Exchange may have, is conditional upon a breach of either the listing contract or of the rules of the Exchange.

The primary submission by the Defendant (The Stock Exchange) was however that the Stock Exchange had a right to suspend or cancel the right of quotation at any time. This right was conferred by Rule 12.02[33] of the Gazetted Rules of the Stock Exchange. Further, this right expressly formed part of the Plaintiff's Listing Agreement, accordingly it was not necessary for the Defendant to establish whether there had been a breach of the Takeover Code before taking action to suspend. It was therefore unnecessary to discuss the status of the Takeover Code because the Exchange had an absolute power, conferred in contract, to suspend. Rule 12.02 reads:

> "A company desiring to have its equity or loan securities or any class or classes thereof granted the right of quotation on the official list shall make application in that behalf to the Executive Office of the Exchange and pay the fee from time to time prescribed by the Executive. The Executive may, without assigning any reason, refuse to grant such securities or class of such securities the right of quotation on the official list and similarly may at any time suspend or cancel such right of quotation." (emphasis added)

It was this power that the Exchange sought to exercise against N.Z.F.P., a suspension from the Official List. This power is transferred into the Exchange's contract with the listed company by Clause 4 of the standard form listing agreement. This clause reads:

> "4. The Company acknowledges that, in accordance with the rules and regulations of the Exchange the Exchange may at any time suspend or cancel the Company's right of quotation on its Official List."

This power is again repeated in the Listing Manual by Clause 108 which reads:

> "108. The Exchange reserves the right to cancel or suspend listing or quotation of any security without assigning a reason."

This clause, contained in the 1976 Manual, is part of N.Z.F.P.'s contract with the Exchange by virtue of Clause 1(b) of the Listing Agreement which reads:

> "(b) Comply with the relevant Requirements and Conditions of the Official Listing as from time to time set out in the Exchange's Listing Manual."

The Defendant's argument therefore was that the suspension of the Plaintiff was merely an exercise of this power, and whether or not the Takeover Code is valid or binding is irrelevant to that power.

Barker J. however did not accept this interpretation of the Exchange's power, and held that the Exchange is not allowed to suspend arbitrarily. Barker J.'s reason for this conclusion was that the Exchange was a Statutory Body, charged by the legislation with a number of public interest duties. Such a body, it was held, cannot have been authorised to act wholly capriciously. The only support for this contention is that Clause 606 of the Takeover Code states:

> "606. Where the shares of either offeror or offeree company are listed, Exchanges will normally continue quotations during currency of the offer except that the Exchange may suspend quotations if it believes that:
>
> * a false market exists; or
> * a breach of this Code has been committed; or
> * there is non-compliance with the requirements of the Listing Manual (including "Spread")."

From this Barker J. concludes that the Listing Manual itself indicates that there has to be some breach of the listing requirements for the listed company to be suspended.

There are however a couple of points that should be noted here. Firstly Clause 606 is limited to suspension during takeovers and therefore cannot really be said to limit the power of suspension generally. Secondly this interpretation of Clause 606 specifically contradicts Clause 108, which explicitly says no reason need be given. Finally it is appropriate to note that the Exchange need only believe that a breach of the code has been committed. The weak language of Clause 606 does not really warrant Barker J.'s interpretation of the effect of the Clause.

Barker J. however concludes that:[34]

> "Ordinary principles of fairness must apply and militate against such an arbitrary approach."

Alternatively he held that if the power exercised stems from contract, a term must be implied into the Listing Contract that, provided the listed company carries out its obligations under the Listing Agreement and the Listing Manual, the Defendant will not arbitrarily withdraw the Listing. In support of this conclusion Barker J. offers no authority beyond Section 4(i)(b) of the Share-

brokers Amendment Act which states that a function of the Exchange is to specify conditions and terms of the listing. It is argued that the word "conditions" implies that if the conditions are fulfilled, listing will be granted and sustained.

However this interpretation conflicts with Rule 12.02, which states no reason need be assigned when refusing or suspending listing, and Clauses 107 and 108 of the Listing Manual. Clause 107 reads:

> "107. Companies which conform to the conditions set out in this Manual may be considered for official listing but are not entitled to listing by reason of such conformity."

Clause 107 forms part of the contract formed by the execution of the Listing Agreement and would count against the implication of such a term.

The only further support given by Barker J. for the limitation of the power to suspend is that the consequences of delisting lean heavily in support of such an interpretation. No authority is cited for limiting such an explicitly drafted power or implying into a contract a limitation on what is a very clear term.

It should be remembered that as a preliminary point to the judgment Barker J. said that factors of commercial consideration, public interest and proposed reform would be ignored in the judgment. Indeed at page 31 of the judgment he said:[35]

> "Vague allegations of the "spirit" of the Rules do not provide any reliable basis for interpretation of a contract or of secondary legislation."

The Court of Appeal made no direct statement on the Exchange's power of suspension. However by implication the argument of the Exchange has been accepted. Since the relationship between the Exchange and the listed companies is based solely on a contract which was held to

be enforceable and is unlikely to be reviewed for Administrative Law reasons, as is discussed in the following section, the Exchange's power of suspension would appear to be unfettered.

E. Questions of Administrative Law

What justifications can therefore be found for placing such limitations upon the power of suspension? Before the Court of Appeal it was argued by the Second Defendant (amicae curia in place of N.Z.F.P.) that such a limitation could be implied by administrative law.

If the exercise of the power can be regarded as the exercise of a statutory power of decision conferred by Rule 12.02, the imposition of a term that the Exchange will not withdraw a listing arbitrarily, by administrative law, is relatively straight forward. However if the power is limited to a term of the contract the matter becomes somewhat more complex.

If the power of suspension exercised stems from Rule 12.02 the decision to suspend is a statutory power of decision. An application can be made for a review of the decision under Section 3 of the Judicature Amendment Act 1972. The Court may then hold that an absolute discretion is unfair or unreasonable and imply a requirement that the Exchange may not arbitrarily withdraw a listing.

It was however held by the Court of Appeal that the Exchange's power of suspension was based entirely on their contract with the listed company and that the Exchange in fact had no power to make rules governing their relationship with listed companies. How such limits can be implied into the Exchange's contract with the listed company becomes a difficult question.

The first argument raised was that the Exchange has a public law responsibility to avoid acting arbitrarily in relation to the

exercise of its right of suspension. It was argued that in the end such a right has its origins in statute by reason of the statutory power given to the Exchange to enter into contracts, therefore action taken to suspend or cancel a listing might be made the subject of judicial review. The Court of Appeal decision in Webster v. Auckland Harbour Board[36] is said to support this argument. At page 650 of that case Cooke J. said:[37]

> "Undoubtedly a public body which has, as here, lawfully entered into a contract is bound by it and has the same powers under it as any other contracting party. But in exercising the contractual power it may also be restricted by its public law responsibilities. The result may be that a decision taken by the public body cannot be treated as purely in the realm of contract; it may be at the same time a decision governed to some extent by statute.

The Court of Appeal did not adopt this argument in the Exchange's case. It held that, whether a statutory body with local authority responsibilities or not, the question must still depend on whether that conduct falls within any one of the carefully defined and limited categories specified in the Judicature Amendment Act 1972. Any wider approach could never have been intended by Parliament. Otherwise any corporate body recognised by statute or owing its existence to a specific or general statute could have all its commercial operations subject to constant judicial review.

In the Exchange's case the Court of Appeal found two matters which put the Exchange's power beyond review. The first turns upon the character of the act involved when the Exchange enters into a Listing Contract. It may not follow by any means that such a step in itself amounts to the exercise of a statutory power even though it is clearly the exercise of a statutory function.

The second matter concerns the exercise by the Exchange of the power of suspension. The Court held that it was the exercise of a right given by the contract and thus clearly outside the scope of the exercise of any power under the statute; at best it could be

described as one step removed from the exercise of a statutory power. Only the latter step is the subject of challenge in the proceedings and is too remote to be classed as a statutory power of decision.

An interesting combination of sources of "Statutory Power of Decision" was also argued before the Court of Appeal by the First Defendant, the Listed Companies Association. It was argued that because of the reference to Rule 12.02 in Clause 3 of the Listing Agreement, Rule 12.02 was imported to the Listing Agreement and any exercise of the power in Clause 3 was in effect an exercise of Rule 12.02. In this way the exercise of the contractual power was in effect an exercise of a statutory power of decision. From this it was contended that, where under statutory power of decision, reasons are given by the decider it is always open for the Courts to review that decision as to the correctness of those reasons.

This argument was however quickly dispensed with by the Court. It was held that the relationship between the Exchange and a listed company is in contract alone. The purpose of Rule 12.02 was to enforce any suspension in the Exchange's domestic relations with its members. For this reason the reference to the power of suspension is made in Rule 12.02 but this does not lead to a conclusion that the relationship between the Exchange and listed companies takes on a statutory complexion.

As a residual argument before the Court of Appeal it was suggested that judicial review of the delisting might be available without recourse to the Judicature Amendment Act but on a wider approach to administrative law. Wade in Administrative Law says:[38]

> "Powers of public authorities are ... essentially different from those of private persons ... (A person) may act out of malice or a spirit of revenge, but in law this does not affect his exercise of his power. In the same way a private person has an absolute power to release a debtor or, where law permits, to evict a tenant regardless of his motives. This is unfettered discretion. But a public authority may do neither

> unless it acts reasonably and in good faith upon lawful and relevant grounds of public interest. Unfettered discretion is wholly inappropriate to a public authority which possesses powers solely in order that it may use them for the public good."

It is suggested that public bodies may never have truly unfettered powers.[39] That this extends to exercises of contractual power by public authorities is accepted in Cannock Grace District Council v. Kelly.[40] In this case it was accepted that review went beyond bad faith and capriciousness and extended to the Westbury[41] grounds that an impermissible consideration had been taken into account or some mandatory considerations had been missed. It was also suggested in Cannock that the proper ground of relief may have been certiorari.

Two matters are raised when applying this type of review to the Exchange. First there is the question of scope of any review. Presumably if the action is open to review on Westbury grounds it is also reviewable on grounds of lack of natural justice. Through natural justice it might quite easily be held that the absolute power be limited by implication of a term that listing not be arbitrarily withdrawn.

The second matter concerns the scope of the term "statutory body". At its widest this would include all bodies incorporated under statute. However this must for obvious reasons be limited to bodies which are statutory monopolies, for example the Post Office. Even this however would have absurd results for every commercial contract of a body such as the Dairy Board would be open to judicial review. In the Exchange's case it would seem that it falls outside this area of review. The contract in question is a commercial contract of service with the listed company. There would have to be serious reasons before such a contract should be disturbed. It seems unlikely that the Courts power of review extends this far.

This question of review outside the Judicature Amendment Act was left undecided by the Court of Appeal as it was not comprehended within the questions raised for consideration.

F. Status of the Manual

If however the power of suspension requires a breach of a condition before it can be invoked, as was held by Barker J., the question arises whether Clause 612 was a valid condition. Whether or not a breach of the Takeover Code allows the Exchange to suspend a listed company depends upon the status of the 1981 edition of the Listing Manual. N.Z.F.P. argued that the Takeover Code was not a valid condition because it was either an invalid Rule of the Exchange or it was not part of the Listing Agreement executed with the Exchange.

(1) The Manual as Regulations:

As regards the code being invalid as a regulation it was submitted to the High Court that the Takeover Code, and therefore presumably the whole Listing Manual, constituted rules of the Exchange and as such were not made in compliance with Section 7(3) of the Sharebrokers Amendment Act, which requires approval of the Governor-General in Council and publication in the Gazette. In approaching this question Barker J. began by holding that the legislation clearly contemplated that listing, delisting and suspension be covered by rules of the Exchange. This conclusion was based upon the observation that Section 4(b) of the Act required the Exchange to promote and specify the conditions and terms for the listing and trading of securities on the Exchange. This he held was a statutory function of the Exchange and when read alongside the power to make rules for the conduct of business on the Exchange, concluded that rules could, and in fact should, be made dealing with listing requirements and specifically takeover practices.

Further Section 3(3)(f) provides that companies will be "listed for the time being" which Barker J. interpreted as meaning that listing will be continued until some new arrangement is made. In the judgment he holds that in enacting the new legislation Parliament contemplated a new regime for listing, delisting and suspension of listing. This new regime was to consist of rules, fresh contracts or both. It is not clear whether the argument that the Exchange in fact had no power to make rules as regarding listing was argued before the High Court, however Barker J. is clearly of the opinion that the Exchange not only has the power to make such rules but is required by the new legislation to do so.

Barker J. goes on to identify two reasons why the Takeover Code is invalid as Rules of the Exchange. Firstly, since the rules go beyond the general law governing takeovers, they must therefore be rules for the conduct of business on the Exchange and as such are required to be made in accordance with Section 7(3). Since none of the Listing Manual has been approved or gazetted is is therefore invalid.

