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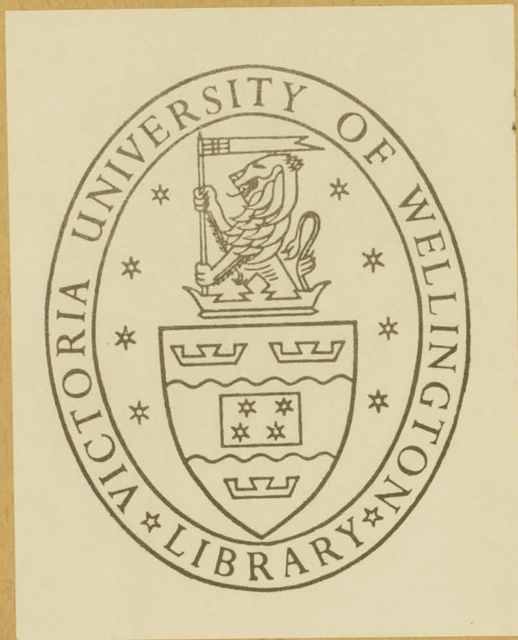
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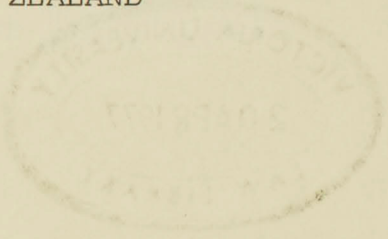
THE COMPANIES AMENDMENT ACT 1963: THE ADEQUACY OF THE STATUTORY CONTROL OF TAKE-OVER SCHEMES IN NEW ZEALAND



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Submitted for the degree of Master of Laws with Honours, Victoria University of Wellington, New Zealand.

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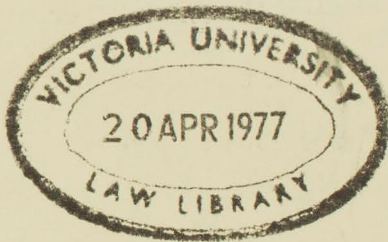

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INTRODUCTION

Take-over schemes and mergers in New Zealand are regulated by the provisions of the Companies Amendment Act 1963,[1] which came into force on 1 January 1964. The Act was the first legislative attempt in New Zealand to deal with take-overs and mergers. Since its enactment, the Act has been the subject of criticism to the effect that it is too restricted in those take-over schemes to which it applies. The Act has also been criticised on the ground that where a take-over scheme is within the scope of the Act, the Act is not sufficiently comprehensive to control many of the current practices that may be employed in the course of a take-over scheme.

Since the Act came into force, it has been considered by the New Zealand Special Committee to Review the Companies Act[2] which reported to the Minister of Justice in 1973.

In its Report,[3] the Macarthur Committee expressed the view that while the Act, since coming into force, had worked "reasonably satisfactorily" in regulating

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(1) Hereinafter referred to as "the Act".
(2) The "Macarthur Committee".
(3) The "Macarthur Report".

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take-over schemes, a number of amendments were desirable if the Act was to effectively achieve its intended purpose.

A number of developments have also taken place overseas in the legislative control of take-over schemes. Of particular interest are developments in Australia where, in 1969, the Company Law Advisory Committee to the Standing Committee of Attorneys - General[4] furnished its Second Interim Report,[5] Section C of which deals with take-over offers. Many of the Eggleston Committee's recommendations in respect of the legislative control of take-over offers have been incorporated into Australian legislation in Part VII B of the Companies Act 1961 (Commonwealth) which came into force on 1 January 1972.

In this paper it is not intended to question the need for the regulation by statute of take-over schemes by which an offeror intends to gain effective control over the offeree company. It is accepted that statutory control of such take-over schemes is both necessary and desirable. In particular, it is accepted that it is necessary to ensure an

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(4) The "Eggleston Committee".

(5) The "Eggleston Report".

offeree has adequate information upon which to decide whether an offer to acquire his shares should be accepted, and sufficient time in which to consider the merits of the offer and, if necessary, to seek advice. It is also accepted that it is necessary to ensure that public confidence in the share-market is maintained not only by protecting the offeree, but by ensuring that when a take-over offer is made, it is not made in secrecy, but that notification of the offer is given to all members of the offeree company, the Stock Exchange, and the Registrar of Companies.

The purpose of this paper is not to traverse the subject of take-over bids and their statutory control generally, as this is a matter which is adequately discussed elsewhere.(6) Rather it is proposed to confine the scope of this paper to a consideration of some of the ways in which the Act may no longer be regarded as being reasonably satisfactory in regulating take-over schemes in New Zealand. It is proposed to examine some of the recent developments relating to take-over schemes and to consider whether it is desirable that New Zealand should adopt more comprehensive legislation to regulate take-over schemes, having particular regard to current Australian legislation.

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(6) Paterson R.K. "Take-over bids and the Companies Act" (1970) 5 V.U.W.L.R. 447.

THE SCOPE OF THE ACT

1.1 The Act applies to take-over schemes which are within the definition of that expression contained in Section 2(1) of the Act:

> "'Take-over scheme' means a scheme involving the making of offers for the acquisition of any shares in a company which, together with shares, if any, to which the offeror is already beneficially entitled, carry the right to exercise or control the exercise of more than half the voting power at any general meeting of the offeree company".