Secondly Rule 12.01, which was made in accordance with Section 7(3), purports to delegate the power to make regulations concerning listing to the Executive. Barker J. considers this to be an unauthorised delegation of the Exchange's rule making power to its executive and on normal principles of administrative law, those parts of the listing requirements purporting to delegate matters of principle, such as general listing requirements, to the Executive are invalid. Matters of administrative detail, it was held, could be delegated. Rule 8.08 which allows the Executive to make regulations governing incidental matters of detail or administrative machinery relating to matters provided for in the rules is therefore unaffected. However matters such as the Takeover Code were considered to be far from administrative detail. Authority for this conclusion on unauthorised delegation was found in Hawkes Bay Raw Milk Company Limited v. New Zealand Milk Board.[42] Barker J. states in summary that:[43]

> "General Listing requirements must be rules for the conduct of ordinary trading on the Stock Exchange. These requirements should have been included, at least in general terms, in the gazetted rules ... Moreover, rules which purport to delegate to the Executive listing requirements when such listing requirements should have been made by means of the Rules, must be an improper delegation."

The whole conclusion stems however from the finding that it was a role of the Exchange to make rules as to the conditions of listing. This question was taken to the Court of Appeal in order to establish that the Exchange was not only not required to make such rules but in fact had no power to make such rules.

(2) <u>The Court of Appeal Decision on Questions 1 and 2</u>:

The Court of Appeal approached the question from a completely different perspective. It was held that the new legislation did not intend to change the method in which listing conditions were made. The Act was only concerned with the conduct of activities of the Exchange and its members and not on the whole concerned with the conduct or activities of listed companies. This is supported by the long title to the parent Act which reads:

> "An Act to consolidate certain enactments of the General Assembly relating to sharebrokers and Stock Exchanges."

The aim of the Amendment Act is consolidation of the Stock Exchange - sharebroker relationship rather than amendment of the relationship between the Exchange and listed companies.

To support its eventual conclusion that the Act neither requires nor enables statutory rules to be made by the Exchange the Court of Appeal considered the meaning and purpose of Sections 4 and 7 of the Act. It was submitted by the Second Defendant that the conditions

of listing must be made as Rules of the Exchange because they are a matter relating to "the conduct of business" on the Exchange. The Court however pointed out that the thrust of the two sections is different. Section 4 is concerned with the functions of the Exchange whereas Section 7 is directed much more narrowly to its rule-making powers. It would be wrong to extend the ordinary and natural meaning of the rule-making authority to include all the functions of the Exchange. It is noted that although the various specific provisions of Section 7(2) are not intended to provide an exhaustive table of the matters which are to become the subject of rules, there is nothing among them which is even remotely concerned with controlling the conduct of listed companies or their businesses. Each item is in fact related only to internal management by, and the affairs of, the Exchange.

Further this is emphasised by the fact that Section 7(4) provides that the rules shall be "binding on the members of the Exchange". Nothing is said about listed companies or any other outside organisation.

Finally the language of Section 4(1)(b) is contrasted against the language of Section 4(1)(c). Section 4(1)(b) requires that the Exchange "regulate and promote uniformity in the conduct of its members and of business of its members". This is imported directly into Section 7(2) where paragraph (b) requires rules dealing with "the terms and conditions on which a member may operate".

In contrast paragraphs (b) and (d) of Section 4(1) omit any reference to regulation. The respective functions are "to promote and specify" or "to promote". Though it was argued by the Second Defendant that "promote" could include in its meaning regulation the Court considered that this was language[44] "entirely appropriate to the incorporation of conditions and terms of listing in contracts of adhesion". The deliberate use of the word "specify" in fact implies that some power other than the power to regulate under Section 7 is to be used. Section 5 provides the necessary mechanism for that

power, by providing ways in which the Exchange may enter into contracts.

The argument adopted by Barker J. that Section 3(3)(f), in providing that securities will continue to be listed for the time being, implies that a change is to take place in the method of specifying listing conditions, is explained as only providing a transition period. No implication of new regulations is raised.

With the decision that listing conditions cannot be made by regulation the only remaining conclusion is that listing requirements are a matter to be specified by contract.

(3) The Manual as a Contract:

The question that remains therefore is whether the Manual is a valid contract with listed companies.

A number of Australian cases have dealt with the question of whether a Stock Exchange and a listed company have between them a binding contract which gives legal effect to the listing requirements.[45] The cases have held that such a contract exists between the listed company and the Exchange, which arises on acceptance of a listing. N.Z.F.P. had a contract executed in 1976, with the Stock Exchange Association. This agreement, which incorporated the Listing Manual in its 1976 form, was silent on the matter of takeovers. The benefit of all contracts with the Association devolved upon the New Zealand Stock Exchange under Section 3(3)(b) of the 1981 Act.

In the Designbuild v. Endeavour[46] case however the form of listing agreement was not explicit as to terms, and the Court felt it must ascertain the contents of the contract by inferring terms implied by the contracting parties. The Court was only prepared to imply terms necessary in order to give business efficacy to the relationship between the parties, the obligation to observe the listing require-

ments was not such a term. However two factors distinguished this case. Firstly N.Z.F.P. expressly agreed in their Listing Agreement to be bound to the Listing Manual.

Secondly in Designbuild implying a binding obligation to obey the listing requirements was not considered necessary because the Sydney Stock Exchange had absolute discretion to suspend or delist which was felt to be a greater sanction than binding a listed company to obey the Listing Manual.

In Howard Smith v. Ampol Petroleum Limited the Privy Council affirmed the earlier decision of Street L.J. which recognised the contractual force of the Stock Exchange's listing requirements. It is therefore clear that listing requirements can, and in this case would, bind a listed company in contract.

The important question that remains is whether N.Z.F.P. is bound by the Takeover Code of the Listing Manual, inserted after execution of their Listing Agreement. Clause 1(b) of the Listing Agreement reads:

> "(1) The Company will for so long as the Exchange continues to grant the Company the right of quotation on its Official List;
>
> (b) Comply with the relevant requirements and conditions of Official Listing as from time to time set out in the Exchange's Listing Manual."

This clause would appear to provide the Exchange with a unilateral right of variation whereby the company is required to comply with any amendments the Exchange may make. This intention would seem to be borne out by Clause 3 of the agreement which requires the listed company on variation of the listing requirements by the Exchange to inform their shareholders of the variation and if the Articles of the company require amendment, put such amendments to the shareholders. If such amendments are not approved the Exchange may, at its discretion, remove the company from the Official List. This is a pretty broad power and seems to envisage fairly sweeping powers of variation.

Barker J. however did not accept such a wide power of variation. It was held that the power of variation only extended as far as additions and variations within the reasonable contemplation of the parties at the time the agreement was exercised. This conclusion is supported with the case of Hole v. Garnsey[48] and subsequent authority.[49]

Having accepted this limitation on the variation clause Barker J. went on to hold that the changes made by the Takeover Code were outside the reasonable contemplation of N.Z.F.P. when the agreement was executed. It was held that when N.Z.F.P. executed this agreement it was entitled to assume that the only restrictions and requirements concerning takeovers were those found in the legislation and it was not in their contemplation that the Exchange would use the open-ended power in the contract to make new terms, which would have the effect of restricting statutory rights, without at least the implied assent of N.Z.F.P. For these reasons Barker J. concluded that the Takeover Code was not binding on N.Z.F.P. because it was not part of their contract with the Exchange.

The Hole v. Garnsey line of authority is however not as easily applied to this case as may at first be thought. This line of authority applies to a specialised fact situation. Hole v. Garnsey concerned an alteration of the rules of a registered industrial and provident society. The alteration was made not by a variation clause but by a resolution of the members, and required members of the society to subscribe for additional shares. The resolution was held not to bind members who neither voted for the resolution nor otherwise assented to it. Lord Tomlin clearly said that[50] "the power of amendment must be limited to amendments reasonably considered to be within the contemplation of the parties at the time the contract was made, having regard to the nature and circumstances of the contract". It is the last part of this statement which must be remembered.

This decision was followed by Ostler J. in New Zealand Fruit Growers Federation Limited v. Registrar of Building where Ostler J. said:[51]

> "It is clear from the decision of the House of Lords in Hole v. Garnsey that as against dissentient members the power of amendment of the rules must be confined to such amendments as can reasonably be considered to have been within the contemplation of those members when they joined the Society." (emphasis added)

Again the case was limited to amendment of the rules of a society against members of that society.

In the case of Eltham Dairy Co-Operative v. Johnson Meyers C.J. said of Hole v. Garnsey:[52]

> "It will be observed that the Learned Lord is referring only to alterations in the constitution of the company and not to matters of contract apart from what may be regarded as the constitution of the company."

This case again concerned the relationship between a body and members of that body.

In the most recent case of Black, White and Grey Cabs Limited v. Reid[53] the doctrine was applied by the Court of Appeal in 1984. However once again the case concerned the relationship between a member of a body and a variation of the rules of that body.

In all the cases in which Hole v. Garnsey has been applied previously the contract has been of a very different nature. The contracts have involved the relationship between a member and an organisation. The contracts have been of an ongoing institutional nature, the type of contract under which the member acquires a significant right, for example the right to income, which he or she expects to keep.

In the case of the listing contract the situation is very different. Firstly, the contract contains unilateral rights of termination for both parties. Rule 12.02 which is imported to the Listing Manual provides a right for the company to cancel the right of quotation. This right is equal to the right of the Stock Exchange in Rule 12.02 to suspend or cancel the contract. The contract is not therefore of an ongoing nature as it can be terminated at any time by either party. The contract is in fact merely a contract of adhesion for the performance of a service. All the agreement provides is that as long as the listed company pays the fees required and observes the conditions requested of it, the Exchange will list the company on its Official List. The listed company does not become a member of the Exchange, contributes no capital and acquires no rights of management, as did the Plaintiffs in the Hole v. Garnsey case.

It was therefore submitted to the Court of Appeal that the "reasonable contemplation" limitation is merely a term to be implied into certain types of contract where protection of a valuable interest is required.

(4) The Court of Appeal's Decision on Questions 3 and 4:

The judgment of the Court of Appeal accepted this limitation on the application of the Hole v. Garnsey doctrine. The Court held that the qualification which was read into the right of variation is not something which will follow as a matter of course. Whether or not it is read in will depend upon whether or not such a qualification can be implied as a necessary term. This is supported by the Court's judgment in Black, White and Grey Cabs Limited v. Reid where Richardson J. said:[54]

> "Whether or not a regulation subsequently laid down by one party is within the powers of amendment under the provision must be determined having regard to the surrounding circumstances including the relationship of the parties and the nature and object of the agreement."

The Court interpreted this as meaning that such an implication will not arise almost automatically. It will depend upon the very contract under consideration, construed within its own particular environment.

In the case of the Listing Manual it was found not to be possible to make such an implication. The Court said:[55]

> "In the present case it may be that no thought was given by anybody to the possible introduction into the Listing Manual of requirements concerning takeover bids. Nonetheless the provisions of the contract which anticipate general changes in the listing requirements are clear and entirely free of any ambiguity. Nor is it possible to spell out of the contract as a whole an implied term which would justify a qualification upon those provisions of a kind accepted in Hole v. Garnsey."

It was held that, in the light of the Exchange's continuing responsibility to promote the interests of both its members and the public at large, the contents of the Listing Manual could not possibly remain static in a changing commercial and economic climate. The functions of the Exchange could only be effectively performed by the introduction of new provisions to meet changing conditions and any qualification limiting the power of variation might well defeat important purposes of the listing requirements system.

It was further pointed out that it was not a matter of interfering with the affairs of individual companies but of maintaining a fair market in the interests of everybody for the buying and selling of securities. This wider function of the Exchange would be stultified if it were impossible to vary listing requirements without the concurrence of individual companies.

The importance of the ability to take immediate action demanded by business pressures is also noted. Absurd results could follow if some companies were free to challenge a change with others willing to acquiesce. One of the main benefits of making listing requirements by contract rather than by regulation is to allow greater

flexibility and avoid delays involved in approval and gazetting of rules.

Finally the Court notes that the Listing Agreement was not for any fixed term. An end could be put to it at any time either by the Exchange or by the listed company.

The Court therefore concludes that the Listing Manual requires that each listing, so long as it has the right of quotation on the Official List, will comply with contemporary listing requirements. Any limitation of the right of variation would inevitably defeat the purpose of listing requirements. Any limitation on the power of variation cannot therefore be implied into the Listing Agreement.

The Court of Appeal was not asked, and of course it became unnecessary, to go on and decide whether the Takeover Code was outside the reasonable contemplation of the parties. However it is submitted that for much the same reasons as advanced by the Court for not implying limitations on the right of variation, the variation actually made was within the reasonable contemplation of the parties. The very nature and purpose of the contract must make it contemplatable that substantial changes could be made, even changes which go beyond the general law on the subject.

Further the introduction of some takeover control must have been in the minds of the parties. As will be discussed later, by 1978 most overseas jurisdictions had adopted or were planning controls of the type adopted in Clause 612. The London City Code[56] had adopted Rule 27(4) on which Clause 612 was based. In Australia the Stock Exchanges had placed provisions governing the conduct of takeovers in their Listing Manuals. The Australian Associated Stock Exchange's listing requirements contain Clause 3R(9)(b) which is similar in intention to Clause 612 of the Exchange's Takeover Code. The New York Stock Exchange also had a similar requirement. It therefore must have been within the contemplation of a company the size of N.Z.F.P., which is in fact listed on Australian Exchanges,

that some requirements concerning takeover conduct, perhaps of the very type introduced by Clause 612, would be likely to be added to the listing requirements.

The result of the Court of Appeal's decision is therefore that the Listing Manual forms a binding contract between the Stock Exchange and the listed company and that contractual relationship was in no way qualified by the provisions of the 1981 Act. This contract contains a unilateral power of cancellation for both parties to the contract and a unilateral power of variation for the Stock Exchange. The nature and purposes of the contract do not allow the implication of a term limiting the power of variation as was implied in Hole v. Garnsey.

G. The Role of the Stock Exchange

One interesting aspect of both the High Court and Court of Appeal decisions in this case is how far Courts will go to imply terms into perfectly clearly worded clauses of contracts. Both the Exchange's power of suspension and the power of variation were clearly worded in the listing agreement. Barker J. found it necessary to imply terms into both these powers, finding a principle of law to control both these open-ended powers. Barker J.'s decision seems to be based on a desire to control the Exchange's powers to contract and regulate. The one issue that seems to underlie the whole case and explain Barker J.'s decision is the exact role of the Exchange. Two possible views of the Exchange seem to appear from the judgments. Firstly, the view which tended to be adopted by Barker J., that the Exchange was a statutory monopoly which should be controlled in the same way as other public bodies. The Exchange is viewed as having powers beyond its own members extending it into a controlling body of the security market. Thus its primary methods of control would be through regulation, which could extend beyond controlling its members to affect members of the public and public companies. Barker J.'s whole judgment seems to be based upon such an interpre-

tation of the Exchange's role which he concludes is introduced by the 1981 Act.

The second view appoints the Exchange a more limited role. The Court of Appeal is more reluctant to impose controls on the Exchange and seems to be adopting the view that the Exchange is merely an incorporated society of sharebrokers. As such, the Exchange should be free to make contracts for the supply of its services (i.e. Official Listing) in whatever terms it and it's clients (i.e. the listed companies) think fit. The Exchange's power of regulation therefore has been limited to its relationship with its members and its domestic operations. The Court of Appeal's interpretations of the 1981 Act, that it is concerned primarily with consolidating the law relating to the activities of the Exchange and its members, reflects this view of the role of the Exchange. This latter view is the more traditional role of the Exchange. In his judgment Barker J. says:[57]

> "[T]he Legislature seemed in the legislation to take the subject of listing away from the realm of pure contract and require the formation of rules on listing ... [T]he specifying of conditions and terms of listing was made a statutory function and the Defendant was required to make rules governing the conduct of business on the Exchange. The Legislature indicated that delisting was something to be provided for in the rules rather than by mere contract."

This conclusion not only implies that the entire Listing Manual may be invalid in its present form and must be re-drafted as rules of the Exchange but also implies that the Exchange has the power to regulate beyond its domestic affairs, a power which was given to the Exchange by the 1981 Act. It follows from this that the intention of the 1981 Act was to replace the existing Association with a new "Exchange" which would have a statutory authority to make rules and regulations for the Exchange. The result of this is that the Exchange becomes a quasi-governmental body rather than the self-regulating incorporated body which it was prior to the Act.

When the implications of Barker J.'s judgment are outlined it becomes obvious why the Exchange so energetically argued that they had no power to make "rules" which had effect beyond their own member constituents. For example listing requirements, which affect listed companies who are not members of the Exchange but clients of the Exchange. The Exchange's motivation therefore went beyond a desire to prove the validity of the Listing Manual or the Takeover Code.

If Barker J.'s judgment had stood unchallenged the Exchange would no doubt have had to seek some statutory clarification of their role and the intended effect of the 1981 Act.

The judgment of the Court of Appeal does clarify the Exchange's position. The Court says:[58]

> More generally it may be said as well that except indirectly the 1981 Act when taken as a whole is not concerned with the conduct or activities of listed companies. It is concerned with the activities of the Exchange and its members. Finally, the general purpose of the 1981 Amendment is simply to support the corporate and domestic purposes expressed in the long title of the parent Act which reads - "An Act to consolidate certain enactments of the General Assembly relating to sharebrokers and Stock Exchanges"."

Together with the conclusion that the Exchange cannot make rules relating to its relationship with listed companies the Court of Appeal's interpretation of the 1981 Act has reaffirmed the more traditional role of the Exchange.

The result is therefore that the Exchange is required as the self-regulating body of sharebrokers incorporated by statute with powers of regulation no greater than any other incorporated society. All functions beyond those relating to the regulation of conduct of its members are to be achieved by methods available to any incorporated body, notably the power to contract with other parties.

It is submitted that this is the proper interpretation of the Exchange's role. This is the role of Stock Exchanges in overseas jurisdictions, notably in Australia where Exchanges are body corporates incorporated under companies legislation and are not created by statute. This conclusion also makes the 1981 Act more understandable. It is easier to accept that the 1981 Act intended merely an administrative tidy-up, to do away with the previous duplication of bodies, rather than to introduce a new type of quasi-governmental exchange. The exact role that the Exchange should play in the control of takeover conduct will be dealt with later in this paper.

H. Interpretation of Clause 612

The second half of Barker J.'s judgment deals with the interpretation of Clause 612. Strictly it was not at all necessary for him to deal with this point. If the submissions of the Exchange were accepted, the Exchange had a contractual right to suspend arbitrarily and so the interpretation of Clause 612 was unnecessary. However if the submissions of N.Z.F.P. were accepted, as they were, the Takeover Code was void and the interpretation again becomes irrelevant. Barker J. however went on to deal with the party's submissions on this point. The question of interpretation of Clause 612 was not taken to the Court of Appeal because once the N.Z.F.P. offer had been withdrawn, the situation could be remedied by re-drafting Clause 612 as re-executing the Listing Agreements with the listed companies.

(1) All Shareholders Treated Equally:

The first submission of N.Z.F.P. was that the clause did not have the effect of prohibiting a "discriminatory" offer. The Court uses the term "partial offer" but the term "partial offer" refers only to the fact that less than the entire shareholding of the target

company was sought. The Exchange has never sought to limit partial offers when the offer is made to all shareholders and acceptances are pro-rated. "Discriminatory" is a better term for the situation in this case, where offers were made to only 41% of the shareholders and acceptances to be accepted in full.[59]

N.Z.F.P. claimed therefore that Clause 612 did not restrict them from excluding any given shareholder or group of shareholders from the ambit of the offer. It was argued that all Clause 612 required was that all shareholders of a class, <u>to whom offers had been made</u>, must be offered the same consideration. This restricted interpretation was contested by the Exchange who claimed that the clause clearly meant that all shareholders of the same class must receive equal treatment and this would not be achieved if some shareholders were excluded altogether from the offer. Such an interpretation, it was submitted by the Exchange, accords with the principles of fairness inherent in the Takeover Code. The clause in full reads:

> "612. All shareholders of the same class shall be treated similarly by the offeror except that the allotments of less than a marketable parcel of shares may be satisfied by cash. The amount shall be stated in the offer documents."

It seems quite clear that the aim of the clause was to stop the very practice which took place in this case. The Exchange, who drafted the rule, the press and the Securities Commission[60] clearly thought N.Z.F.P. was in breach of the clause. Though this is not, because of among other reasons, the contra proferentem rule[61], any guide to the Court's interpretation of the clause, it does demonstrate the intention behind the clause. The clause has its origins in Rule 27(4) of the London City Code which has the effect Clause 612 was intended to have by the Exchange.[62] Rule 27(4) requires the offeror to make the offer to all shareholders and then pro-rate acceptances back to the percentage level that it desires. Clause 612 is however hardly the equivalent of Rule 27(4), at best it enumerates a somewhat similar principle, however it fails to provide the means to achieve it.

In dealing with the interpretation of Clause 612 the Court rejected the contention that the Exchange's principles of fairness, inherent in the Takeover Code, must be borne in mind. Barker J. refers to the Multiplex[63] case and concludes that the desire for fairness may not be a valid aid to interpretation. Though, he says he has sympathy with the stated objects of the Exchange in trying to protect minority shareholders, this object will not effect the interpretation of the clause.

An interesting contrast to this approach is found in the Australian case of Kwikasair Industries Limited v. Sydney Stock Exchange Limited.[64] In this case Kwikasair was suspended from the Official List because the activities of the company were not being carried on within the spirit of the rules of the Stock Exchange. In refusing to overturn the decision of the Stock Exchange Street C.J. said:[65]

> "The Stock Exchange is not only entitled but it is bound to be vitally concerned with the maintaining of a fair market for the buying and selling of securities ... paramount and predominant amongst all [of its] objects is:
>
> '(b) To promote and protect the interests of all members of the public having dealings on the Sydney Stock Exchange or with members of the Sydney Stock Exchange.'"

It should be noted that Section 4(d) lays down the objects of the New Zealand Stock Exchange as:

> "(d) To promote the interests of its members and members of the public in relation to the listing, trading, underwriting and marke-ting of securities."

There is obvious similarity of purpose between the two Exchanges. Street C.J. goes on:[66]

> "Moreover, so long as the Stock Exchange continues in this community to discharge with the acquiescence of

> the legislature the important public duty expressed in its paramount and predominant object (Clause 6) the members of its committee should be left free to exercise honestly their powers of entry on or removal from the Official List unencumbered by any prospect of their having to face a litigious investigation of the correctness of their decisions. The powers of the Committee in this regard are arbitrary; they are intended to be exercised summarily and fearlessly in protecting the public interest."

This shows a somewhat different approach to the Exchange than the approach adopted by Barker J. who held that though he could see the force of the Exchange's intepretation, when one considers what it wishes to achieve, the words it chose do not necessarily achieve this object. They are at best he says equivocal. In the absence of any more express prohibition against this type of offer, the clause must be interpreted in the light of the existing legal rights of the offeror, in particular the 1963 Companies Amendment Act which permits this type of offer.

Barker J. finds support for N.Z.F.P.'s interpretation of the clause in the latter part of the clause which excepts allotments of less than a marketable parcel from the clause and allows these to be made up in cash. This, he says, shows that consideration for the offer was in the mind of the draftsman. Likewise the reference to amount.

Though a logical approach has been taken to the problem, I doubt that Barker J. has reached the best result. The Court again seems to be unable to accept that the Takeover Code was intended to go beyond the limitations of the much criticised 1963 Act, although the foreword to the Manual states that the listing requirements are "additional and complementary to the companies statutory obligations". It is admitted that the clause is ambiguous and badly drafted, however it is submitted that the same account should be taken of the obvious intention and purpose of the Exchange to fulfil its public interest functions. The clause was obviously intended to go beyond the obligations of the 1963 Act, as other sections of the Code in fact do.[67] The final conclusion is I submit that the

Exchange has been the victim of thoughtless drafting, though Barker J.'s approach does seem to be over-restrictive. This approach however may be explained by Barker J.'s interpretation of the status of listing requirements as Rules of the Exchange rather than as terms of a contract adhesion.

(2) The Class of Shareholders

The final submission for N.Z.F.P. was that the Goodman Group constituted a different class from all the other Wattie shareholders. This rather practical definition of the term "class" was supported by affidavits from Sir Lewis Ross, former chairman of N.Z.F.P. and David A. Clark, an independent holder of company directorships. The basic thrust of these affidavits was that Goodman, by virtue of their 30% holding, had effective control of Wattie. This controlling block of shares, from a commercial point of view, places Goodman in a different category to the other shareholders, who are primarily investors. Further Goodman's expected return from the takeover would be somewhat higher as they would expect the consideration to reflect some of the premium for control which their shares represented. In short Goodman's interest was somewhat different to the interests of the other shareholders. The affidavits also noted the undesirable effects involved for N.Z.F.P. if the offer were extended to Goodman's.

N.Z.F.P.'s interpretation of the word "class" is also supported by the authority of Re Hellenic and General Trust Limited[68] which, though in an entirely different context, deals with the definition of "class". In this case, approval was sought for a scheme by way of a takeover under the equivalent of Section 205 of the Companies Act. The Court was asked to decide whether the shares held in the company which was the subject of the arrangement (Hellenic) by a subsidiary (M.I.T.) of the company proposing the arrangement (Hambros) were in the same "class" as those of the other ordinary shareholders in Hellenic. The shares held by the subsidiary were of

the same kind as the others. However it was held they were in a different class because M.I.T. had substantially different interests to the other shareholders. In reaching this conclusion Templeman J. applied the dicta of Bowen L.J. in Sovereign Life Assurance Company Limited v. Dodd where he said:[69]

> "It seems plain that we must give such meaning to the term "class" as will prevent the section being so worked as to result in confiscation and injustice and that it must be confined to those persons whose rights are not so dissimilar as to make it impossible for them to consult together with a view to their common interest."

It seems from this that the word "class" can be defined to promote the intention of the section in which it is used. For Clause 612 N.Z.F.P. sought a very practical and commercial definition which would recognise the realities of the situation.

Barker J., however, found this definition too wide. The subjective investigation into the rights and expectations of a particular shareholder as distinct from one of his rights under the articles of company, was rejected. He says in conclusion:[70]

> "I am not inclined to the view that the word "class" in the context of Clause 612 means more than differentiation according to the company's constitution; e.g. preference shares as contrasted with ordinary shares. The ascertainment of "class" is to be governed by the Articles of Association."

In the context in which the word "class" is used here, the listing and transfer of shares, it is submitted that Barker J.'s conclusion must be correct. The word "class" is used in Clause 612 in a very different context and purpose to the use of the word in Section 205 and as such requires a stricter definition to do justice to the clause.

The wider more practical and commercial definition would however have provided a useful solution to the problem raised in this case.

The wider definition may be of some use later when discussing proposals for takeover legislation.

I. Suspension as a Sanction

One final point that Barker J. raises in his judgment, that may be of interest, are his comments on the suitability of suspension as a sanction. He is of the opinion that suspension is an inappropriate sanction because the people who are most likely to suffer are the numerous innocent shareholders who will not be able to trade upon the open market. Barker J. felt that the delay in implementing the suspension, which was supposed to allow the small shareholders time to trade, only exacerbated this problem. The threat of suspension must inevitably depress the market with the result that some of those for whom the Exchange professed concern might have to sell at less than true market value.

The Exchange's reply to this criticism was that the power of cancellation or suspension is the only sanction the Exchange has against any company which breaches the provisions of the Listing Manual. The Exchange felt that it must be prepared to exercise the power in order to secure a well-informed and orderly market.

Barker J, however concludes that this comes close to an acknowledgement by the Exchange that the present statutory and regulatory provisions and its current listing arrangements are less than satisfactory, a view which he shares. What alternatives there are to suspension by the Exchange will be looked at later in this paper.

J. The Effect of the Listing Agreement on Subsidiary Companies

One point which was not raised by the High Court and was not proceeded upon by the Court of Appeal was the question of whether the subsidiaries of listed companies were bound by the terms of the

listing. This point it is submitted is of crucial importance to this case since both N.Z.F.P. and Wattie-Goodman acted through subsidiary companies, who had not executed a listing agreement and therefore could not possibly be bound by the Takeover Code. Adopting a strict approach to corporate personality N.Z.F.P. have not committed a breach of the Takeover Code because the offer was in fact made by N.Z.F.P. Investments Limited, an unlisted company. This of course seriously limits the scope of the Takeover Code. Most major takeovers are made by using subsidiary companies, for example Dominion Industries, was used to acquire the Wattie-Goodman interest in N.Z.F.P. Therefore unless the takeover conduct of an unlisted subsidiary can in some way be disciplined against the listed parent company the Takeover Code becomes useless as a method of controlling takeover conduct.

There are three ways in which parent companies may be disciplined for the actions of their unlisted subsidiaries. Firstly if it is accepted that the Exchange's power of suspension is, as a term of the listing contract, unlimited and arbitrary, there is no problem which legal entity commits the breach, as no breach is required to be proved.

Secondly, even if the power must be exercised on proper grounds, grounds are provided by Clause 606 of the Listing Manual. One possible interpretation of this clause, which reads:

> "606. Where the shares of either the offeror or offeree company are listed, Exchanges will normally continue quotations during the currency of the offer except that the Exchange may suspend quotations <u>if it belives that</u>:
>
> * a false market exists; or
>
> * <u>a breach of this code has been commit-ted</u>; or
>
> * There is non-compliance with require-ments of the Listing Manual (including "Spread")." (emphasis added)

is that to justify suspension by this clause the breach of the code need not be made by the listed company at all, the only requirement is that the Exchange believes that a breach of the code has taken place. However some nexus would need to be present. It would probably be sufficient to show that the subsidiary was acting at the direction of the parent company and not for itself. It need not however be the same legal entity who breaches the Code as is suspended.

The third possibility involves the question of corporate identity. It is recognised that the veil of corporate identity will be lifted for groups of companies for certain purposes. Group accounting is one area in which the entire group of companies will be treated as one entity, there are several other areas of the Companies Act which do the same.[71] This lifting of the veil is however limited. For example in the case where one subsidiary is insolvent while the group as a whole is financially healthy, creditors of the subsidiary have no recourse against the group. There are however cases where the Courts have been willing to treat a subsidiary company as an agent of the holding company.[72] Examples of this arise in The Roberta[73], where a parent company has been held liable on a bill of lading on behalf of a wholly owned subsidiary, and Smith, Stone and Knight v. Birmingham Corporation[74], where a parent company was entitled to compensation on the compulsory acquisition of land owned by a wholly owned subsidiary. In the latter case Atkinson J.[75] concluded that while it was a question of fact in each case whether the subsidairy was carrying on the parent company's business or its own, six points were relevant in determining this question:

(1) Were the profits treated as those of the parent company?

(2) Were the persons conducting the business appointed by the parent company?

(3) Was the parent company the head and brain of the trading venture?

(4) Did the parent company govern the adventure and decide what should be done and what capital should be embarked on it?

(5) Were the profits made by its skill and direction?

(6) Was the parent company in effectual and constant control?

In the case of N.Z.F.P. and its subsidiary N.Z.F.P. Investments all the above criteria surely apply. With the further fact, which will apply in all subsidiary lead takeover situations, that the holding company supplied all the capital and enterprise for the venture, the Court is highly likely, if they adopt the Smith, Stone and Knight approach, to hold that the subsidiary is merely acting as the agent of the holding company. The holding company would therefore be responsible for the takeover conduct of the unlisted subsidiary and accountable for any breach.

4. POLICY AND REFORM

A. The Exchange as a Takeover Control Body

N.Z.F.P.'s attempted takeover also raises interesting questions about the state of controls over takeover conduct generally. Though the Court of Appeal did hold that listed companies were bound by the Exchange's Takeover Code, which presumably will be amended to accurately reflect the Exchange's intention, the controls over takeover conduct are far from satisfactory.

Control exercised by the Stock Exchange is unsatisfactory for a number of reasons. These being the unsuitability of suspension as a sanction, the scope of the Exchange, and the role of the Exchange generally.

Firstly as was shown in the N.Z.F.P. case that the Exchange is very limited as to the sanctions available to it. The only sanctions available are suspension or delisting, both of which are particularly unsuitable for takeover control. As was pointed out by Barker J.[76] in his judgment. The effect of suspension is usually to do the most harm to the small shareholders who lose the ability to deal on the market and will be unable to deal with the knowledge of a "market price".

Though an undesirable inconvenience suspension does little to directly effect the delinquent company. In this case, though N.Z.F.P. would have been suspended, this would not have stopped the takeover. Wattie shares could continue being exchanged off the market, even by members of the Exchange, as Mr Lynn Papps pointed out on the day the suspension was announced.[77] The Exchange's suspension had no effect on N.Z.F.P.'s takeover offer at all. Further N.Z.F.P.'s suspension would in no way have stopped N.Z.F.P. from increasing the holding in Wattie by "on market" buying.

Suspension only had the indirect effect in this case of making N.Z.F.P. shares less attractive as consideration for the offer. Few of Wattie's small shareholders would want to accept as consideration shares which could not be traded on the Exchange. If the offer had been a cash offer there would naturally be no such effect. Suspension therefore in most cases only poses an indirect inconvenience to the delinquent company rather than effectively controlling their conduct.

An alternative is to suspend the offeree company. This however is somewhat unfair on the offeree company's minor shareholders. At least when the offeror company is suspended the minor shareholders bear the detriment of their own board's actions and some indirect censure may be exercised by the aggrieved shareholders in the next general meeting. If the offeree company is suspended then the shareholders adversely affected have no connection with the wrong doing. Further the takeover can still proceed off the market and competitive buying to defend the target company would be stopped. The action would only further advance the takeover by removing securities from the market at the very time that competition on the market should be encouraged.

Suspension is therefore rather a "blunt instrument" as far as sanctions go. The Exchange does in fact have an alternative sanction which would have had a more direct influence in this case. Rule 16.04 of the Rules of the Stock Exchange provides:[78]

> "16.04 The Council may by resolution, notify regional exchanges forbidding business on any terms by all members with a particular person, firm or company or in some particular share, stock or debentures, should they deem such an action to be in the interests of the investing public, the interests of or standing of the Exchange or its members, or for such other reason as they may consider to be relevant."

This power would have been more effective in this case, as the Exchange could have forbidden any member of the Exchange from

dealing with N.Z.F.P. or their shares. No member could thereore have been involved in the selling of Wattie shares to N.Z.F.P. or the transfer of N.Z.F.P. shares in consideration. This however would not stop the takeover completely, it merely stops any member of the Exchange from being involved in the transaction. Transfers can still take place directly between N.Z.F.P. and Wattie shareholders. It should however be noted that for a company to have this rule applied against them they need not be a listed company.

The scope and effect of Rule 16.04 however may be limited by the Courts. This is a rule of the Stock Exchange and as such would be open to administrative review, however the aggrieved company may have trouble proving standing. A member of the Stock Exchange could however object to the exercise of the rule. The power is somewhat arbitrary and drastic and it is doubted that the Exchange would readily use it. Another point to note is that the Clause 16.04 power is expressly reserved to the Council by resolution and the power can only be exercised by the Council and not by the Executive of the Exchange.

A further alternative to suspension as a sanction for breach of the Exchange's Takeover Code has been adopted in Australia. Section 42(2) of the Securities Industry Act 1980 declares that a body corporate is under an obligation to comply with the listing rules of the Exchange. This means that rather than suspend the errant company, the Exchange can seek a Court Order to enforce compliance, due to this statutory obligation. This however is only applicable to listed companies.

The second reason that the Stock Exchange is an unsatisfactory body for controlling takeover conduct is that the Exchange is limited to controlling takeovers made by listed companies only. Unlisted companies are not bound in contract by the Takeover Code and the Exchange has no power to make regulations covering either listed or unlisted companies. Even though most takeovers are made by listed companies, or their subsidiaries, this remains a serious limita-

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tion. There is always the possibility that the Code can be avoided with the use of unlisted nominee companies. Further the only takeovers and substantial acquisitions which come to the attention of the Exchange are those of other listed companies by virtue of Section 5 of the Companies Amendment Act 1968. The takeover of an unlisted company could take place without the attention of the Exchange.

Finally it is questionable whether the Stock Exchange is the proper body to be regulating the securities market. In essence the Stock Exchange is an incorporated body with power to regulate only its members. Though the Exchange should be interested in maintaining a fair market during a takeover, it is doubted that it is an adequate body to leave the primary control of takeover conduct with. It may be interesting to remember the classic statement of Lord Buckmaster in Weinberger v. Inglis:[79]

> "The London Stock Exchange is in reality a building vested in certain proprietors and used for the purpose of carrying on a market for stocks and shares. It is not regulated in any way by charter or statute. The management owes no duties to the public and the business is subject to no regulations except those which, from time to time, (the Council) think right to impose on those whom they choose to admit. The prestige and authority of the institution depend entirely upon the reputation it has established for honest and efficient business methods. Any group of people who so desired could start another Stock Exchange tomorrow. It is not a public market, it is a private market and access to it is obtained through membership."

Though no longer strictly true of the New Zealand Stock Exchange, this does reflect the traditional role of the Exchange and its position in the business world. The Exchange remains a private body whose primary concern is the conduct of its members and the conduct of business on the Exchange. In the light of this and the limitations on the Exchange as a takeover control body, it is submitted that the Exchange is not the ideal body for this role. This view was shared by the Securities Commission in their review[80] of

takeover law, where they suggested that rules of the kind set out in the Takeover Code should be translated into rules of law so that ordinary sanctions for rules of law will be available.

B. The Present Legislative Controls

Apart from the Takeover Code the only other controls on takeover conduct are provided by the Companies Act 1955 (which includes the provisions of the 1963 Companies Amendment Act). There are however a number of rules which do affect the securities market. Firstly there are rules, whose object it is to regulate the markets for and dealings in goods and services, other than securities, and impact upon securities law for better attainment of that main object. These rules are principally contained in Part III of the Commerce Act 1975.

Then there are rules whose main object is to implement national policies relating to overseas investment and they impact upon securities law in furtherance of that object. This body of law is found in the Overseas Investment Act 1973 and regulations under that Act.

Until 1963 legislation dealing with takeovers tended to be made for a particular situation rather than as part of a scheme.

The following are examples of this type of legislation:

Sections 191-194:	Procedure for disclosure of payments to directors for loss of office.
Section 62:	Prohibition on a company financing purchases of its own shares.

Section 208: Compulsory acquisition of remaining shareholding when 90% is already held.

Sections 205-207: On reconstruction and merger as an alternative to a takeover.

In contrast to this legislating for specific circumstances, a legislative scheme to regulate takeover activity was introduced in 1963 in the Companies Amendment Act 1963. However over the last twenty years the inadequacies of the statute have been realised and exploited with the result that most transfers in control now take place outside the scope of the Act.

The N.Z.F.P. offer for Wattie shares was a "takeover offer" for the purposes of the 1963 Act and all the requirements of the Act were fulfilled. The pre-offer purchasing of 24.9% percent by N.Z.F.P. was not a "takeover offer" because the offers were made by standing in the market and were not, as will be explained later, inside the scope of the Act.

In 1983, the Securities Commission completed a review of the law and practice governing takeover activity.[81] Also at present the Securities Commission is investigating the N.Z.F.P./Wattie-Goodman saga. It is expected that this should provide a useful test for a number of aspects of the Commission's report, as well as being an interesting test of the Commission's investigative powers.

The scheme of the 1983 Act is that when an offeror wishes to advance their holding beyond 20 percent of the voting power of a company certain information, as prescribed in the Schedules, must be passed between the offeror, the target company's directors and the offerees. Directors are required to disclose their intentions as regards their shares and recommend action for the offerees. Strangely enough there is no requirement to disclose the Director's future

employment with the offeror's company or the target company, while under Sections 191-194 of the Companies Act, they are required to disclose payments for loss of employment.

The criticism of the Act is not however that its scheme is ineffective but that its scope is too limited for it to have any practical effect. The major problem lies in Section 2 in the definition of a "Takeover Offer" which introduces two limitations on the scope of the Act. This definition reads:

> "Means an offer in writing for the acquisition of shares under a takeover scheme."

The first limitation arises from the decision in the Multiplex Industries[82] case where it was held that an oral offer is not included in the definition. The Court of Appeal rejected the argument that Section 2 was exhaustive and limited the Act to written offers only. This opened the gate for many oral takeovers. The Tatra Industries Limited v. Scott Group Limited[83] took this one step wider holding that "writing" only referred to writing between the offeror and offeree and did not include written notice to the Stock Exchange.

The second limitation arises from the words "under a takeover scheme". A takeover scheme was held in an Australian case on similar legislation to be[84] "A plan or purpose which is coherent and has some unity of conception". "Takeover scheme" was further limited in the Carter Holt[85] case to a scheme of written offers only. Any preceding oral offers are not to be included in the scheme and added toward the 20 percent limit. This "coherent plan" test of a scheme was found by the Securities Commission[86] to be difficult and in the three investigations undertaken by the Commission[87], it was found to be impossible to determine whether, and if so when, a scheme came into being. Written offers which do not fall inside a "scheme" are therefore also outside the application of the Act.

It should be noted that both the Commerce Act 1975 and the Overseas Investment Act 1973 apply to both written and oral offers.

Further problems are raised by Section 3(b) of the Act which provides that the Act does not apply in respect of any scheme involving the making of offers for the acquisition of "any shares in any company, if offers are made to not more than six members of that company". This exception allows a person to obtain control of a company by purchasing the shares of a major shareholder without the necessity of complying with the Act. A combination of factors, among them the increased size of institutional shareholdings,[88] the greater willingess of institutions to trade actively in these holdings and the fact in some cases effective control may be passed by a parcel as small as 10 percent, has meant that a large number of transactions which ought to be classified as company takeovers are exempt from the 1963 Act.

Compliance with the 1963 Act therefore becomes optional depending on the form rather than the substance of the takeover bid. This is clearly an unsatisfactory situation and needs reform. The Securities Commission reached this conclusion and recommended the repeal of the Act and replacement with new provisions in the Securities Act.[89]

There is also some doubt about the exact effect of non-compliance on the validity of the offer. Section 13 provides for penalties for non-compliance. However nothing is said about the validity of the offer. It has been assumed by the Courts[90] that only serious non-compliance invalidates an offer. However it is still unclear exactly where the line is to be drawn.

The Securities Commission went on to recommend reforms to the law affecting company takeovers. These recommendations not only widen the scope of the law with the effect that the 1963 Act's requirements apply to many more takeovers, but introduce new requirements designed to further achieve the objects of a takeover law. In the

remainder of this paper it is proposed to look at the recommendations of the Commission for reform and apply these to the N.Z.F.P. offer. However before examining these reforms it is necessary to examine what the objectives of and reasons for a takeover law are.

C. The Reasons for Regulation

The case for legislative regulation of takeovers as an aspect of securities law, is based on two sets of arguments:

(1) That legislation is necessary to protect the fundamental premise of securities law that securities ranking pari passu should entitle the holders as nearly as may be to equal treatment; and

(2) That legislation is necessary to protect and promote the efficiency and integrity of the capital market.

It is accepted that takeovers are not themselves bad. They encourage more efficient utilisation of capital and resources. Further the threat of a company takeover encourages more efficient management and stimulates innovation. The aim of a takeover law therefore should not be to reduce the number of takeovers but to promote a more competitive and balanced market for control.

The first set of arguments are based on legal propositions derived from the nature of a share. These legal reasons usually receive the most prominence, however there are strong economic arguments, in favour of regulation, which are probably more important and compelling. The legal proposition is open to question since it is based on the assumption that a share in a large shareholding should be treated equally with a share in a small shareholding. The validity of this legal principle may be open to question in the light of the fact that shares in a large shareholding have an element of control

attached. In reality not all shares can be treated equally for all purposes.

The second set of arguments are based on economic principles and the unbalanced nature of the market for control. They draw attention to the public interest in the mechanisms of capital markets as a means of guiding economic activity, stimulating innovation, minimising resource waste and satisfying needs at a competitive cost.

It is recognised by the Jenkins Committee[91] that there is a market for control of a company just as there is a market for investment in its shares. Problems arise when control is sold on a market designed for the trading of minority parcels. The Exchange does not provide an adequate market structure for the situation were there are relatively few buyers, who need time to prepare, and no organised group of sellers. Problems also arise because investment share prices are based on expected returns whereas a control price is based on asset-backing and potential for re-organisation and there is no structure for prices to adjust from one basis to the other. Asset values are commonly inflated beyond the share value.[92] Thus assets can be obtained well below their true value. Further, in the market for control, the product is large and complex and some preparation is required before entering into competition. The investment share market cannot provide the structure for this and it is therefore rare that a competitive price is reached.

The aim of legislation should therefore be to provide efficient competition to ensure that a premium over market value is paid. This was the idea behind the 1963 legislation.[93] However take-overs are still being achieved by pre-emptive or sudden tactics and selective off-market trading, thus avoiding a competitive market for control.

D. Costs and Benefits of Regulation

In their report the Securities Commission highlight a number of costs and benefits of regulations and conclude that intervention is a positive and beneficial step. The main benefits of regulation are seen to be:

(1) Promotion of Confidence in the Market

In an unregulated market the stockholders who receive the most benefit from a takeover are usually large parcel holders since from their holding control can be assembled more rapidly. This the report argues is the reason for the declining role played by individual investors and consequently the loss of ability to raise new equity capital for companies. Also a move away from small investment reduces the number of transactions and weakens the price formation process of the market.

If an uncompetitive price is paid there is a shift of benefit from vendor to purchaser and if a premium is paid for large holdings there is a shift of benefits away from smaller investors. Since, in the last decade there has been a shift towards buying for capital growth this is an important consideration.

It is also argued that in a sale of control it is the assets and goodwill which are being sold and so shareholders should share pro-rata the proceeds as they do with a surplus on the winding-up of a company. This analogy however is open to question since in a transfer of control, much more than assets and goodwill affect the valuation. The potential for re-organisation and control of the assets also affects the value of control

and this is a value which attaches only to those shares from which control can be effectively assembled.

A more competitive market, it is concluded, would promote the availability of equity capital by inducing business confidence.

(2) Effects on Investment Decisions

This effect works in two ways:

(i) An active market facilitates the issue of shares for cash to finance investment and maintains a balance against corporate borrowing; and

(ii) It is argued that by reducing the discount at which assets can be required by takeover, the investment in new capital assets will be stimulated. This however is doubtful as a takeover does much more than pass assets. It passes instant know-how and goodwill and eliminates existing competition. It is doubtful that many potential offerors would easily be encouraged to move from capital investment to full-scale enterprise.

(3) Allocation of Resources

It is argued that allocation is best made by perfect market conditions, which channels resources to their most profitable use. However, the application of this to a market for control need not follow. The most

effective allocation would surely be to the most astute and financially strongest offeror. This offeror, it is submitted, will usually be the first to succeed in a "first come, first served" unregulated market.

The disadvantages that the Commission sees are:

(1) Loss of Freedom

The Commission approaches this as a fundamental consideration. However, this must be balanced against the loss of freedom experienced by small investors who are under-paid or completely forgotten on the present "free" market.

(2) Potential for Reducing the Incidence of Takeovers

This would seem to be the most important disadvantage of regulation. A takeover generally moves under-producing assets to more productive management, which eventually must economically benefit the whole economy. A reduction in takeovers would therefore cause a general economic loss.

However, the Commission argues that, though a rise to a competitive price will discourage takeovers, the effects of competition will be to introduce more bidders. Further, where a takeover is discouraged by a competitive market it may be more economic to leave control where it is.

The Commission concludes that there will be a slight reduction in the number of takeovers but those discouraged will have little effect on industry structure.

The proof of this is the fact that in overseas jurisdictions there has been no appreciable decline in takeover activity after regulation.

(3) Administrative Costs

These are not expected to be great as no additional administrators are required and sanctions are designed so that the people using the law enforce it.

E. Proposed Reforms

The Commission supports a move away from the approach based on offers. It finds the definition of "Takeover Offer" too difficult and moves towards a scheme based on the acquisition of "relevant interests". This ties in with a previously suggested register of "relevant interests". The essence of the register is that anyone who acquires a relevant interest of over 5 percent of the voting securities of a listed public company should be required to disclose that fact and the price at which the interest was acquired. Disclosure is to be made to the Stock Exchange and the target company. Thereafter the person should be required to report any acquisition or disposition of 1 percent or more until his/her holding falls below 5 percent. The definition of "relevant interest" is wide and complicated and includes nominee voting agreements and conditional agreements to acquire. Because the 5 percent is substantially below the 20 percent level the nominee legislation would act as an early warning system, for the market, of a prospective takeover. Disclosure of the price paid would also ensure equal prices for small parcel holders.

This legislation which was first suggested in the Commission's report on nominee shareholdings in public companies, would, as the Commission accepts create an informed but not necessarily competi-

tive market. The suggested replacement to the 1963 Act is also based upon the acquisition of "relevant interests" and uses the same defintion.[94]

In the Wattie-N.Z.F.P. situation this nominee legislation would certainly have had an effect. Assuming they amounted to "relevant interests", which will be discussed later, all parties would have been required to disclose their interests when they were obtained. This may have done much to defuse the situation. If the exact Wattie-Goodman holding in N.Z.F.P. had been clear N.Z.F.P. may not have launched the defensive buying which led to the takeover offer. Further N.Z.F.P. would have become aware of the Brierley-Goodman moves much sooner and may have withdrawn their offer sooner. Similary Goodman would have known the level of acceptances to the N.Z.F.P. offer and may not have embarked upon the costly defensive move. Altogether it is submitted that disclosure as envisaged by the Commission would have resulted in a more rational and informed approach from all parties and thus saved considerable amounts of shareholder's funds.

The important question is however which holdings would be regarded as "relevant interests". The defintion of "relevant interest" is wide and complex.[95] N.Z.F.P.'s interest in Wattie was clearly a "relevant interest" by virtue of part (1)(b) and (c) because it had the power to exercise the voting rights and the power to dispose of the voting securities, despite the fact that the shares were in fact held by a subsidiary. Further (3) of the definition reads:

> "(3) A body corporate or other body shall be deemed to hold a relevant interest in respect of any voting security in which another body corporate that is related to that body corporate or other body holds a relevant interest".

Though "related" is not defined, wholly owned subsidiaries would certainly be included.

Further acceptances to the N.Z.F.P. offer would have to be declared as they were received, since the definition extends to conditional agreements to acquire voting securities.

Similarly, for the reasons above, Goodman's interest in Wattie and Wattie's interest in Goodman would have to be declared.

Dominion Industries clearly held a relevant interest in the N.Z.F.P. shares they held. However Wattie and Goodman probably did not hold a declarable "relevant interest" in N.Z.F.P. Since both Wattie and Goodman held 50 percent of Dominion Industries both should be treated similarly. Neither party can be said to have direct control over the voting rights or acquisition and disposal of the shares held by Dominion Industries, since Dominion Industries was controlled by its own board with equal representation from Wattie and Goodman. Thus Wattie-Goodman do not hold a relevant interest in N.Z.F.P. by virtue of (1)(b) or (c) of the definition. Whether Wattie-Goodman hold a relevant interest therefore depends upon whether they are a "related" company to Dominion Industries. The definition leaves this question unclear, however Section 2(5) of the Companies Act[97] defines "related company" as either:

> "(a) A subsidiary or holding company.
>
> (b) A company in which more than 50 percent of the shares are held by the other company or by the members of that company.
>
> (c) Companies in which the businesses of the companies have been so carried on that the separate business of each company is not readily indentifiable.

Dominion Industries does not seem to come under this definition since 50 percent is held by both Wattie and Goodman and the businesses have not become unidentifiably intermixed. The logical result is that neither party holds a relevant interest in N.Z.F.P.. This would mean that Dominion would be required to make disclosure and comply with the requirements for any N.Z.F.P. shares it holds or acquires. If Wattie and Goodman were to hold "relevant interests",

both would have to comply with the requirements of the suggested legislation for every acquisition by Dominion Industries, thus producing a duplicate effect which would distort the true situation and defeat the purpose of the suggested legislation. The Wattie and Goodman interest in N.Z.F.P. however remains undisclosed which does seem to leave a gap in the scheme.

The "relevant interest" approach was adopted from the Australian Companies (acquisition of shares) Act 1980, which applies, in its own right, in the Australian Capital Territory. The Act has also been adopted in each state with minor "translator" modifications. The "relevant interest" approach overcomes the problems experienced with the definition of "takeover offer" and "takeover scheme" by the 1963 New Zealand legislation.

The nominee legislation, while providing a more informed market, would not however result in a truly more competitive market. For example in the Wattie-N.Z.F.P. situation disclosure may have made the parties decisions more informed and disclosed the true situation but N.Z.F.P. would still have been free to go ahead and exclude Goodman from the offer.

For this reason the Commission goes on to suggest replacement legislation for the 1963 Act. Firstly it is suggested that the 1963 Act be repealed and replaced with new sections in the Securities Act. The new rules would prohibit the acquisition of a "relevant interest" in a voting security except in the following circumstances:-

(1) If immediately after the acquisition relevant interests are not in aggregate over 20 percent of the total voting securities of the issuer. The figure of 20 percent being the point at which control is assumed to become an issue;[98] or

(2) By general offer to all holders of voting securities under a "takeover offer"; or

(3) By means of an offer to the market to take all securities tendered under a "standing in the market" offer; or

(4) Where less than 3 percent of the total securities are acquired in six months; or

(5) Where before acquisition the holder has 90 percent of the voting securities; or

(6) By new subscription to all holders, pro-rata to their holdings; or

(7) In accordance with the terms and conditions of an exception made by the Commission. A power to make exceptions is conferred on the Commission by the proposed legislation.[99]

Acquisitions may be made under any of these circumstances. Because of the prohibition approach acquisitions can be made once one of the circumstances is satisfied, notwithstanding the fact that the offeror may be outside another of the circumstances. For example if any offeror who holds 19 percent, acquires a further 3 percent and no other acquisitions have been made in the preceding six months, the offer is permissable under (4), regardless of the fact that immediately after the acquisition the acquirer is entitled to relevant interests in more than 20 percent of the voting securities.

A "takeover offer" under the Act is required to be in writing and is required to be made to every security holder. There is no limitation on the type of consideration except that identical consideration must be offered for all securities and must not be less in value than consideration provided by the offeror in the preceding

three month period. The suggested nominee legislation would ensure compliance with this requirement, since prices paid for acquisitions over the 5 percent level must be disclosed.

Partial offers are acceptable under a "takeover offer". However offers must be made to all holders of the desired security and where acceptances exceed the desired level they must be pro-rated so that all acceptors participate in the offer. Where a partial offer is made, a statement of offeror's intentions in regard to the target company is required. It is hard to see why these statements of intention are required only in partial bids. The information would be equally relevant to shareholders when making the decision whether or not to remain with the company in an unlimited bid.

An offer is also permitted to be conditional. Offers can therefore, still be made conditional on an stated minimum level of acceptance. All offers are to open for acceptance not earlier than 14 days after announcement and close not earlier than 21 days after opening. This provides a period of consideration for offeree's to avoid the stampeding of offerees to accept. Further this allows any parties who wish to compete in the market for control, time to formulate and announce counter offers.

A "standing in the market" offer must similarly open 14 days after announcement and close 21 days later. The offer need only be announced in the Stock Exchange. Consideration must be in cash and any increased consideration must be paid to all acceptances. As with "takeover offers" consideration must be no less than the highest price paid during the three months preceding the announcement. Partial offers would not be permitted and all shares tendered must be accepted. Offers must be unconditional and therefore acceptances will not be revocable. This means that any consent required under the Commerce Act must be obtained before the offer is commenced.

These "standing in the market" rules clearly cover the situation which arose in Tatra Industries Limited v. Scott Group Limited,[100] where a partial offer was made for 51 percent of the shareholding on a "first come first served" basis. The 1963 Act did not extend to this case because the written notice to the Stock Exchange, containing the offer, was held not to be an "offer in writing".[101] With the new rules the sudden tactics employed in this case would not be permitted. Shareholders would have 14 days to consider the offer and would have available information required by the New Rules. Further the offer would have to remain open for 21 days and all shares tendered would have to be accepted. Offerees would not be stampeded into the offer in the fear that they would miss out if a hasty decision was not made. This would certainly provide a more balanced and rational marked for control and would allow competing offers to be organised.

Under both of the above methods of making a takeover offer certain information must be made available. This is:

(1) All information currently required by the 1963 Act.

(2) The financial arrangements to secure funds for the offer.

(3) Details of dealings which have taken place in the preceding three months.

(4) In the case of a partial bid, a statement of the offeror's intentions in regard to the target company.

(5) The offeror's intention in regard to the continued employment of the employees (and presumably the Directors).

This duty of disclosure goes hand in hand with the period of consideration, to allow shareholders and competitors to make an informed and unrushed decision. The aim being to allow a free market for control to develop.

The disclosure of the financial arrangements to secure funds for the takeover will allow shareholders to better value the offer, particularly where the consideration offered is, in part, shares in the offeree company. The N.Z.F.P. offer was eventually financed by a share issue. The $45.6 million required for the purchase of Wattie shares was subsequently re-financed by a cash issue of N.Z.F.P. shares.[102] This would certainly have affected the value of the consideration. The disclosure of financing arrangements will also highlight the situation where the takeover is to be financed from the retained profits of the target company.[103]

Details of dealings which have taken place in the three preceding months will have already been made partially for listed companies by virtue of the suggested nominee disclosure requirements. This information will ensure that equal consideration is being offered and that the offeree has not made its initial buying at a higher consideration in order to ensure a strong position form which to launch the offer.

The disclosure of the offeror's intention in regard to the continued employment of employees is important as this can influence shareholders decisions, especially in partial offers. Hopefully this diclosure will extend to directors and their future employment with the target company or the offeror company. The recommendations of directors carry considerable weight and what interest they have in the offer will be significant. In the Securities Commission's report on the City Realties takeover of Property Securities, concern was expressed about the fact that one of the directors of the target company had been offered the position of chairman with the offeror company. It is surely significant that an arrangement such as this be dislcosed when the directors make recommendations about the offer.

The only variations allowed to offers must be a change in consideration and if this is a decrease it must be approved by the Commission, as must the withdrawal of an offer.

Non-compliance with the Act gives rise to criminal liability except for inadvertent or immaterial breaches. The High Court also has a discretion spelt out to make orders prohibiting, delaying or increasing consideration of offers where provisions have not been complied with. The provisions of this discretion is a clear improvement over the ambiguous situation of the 1963 Act.

One doubt about the rules is whether the full procedure is necessary for acquisitions between 75 and 90 percent of the shareholding. Once an offeror has acquired 75 percent of the shareholding they have the fullest possible control of the company. Surely the only remaining protection required in this area is that all shareholders be paid equal consideration. There seems little reason to require other protection.

F. Application to N.Z.F.P.'s Offer

The new rules require that all offers be made to all security holders. Partial offers are permitted but must be extended to all shareholders and acceptances must be pro-rated. N.Z.F.P. would therefore have been required to extend their offer to the Goodman shareholding in Wattie. In order to achieve their partial target N.Z.F.P. would have had to make the offer to all security holders and pro-rata their acceptances. An increase in Goodman's holding in N.Z.F.P. would therefore have been inevitable though depending upon acceptances from other Wattie shareholders, perhaps not enough to give Goodman a controlling interest in N.Z.F.P. A further reduction in the holding given to Goodman could be achieved by reducing the N.Z.F.P. share content of the consideration for the offer. However any increase in Goodman's holding would have been unacceptable to

N.Z.F.P. The offer therefore would probably have been frustrated by the new rules.

However it must be borne in mind that Goodman, the minority shareholder, stood to lose a potential $120 million and a valuable position in the food industry if the N.Z.F.P. offer had gone ahead. Bearing in mind that one of the aims of a takeover law, as recognised by the Securities Commission,[104] is to maintain confidence in the securities market, this result does not appear unreasonable. If the takeover had gone ahead the type of loss envisaged would certainly affect confidence in the securities market.

However it was argued that Goodman fell into a class of shareholder all of their own and all classes of shareholder cannot always be treated equally. It was argued that because extending the offer to Goodman would have resulted in an unfavourable result for N.Z.F.P.'s shareholding, and because Goodman's interests varied markedly from other Wattie shareholders, it was unreasonable to expect the offer to be extended to all shareholders.

It is difficult however to see that Goodman's interest did not require some protection. Though their interests are different from other minority shareholders, Goodman still has a valuable interest which requires protection. In any takeover situation there will be groups of sharedholders whose interests vary greatly, depending on many factors, one of which is the size of their shareholding. It is because of the mixed nature of shareholders and their interests that a takeover law is required in the first place. If all shareholders were in the same "class" and had the same interests there would be no reason to enforce equal treatment, as equal treatment would follow naturally. The fact that it is often more convenient or commercially expedient to make an offer to only a portion of the shareholders is the reason for the basic rule that all shareholders must be given an opportunity to participate in the offer. If it is unacceptable that N.Z.F.P. make an offer that, because of the nature of the consideration, results in giving the offeree effective

control of N.Z.F.P., then this surely means that the offer is unworkable. It is hard to understand the reasoning behind an argument which says that because it is commercially unacceptable to make a fair offer, a fair offer need not be made. If an offer which gives all shareholders a right of participation cannot be made then surely no offer should be allowed.

An alternative to abandoning the offer altogether would have been for N.Z.F.P. to make a cash offer to Goodman only. To this effect it would be useful for the Securities Commission to have a power to dispense with the strict application of the rules and allow the Commission to make allowance for some of the harsher commercial realities of the situation. The offeror could be obliged to make a cash offer as an alternative. This has been contemplated as a solution by Mr Colin Patterson, Chairman of the Securities Commission.[105] The Commission also contemplates a power of exemptions with terms and conditions to be prescribed by the Commission.[106] Similar powers of dispensation have been contained in overseas legislative schemes. For example in England where the Panel administering the City Code is required to consent before any partial offer can be made.[107] The Commission would then have to decide if the unfairness involved in offering a different type of consideration is justified by the difference of interests involved.

If N.Z.F.P. had been unable to finance a cash offer, to at least Goodman, then the logical result would be that, if they cannot afford to make a fair offer, no offer should be made.

The principle of equal opportunity for all shareholders is a major theme of overseas legislation. Principal 8 of the City Code requires that all shareholders be treated similarly by the offeror. The Australian Acquisition Code is based upon the same principle [108] as is the Ontario Code [109].

In New Zealand recent cases have highlighted the injustice which can occur when offers are not made to all shareholders. In the Durafort

Limited takeover of Auckland Intercontinental Properties different prices were paid to various offerees and in the City Realties Limited takeover of Property Securities Limited cash was paid to the initial offerees to secure control and subsequent offerees were paid in cash and shares. Both these cases were criticised by the Securities Commission. It seems that to fit with the philosophy behind the report, Goodman must be allowed the opportunity to participate in the offer.

Under the proposed rules N.Z.F.P. would have been required to make a written offer to Goodman. N.Z.F.P. would have been able to acquire up to 20 percent of Wattie shares without any control. However once they passed a 5 percent holding in Wattie all acquisitions would have to be disclosed under the proposed nominee shareholding legislation.

Once N.Z.F.P. reached a 20 percent holding in Wattie they would be required to make either a written offer to all shareholders, partial for the required level of shareholding and conditional on a minimum number of acceptances or an open offer by "standing in the market". To "stand in the market" the offer would have to be unlimited, unconditional and for cash consideration.

In both cases the consideration offered must not be less in value than the highest price paid by N.Z.F.P. in the preceding three months. The likely effect of the proposed rules would be that N.Z.F.P. would have abandoned their offer and limited their holding in Wattie to 20 percent of the shares.

In their report the Securities Commission noted that perhaps the most compelling argument against a takeover law is that it might significantly reduce the number of takeovers.[110] A reduction in the number of takeovers results in a loss of the benefits of industry rationalisation and restructuring and of increased management efficiency which otherwise may have occurred. It was on this ground that the Commssion's suggestions were criticised by the

Reserve Bank.[111] In their submissions to the Commission the Reserve Bank considered that the implementation of the Commission's proposal could well result in a significant and undesirable reduction in takeover activity. It was felt that both the 14 day consideration period and the requirement that all shares receive equal treatment by the offeror would discourage takeovers. This would certainly appear to be the result in the N.Z.F.P. takeover offer. However it is submitted that this is not necessarily true.

The defensive tactics adopted by Goodman to protect their investment in Wattie eventually defeated N.Z.F.P.'s offer. The defensive buying undertaken by Brierley, on behalf of Goodman, resulted in a situation where N.Z.F.P. could not achieve their goal. The final result in an unregulated market was therefore exactly the same as the result under the suggested rules. This type of defensive tactic is discussed by the Commission in their report.[112] The Commission concludes that this "White Knight" competing purchasing will lead to a competitive content for control, if carried out with complete and full disclosure. This buying undoubtedly gives Goodman a "relevant interest" in the shares so purchased, at least for the period they were held by Brierley, because they have entered into an agreement or understanding by which they have a power to control the acquisition, disposal and presumably the voting rights of the shares.[113] The suggested nominee legislation would therefore ensure disclosure took place, however since buying did not exceed the 20 percent level none of the formal requirements of the suggested takeover rules would apply.

The only difference between the regulated and unregulated situation is therefore that in an unregulated market the unfair offer was defeated by the actions of the minority shareholder rather than by the operation of legislation. The cost to the shareholders of both N.Z.F.P. and Goodman would however have been less in a regulated market. The net result was that it cost N.Z.F.P. approximately $45 million and Goodman $20 million to achieve a situation no different from the position which would have been achieved under the suggested

rules. Both these sums were subsequently met by cash issues of shares in the respective companies, which would directly affect the value of shareholder's investments. The same result would therefore have been arrived at, with a substantial saving of shareholders' funds.

This however would not be the situation where the minority shareholders who stand to be adversely affected, have neither the financial power nor the co-ordinated approach that was available to Goodman. A further factor which allowed Goodman to defend their position was the delay allowed by the Commerce Commission's consideration of the takeover. It is for cases where the minority shareholders do not have the financial power or co-ordination that takeover rules are required. The rules suggested by the Commission would protect all victims of unfair offers not just those with the financial power to protect themselves.

Barker J.'s judgment was, prior to the Court of Appeal decision, applied in Baigent v. D. McL. Wallace Limited.[114] In this case a group of shareholders of D. McL. Wallace Limited, who were mounting a takeover offer for 51 percent of the company, sought to restrain the company from selling its 50 percent share in a subsidiary company, Industrial Waste Collection Limited, to its partner in the subsidiary company, T.N.T. (N.Z.) Limited. It was found that the sole aim of the plaintiffs' takeover was to obtain control of the subsidiary.

It was claimed by the plaintiffs that the sale was a breach of the director's obligation not to take measures which are designed to thwart a bona fide takeover offer without first giving the shareholders an opportunity to consider whether defensive measures should be taken.

In his judgment, Prichard J. recognised the existence of such a duty. However, despite the fact that the offer was not in breach of either the 1963 Companies Amendment Act or the Stock Exchange

Takeover Code, as interpreted by Barker J.,[115] it was held that, because the offer was not extended to all shareholders, the offer was not a bona fide takeover bid. The directors had therefore discharged their fiduciary duty to the majority of shareholders in protecting them against a "raid" which was plainly calculated to affect adversely the majority of shareholders of the company.

Pritchard J. concluded:[116]

> "The requirement that directors refrain from taking defensive measures in the face of an impending takeover bid applies only to a bona fide takeover offer: the requirement is so expressed in, for example, the Code of the City Working Party to which the plaintiffs have referred in support of their case. This is not a bona fide takeover bid."

This case therefore preserves the right of the company to defend against unfair takeovers, even though they may not be in contravention of the existing takeover laws. Under the new rules suggested by the Commission an offer such as this would not have been allowed. Baigent would have been required to extend the offer to all shareholders as either a full offer "standing in the market" or as a pro-rated partial written offer. The result therefore again would have been the same. The case does however highlight the confused state of takeover law in New Zealand and supports the need for reform.

It is therefore submitted that the Securities Commission is correct in its conclusion[117] that the only takeovers which will be discouraged are those which are marginal and in which general economic objectives may be best served by leaving the ownership of the resources unchanged until a bidder whose use of the resources will justify a competitive and fair offer enters the market. A distinction must be made between true economic gains and gains made at the expense of minority shareholders. As the Commission points out[118] the suggested rules will create a more competitive market which will enable more bidders to participate in contests for control, thus achieving the above distinction.

G. Other Suggestions Not Adopted

The Commission also considered a number of requirements obtained in overseas legislation which they did not recommend for adoption in New Zealand. The English City Code[119] has a requirement for mandatory offers. Where control of a company which is defined as 30 percent of the shareholding, is acquired, a general offer, conditional on the offeror raising his/her holding to 50 percent by the offer, must be made unless an exemption is granted by the Panel.[120]. The Ontario Securities Act has a similar provision where a takeover bid has been affected by a private agreement, which is exempt from the legislation.[121] The Commission did not suggest that either of these provisions should be adopted in New Zealand. Such a procedure would only be necessary where control is acquired without making offers to all security holders. Such a practice would be expensive and would undoubtedly discourage takeovers. Though the procedure would allow shareholders to quit a company in which control has changed hands the process is not really justified by the expense. Such offers would have to be cash offers to be effective.

An equivalent procedure is already provided by Section 208(3) of the Companies Act, which gives the right to locked in minorities to compel purchase of their shares, where 90 percent is held by the majority.

It should also be noted that under the City Code partial bids are prohibited unless the consent of the Panel is obtained.[122] Consent is usually given only where below 30 percent of the shares are sought. In other cases a partial offer must be approved by shareholders. Once approval is obtained acceptances must be pro rated.

It was noted by the Commission[123] that the suggested rules could give defending directors or competing bidders the chance to frustrate the process of a takeover. The American Securities

Exchange Act[124] contains a general prohibition against the use of "fradulent, deceptive or manipulative acts or practices in connection with a takeover offer.

This has been interpreted by the Federal Courts as applying to certain defensive tactics as well as to activities by the offeror. Similarly the Australian legislation[125] prohibits "bluffing offers". These are offers which the offeror cannot or will not complete but are designed to frustrate a market for control. The law in New Zealand does provide some protection against unfair defensive measures.[126] However serious consideration should be given to extended measures to avoid unfair defensive practices, otherwise the balance may shift unfairly against offerors. A general provision, such as that of the American legislation, may be a good idea. The Commission invited further comment on this issue.

H. The Role of the Securities Commission

The Commission's report raises questions about what role the Commission should play in the securities market. At present the Commission's principle role is to assist the reform of the law and practice in a general way. This is in sharp contrast to the role played by similar bodies in overseas jurisdictions.

In Australia the National Companies and Securities Commission (the "N.S.C.S.") has wide discretion in the application of securities regulations. The N.C.S.C. also has responsibility for all aspects of company registrations, a power which is delegated to state company registries. One of the most striking examples of the N.C.S.C.'s powers in the takeover area is the discretion to declare an acquisition to be "unacceptable", with the result that court orders may be obtained as if the acquisition had infringed the legislation.[127] The Commission also has wide powers of investigation.[128] These powers enable the N.C.S.C. to intervene in the preparation and progress of a takeover. The Commission may act on

application of a person interested or on its own motion. The necessity that the N.C.S.C. act through the courts has been criticised however on the grounds that it delays the N.C.S.C.'s power to act.

In England the Panel has power of consent for partial offers[129] and exempt offerors from requirements[130] of the Code. The Panel also issues Practice Notes to regulate the market.

Recently the Gower Report[131] recommended changes to the administration of English securities law. It was recommenced that all investor protection be consolidated in one act and all invitations to the public, whether distributions or takeovers, should be treated broadly along the same lines. One supervisory commission or department should be appointed to ensure compliance with requirements, with self-regulatory bodies, such as the Stock Exchange or the Panel, as subsidiary authorities.

The Ontario Securities Commission has similar powers of exemption. The Commission also operates as a pre-takeover advisory body, has powers to issue cease trading orders and may apply to the Court for an order or compliance.

In the United States the Securities Exchange Commission (the "S.E.C.") has a more limited role. They have the power to make regulations and investigate transactions to enforce the legislation and regulations.

The Securities Commission report does not make any express recommendations, about the role of the Commission. However since the Commission is to have the power to grant exemptions and consent to variations and withdrawals of offers it is implied that the Commission will adopt a more active role. The greater involvement by similar bodies overseas does have a beneficial effect on the legislation by giving flexibility to its implementation. It is submitted that the Securities Commission should be given full powers

of investigation and power to bring actions on its own motion. This would extend protections to minority shareholders without financial or investigative powers, who are being unfairly treated. However to avoid administrative costs participants should be encouraged to enforce sanctions by their own actions, where it is possible.

Further it seems desirable that the Commission have a power of dispensation from the requirements of the rules. In a case such as the N.Z.F.P.-Wattie takeover offer, it would certainly be beneficial if the Commission had the power to reach a comprise between extremes. Not all minorities will require the full protection of the rules and the Commission's power to consider the situation and require terms and conditions it thinks appropriate, by way of dispensation,[132] would afford greater flexibility and fairness to the rules.

The example afforded by the procedures under the Commerce Act should also be noted. The requirement that approval be obtained from the Examiner of Commercial Practices often results in delays which can frustrate takeover action. Because of the large amounts of money involved delays can often prove expensive and discourage continuation of an offer. Opportunities for economic gains can often be missed because of the time required to obtain consents. It would therefore be unwise to require the Securities Commission to approve takeovers before they could go ahead. The Ontario approach, however, does seem to be a good idea. The Commission should provide an advisory service so that when takeovers are being prepared, compliance can be ensured at an early stage of proceedings. This however should not be a mandatory requirement because of the possibility of delays frustrating takeovers.

Overall the role of the Commission should, in addition to its present law reform role, be supervisory but not unduly interventional. Takeovers should be allowed to proceed unhindered as long as they comply with the legislative requirements of fairness. Parties should be encouraged to protect their own interests as far as they practically can. Investors enter the securities market

voluntarily and therefore should be expected to mainly bear the responsibility for protecting their own interests. The Commission's intervention should be sparing and used only to protect those who are unable to protect themselves.

5. CONCLUSION

The rules relating to company takeovers in New Zealand certainly need reform. The 1963 Companies Amendment Act has been shown to be unable to achieve even its limited objectives. The Stock Exchange has attempted to fill the gap with the Takeover Code of its Listing Manual but this too is unsatisfactory. Despite the Court of Appeal's vindication of the Exchange's power to make these rules as terms of the Listing Agreement, the Exchange is not the appropriate body to assume the responsibility for takeover control. The Exchange is limited by the scope and application of its remedies. In the N.Z.F.P. - Wattie example, suspension proved to be a particularly ineffective sanction, having very little direct effect. Further serious doubts about the role of the Exchange are raised. The control of takeover conduct does not fit easily with the Exchange's primary role of regulating its members and its members business on the Exchange. Altogether the Exchange is the wrong body to take primary responsibility for such fundamentally important control.

The N.Z.F.P. takeover offer for Wattie demonstrated that there is a need for responsibility to be taken at a higher legislative level. Legislative control of company takeovers has long been accepted as necessary in overseas jurisdictions and the adoption of similar legislation in New Zealand seems inevitable. The N.Z.F.P. - Wattie situation has however shown that serious thought needs to be given to the commercial realities involved in such legislation. Protection of minority interests, whatever their size or nature, should not be traded off for commercial convenience. It is equally as wrong to assume that all takeovers are good as it is to assume all takeovers are bad. A takeover law should be neither for nor against takeovers but should merely make them possible under rules which provide even handed fairness to the participants. Flexibility to adapt to commercial situations should be built in to the rules. Hard and fast rules will not be appropriate to all situations and

the ability to reach a fair result would be an asset to any rules. The Securities Commission could usefully fill this role.

The recommendations of the Securities Commission have struck a balance between fairness and practicality. They are not unduly onerous or bureaucratic while providing substantial protection for minority shareholders. The N.Z.F.P.-Wattie example shows that the rules will extend all the protection available to the financially powerful, at a substanital saving of shareholders funds. Accusations that regulation will lead to economic losses because of a reduction in takeover activity seem to be unfounded.

What forms legislative control will take only time will tell. Rushing into such an important field of legislation is definitely unwise and the far reaching economic effects of regulation need to be carefully considered. The United Kingdom, Canada, Australia and the United States have all recognised the need for such legislation. New Zealand must now make a decision about what forms of control best suits our needs.

6. FOOTNOTES

1. This probably represents of only a small proportion of the actual takeovers made, since only limited classes of takeover need to be referred to the Commission.

2. New Zealand Forest Products Limited v. New Zealand Stock Exchange (Unrep. A.15/84 7.9 1984) and New Zealand Stock Exchange v. Listed Companies Association Inc. - New Zealand Forest Products Limited (Unrep. A.83/84 11.6 1984).

3. Sections 3 and 9 of the Sharebrokers Act 1908.

4. Originally, five exchanges were registered - Wellington, Dunedin, Auckland, Christchurch and Invercargill. Christchurch and Invercargill exchanges subsequently combined leaving a total of four exchanges.

5. Section 7 of the Sharebrokers Amendment Act 1981.

6. The New Zealand Gazette (No. 98) 8 July 1983, page 2131.

7. 24.9 percent was the maximum holding that could be acquired without triggering the requirements of the Commerce Act for consent of the Examiner of Commercial Practices. This has subsequently been reduced to 20 percent by the 1983 amendment to the Act, which came into force on the 1st of April 1984.

8. By "standing in the market" Wattie/Goodman avoided any formal requirements of the 1963 Companies Amendment Act which only applies to written takeover offers.

9. The Evening Post, Wellington, New Zealand, 22 November 1983, page 10.

10. The Evening Post, Wellington, New Zealand, 24 December 1983, page 1.

11. Idem.

12. Four fully paid N.Z.F.P. shares and 48 cents for every seven 12.5 percent specified preference Wattie shares and three fully paid N.Z.F.P. shares and 92 cents in cash for every four 16 percent specified preference Wattie shares.

13. At this stage no consideration had been given to offering either Wattie or Goodman a position on the N.Z.F.P. board despite the fact that Dominion Industries was by far N.Z.F.P.'s largest shareholder.

14. First letter to Wattie shareholders dated the 26th of December 1983.

15. The Evening Post, Wellington, New Zealand, 28 November 1983, page 3.

16. Idem.

17. Second letter to Wattie shareholders from the Wattie's Board of Directors, excluding the Goodman nominee directors, dated the 24th of January 1984.

18. Idem.

19. Letter to Wattie shareholders from Messrs G.P. Shirtcliffe and P.H. Goodman dated the 19th of January 1984.

20. N.Z.F.P. being an old family company has somewhat archaic Articles of Association. Firstly Board approval is required for share transfers, secondly

shares have limited voting rights. In a show of hands every shareholder has one vote. In a poll voting entitlements are calculated as follows:

- one vote for every $2.00 of nominal capital up to $200.00, then

- an additional vote for every $4.00 of nominal capital between $200.00 and $400.00, then

- an additional vote for every $10.00 of capital beyond $400.00 but limited to a maximum of 15,000 votes.

Thus large shareholdings are limited in their voting power.

21. The Evening Post, Wellington, New Zealand, 17 June 1984, page 17.

22. The Evening Post, Wellington, New Zealand, 18 July 1984, page 12.

23. It was around June 1980 that Goodman began buying Wattie shares. This report was promised "in a few weeks". It is however still some time away.

24. Letter to Goodman shareholders dated the 15 June 1984.

25. The Evening Post, Wellington, New Zealand, 16 June 1984, page 50.

26. The Evening Post, Wellington, New Zealand,Evening Post 18 January 1984, page 19.

27. Idem.

28. New Zealand Forest Products Limited v. New Zealand Stock Exchange; Barker J. High Court A. 15/84, 7th February 1984.

29. New Zealand Stock Exchange v. Listed Companies Association Inc. and New Zealand Forest Products Limited; Woodhouse P., Richardson J. and Sir Thaddeus McCarthy, 30th July 1984 C.A. 83/84.

30. [1966] NZLR 122, 150.

31. Supra, n. 28 at 35.

32. Supra, n. 28 at 34.

33. Rule 12,02 of the Rules of the New Zealand Stock Exchange, New Zealand Gazette No. 98 7 July 1983 page 2131.

34. Supra, n. 28 at 36.

35. Supra, n. 28 at 31.

36. [1983] NZLR 646.

37. Ibid. at 650.

38. H.W.R. Wade Administrative Law Oxford Press (1982) at page 356.

39. See Lord Denning's reaction to absolute discretion in Ward v. James [1966] 1 QB 273 at 292.

40. [1978] 1 ALL ER 152.

41. Associated Picture House v. Westbury Corporation [1948] 1 K.B. 223.

42. [1961] NZLR 218.

43. Supra, n. 28 at 39.

44. Supra, n. 29 at 9.

45. Designbuild v. Endeavour (1980) 5 ACLR 610 at 635 adopting Repco Limited v. Barldon Ry Limited (1979) 4 ACLR 718.

46. Ibid. at 635.

47. [1974] 3 ALR 488.

48. [1930] A.C. 472.

49. Eltham Dairy Co-Operative v. Johnson [1931] NZLR 316 at 243, New Zealand Fruit Growers Federations Limited v. Registrar of Building Societies [1931] NZLR 273, Black White and Grey Cabs v. Reid (unrep.) A.156/83 (C.A.). See also Union Corporation Limited v. Charrington Broderick [1902] Com. Cases 99.

50. Supra, n. 48 at 500.

51. [1931] NZLR 273, 282.

52. Eltham Dairy Co-Operative v. Johnson [1931] NZLR 216, 243.

53. Unreported A.156/83 (C.A.).

54. Ibid. at 49.

55. Supra, n. 29 at 13.

56. City Code on Takeovers and Mergers (U.K.).

57. Supra, n. 28 at 35.

58. Supra, n. 29 at 9.

59. N.Z.F.P. already held 24.9 percent and Goodman held 35 percent leaving only 41 percent of the shareholding subject to the offer.

60. The Evening Post, Wellington, New Zealand, 19 January 1984, pages 1 and 8; 17 January 1984, page 8.

61. Where words are truly ambiguous and are sought to be enforced by the party who drafted the words, the ambiguity is resolved by adopting the construction favourable to the other party. See Halsbury's Laws of England 4th Edition Vol. 12, paragraph 1472, 1473.

62. Ontario [Ontario Securities Act Section 89(1)(i)], the United States [Securities Exchange Act Section 14(6)] and Australia [Australian Acquisitions Code Section 16(2)(a)(i)] also have provisions similar to Rule 27(4) in their legislation.

63. Multiplex Industries Limited v. Sepper [1966] 122, 150.

64. (1968) C.C.H. Securities Law Reporter 30, 701.

65. Ibid. at 30, 706.

66. Ibid. at 30, 708.

67. See Clause 613 of the New Zealand Stock Exchange Listing Manual.

68. [1975] 3 ALL ER 382.

69. [1892] 2 QB 573, 582.

70. Supra, n. 28 at 48.

71. e.g. Sections 40 and 170.

72. See Gower, Principles of Modern Company Law (4th Ed.) Stevens and Son (1979) at pages 117 and 129.

73. [1937] Ll.l Rep. 169.

74. [1939] 4 ALL ER 116. See also D.N.H. Limited v. Tower Hamlets [1976] 1 WLR 852.

75. Smith, Stone and Knight v. Birmingham Corporation [1939] 4 ALL ER 116, 121.

76. Supra, n. 29 at 22.

77. The Evening Post, Wellington, New Zealand, 19 January 1984, page 8.

78. Supra, n. 6.

79. [1919] AC 606 (H.L.), 618-619.

80. Company Takeovers, A Review of Law and Practice, Securities Commission, Wellington, 5 October 1982, at Vol. 1 paragraph 3.21.

81. Supra, n. 80.

82. Supra, n. 63.

83. (Unreported) HC Wellington A.244/83, 19 August 1983.

84. Australia Consolidated Press v. Australian Newsprint Holdings (1960) 105 CLR 473 at 479 per Dixon C.J.

85. Carter Holt v. Fletcher Holdings [1980] 2 NZLR 80.

86. Supra, n. 80 at paragraph 3.12.

87. Supra, n. 80, Vol. 2.

88. An example of this is N.Z.F.P. shareholding. The top twenty shareholders are all institutions and between them they hold 54 percent of the shareholding.

89. Supra, n. 80, Vol. 1, paragraph 7.2.

90. Supra, n. 63.

91. Association of British Chambers of Commerce in Submissions to the Jenkins Committee Review of the United Kingdom Companies Act 1963.

92. As was the case in the Canterbury Frozen Meats takeover and the City Realties takeover examined by the Securities Commission in Vol. 2 of their report. Supra, n. 80.

93. R.M. Hanan, Minister of Justice, New Zealand Parliamentary Debates, Vol. 336, 1963, 24 September, page 2017.

94. Supra, n. 80, Vol. 1, page 106.

95. Ibid.

96. Voting securities are defined in the Commission's Report as Securities that confer a right to vote at general meetings not being a right limited to voting; during a period in which a dividend is in arrears, on a proposal to reduce capital, on a proposal that affects the rights of the security or on a proposal to wind up. This includes all shares which can be used to obtain control of a company, their shares being the only ones of interest in a takeover. Supra, n. 80, Vol. 1, paragraph 7.3.2.

97. Section 2(5) inserted by the Companies Amendment Act 1980, Section 2(2).

98. The 20 percent trigger is adopted from the 1968 Act. It is also the trigger used in Australian, Ontario and United States legislation. This figure is also used in the Commerce Act as the trigger for requiring consent under that Act.

99. Section 5(5) of the proposed legislation provides this power of exception. However no draft of the legislation is provided in the Commission's report.

100. Supra, n. 83.

101. See earlier discussion in this paper in 4, B.

102. See The Evening Post, Wellington, New Zealand, 11 July 1984, page 16 and N.Z.F.P. Annual Report to Shareholders.

103. See Re Wellington Publishing Company Limited [1973] 133; Weinberg, Blank and Greystone Takeovers and Mergers (4th Ed.), Sweet and Maxwell (1979) at 451.

104. Supra, n. 80, Vol. 1, paragraph 4.10.

105. The National Business Review, Wellington, New Zealand, 16 April 1984, page 16.

106. Supra, n. 99.

107. The London City Code on Takeovers and Mergers, Rule 27(1).

108. Australian Companies (Acquisition of Shares) Code, Sections 50-60.

109. Ontario Securities Act 1980, Section 89(1)(i).

110. Supra, n. 80, Vol. 1, paragraph 4.14.

111. The Evening Post, Wellington, New Zealand, 15 August 1984, page 21.

112. Supra, n. 80, Vol. 1, paragraph 5.3.

113. See definition of "Relevant Interest" (1)(d)(i), (ii) and (iii). Supra, n. 80, Vol. 7, paragraph 7.3.1.

114. (Unrep.) A.255/84 Pritchard J. 3 May 1984.

115. Supra, n. 28.

116. Supra, n. 114 at 15.

117. Supra, n. 80, Vol. 7, paragraph 4.14.4.

118. Idem.

119. Supra, n. 107.

120. Supra, n. 107, Rule 34(1).

121. Supra, n. 109, Section 91(1).

122. Supra, n. 107.

123. Supra, n. 80, Vol. 1, paragraph 4.14.5.

124. Securities Exchange Act 1934, Section 14(e).

125. Supra, n. 108, Section 52.

126. e.g. Actions for Fraud on the Minority, the Doctrine of Proper Purpose (Howard Smith Limited v. Ampol Petroleum Limited [1974] AC 821), Directors Duties to Shareholders and Fiduciary Duties. The disclosure requirements of the new rules will also provide some protection.

127. Supra, n. 108, Section 60.

128. Ibid., Section 12.

129. Supra, n. 107.

130. Supra, n. 107, Rule 34(1).

131. Review of Investor Protection Report 1 LCB Gower Cmnd 9125 (1984), page 153.

132. Supra, n. 99.

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