The expression 'shares to which the offeror is beneficially entitled' is defined by Section 2(2) of the Act to include:

> "(a) Shares which the offeror is or will be entitled to acquire under any option or on the fulfilment of any condition under any agreement relating to the acquisition of any other shares in the offeree company;
>
> and
>
> (b) If the offeror is a company within the meaning of Section 158 of the principal Act, shares to which any subsidiary or holding company of the offeror or any other subsidiary of the offeror's holding company is already beneficially entitled, or which any such subsidiary or holding company is or will be entitled to acquire in any such manner as aforesaid."

Section 3 provides that the Act does not apply to an offer made pursuant to a take-over scheme involving the acquisition of shares in a private company if the shareholders in the private company have, before the date of the take-over offer, consented to the requirements of the Act being waived. It also provides that the Act does not apply in respect of offers made to not more than six members of a company.

1.2 One important restriction on the scope of the Act is that it does not apply to take-over offers unless they are made in writing. If an offeror carries out a take-over scheme pursuant to an oral offer, there need not be compliance with the provisions of the Act.[7]. Not surprisingly, this limitation on the scope of the Act has evoked considerable discussion,[8] with the result that it is not necessary to pursue the matter in this paper.

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(7) Multiplex Industries Limited v. Speer [1966] N.Z.L.R. 122; c.f. Section 66(1) of the Commerce Act 1975 which defines a take-over "offer" to include any proposal to make an offer "whether in writing or not".

(8) "The Scope and Application of the Companies Amendment Act 1963" (1966) 4 V.U.W.L.R. 149; Paterson RK "Take-over Bids and the Companies Act" (1970) 5 V.U.W.L.R. 447 at 460 et seq; Smith W.G. "Mergers and Takeovers": Paper presented at a seminar conducted by the New Zealand Society of Accountants, Wellington Branch, and the Wellington District Law Society, V.U.W., 2 Oct 1971.

1.3 In many instances effective control over a company may be secured and maintained by the acquisition of a number of shares which amounts to considerably less than one half of the shares carrying voting rights in a company. Such control will result not only from the voting power conferred by the shares which are held, but also from the ability to gain control over the gathering of proxy votes. The exercise of the control of a company by holding shares which confer less than one half of the voting power at a general meeting will be facilitated where the remaining shares in the company are widely dispersed among a large number of shareholders, or where large parcels of shares are held by institutional investors which follow a policy of non-interference in the management of a company as long as the management is not acting against the interest of the shareholders. While holding less than one half of those shares which confer a right to vote at a general meeting of a company will not allow an alteration to the articles or a disposition of assets of the company in which the shares are held, it may allow the holder of the shares to appoint directors and thereby influence the day to day management of the company.

1.4 By restricting the scope of the Act to take-over schemes in which an offeror is seeking to acquire a sufficient number of shares to confer the right to exercise (or control the exercise of) more than half the voting power at any general meeting of the offeree company, the effectiveness of the Act is severely curtailed. Furthermore, the Act is concerned only with the acquisition of voting shares and has no application in circumstances where an offeror seeks to acquire non-voting shares in a company, even if all the non-voting shares in a company, or all the non-voting shares in a class, are sought.

1.5 The scope of the Act may be contrasted with the approach adopted in Section 180C of the Companies Act 1961 in Australia. Section 180C, which is concerned with take-over offers, applies to any offer for shares in a company unless such an offer is expressly excluded by the terms of the Section. One of the important exceptions contained in the Section is an offer to acquire voting shares if the offer, when accepted, would not give the offeror control of 15 per cent of the voting power of the company. Prior to Section 180C, coming into force in 1972, take-over schemes were within the scope

of the Act only if offers made pursuant to the scheme could have given the offeror control of one third of the voting power of a company.[9] The lower percentage was recommended by the Report of the Eggleston Committee which recognised that where shares in a public company are widely held, "it is unlikely that any one shareholder would need to control as much as one third of the voting power to gain control of the company".[10] Apart from normal stock exchange trading,[11] there are five situations in which Section 180C of the Companies Act 1961 does not apply, and these may be summarised as follows: offers involving the acquisition of less than fifteen percent of the voting power in a company; offers where the offeror has made not more than three offers or invitations relating to the acquisition of shares in a company to more than three members of the company within the proceeding four months; offers to acquire non-voting shares unless the offeror proposes to acquire all the non-voting shares in a company or all the non-voting shares in a class are to be acquired; an offer to acquire shares in a company that does not have more than fifteen members; and

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(9) S.184 Companies Act.

(10) Para 27.

(11) See S.180C (7) provides that for the purposes of the Section, an "offer" does not include an offer "made at an official meeting of a Stock Exchange in the ordinary course of trading on the Stock Exchange".

an offer to acquire shares in a proprietary company that has more than fifteen members if the members of the company have consented in writing to the provisions of Part VIIB of the Companies Act 1961 not applying to the offer.(12)

1.6 In Ontario, Canada, the Securities Act was enacted in 1966 embodying many of the recommendations of the Report of the Attorney-General's Committee on Securities Legislation in Ontario.(13) Part IX of the Securities Act deals specifically with take-overs and applies where the offeror makes an offer to Ontario shareholders to purchase sufficient shares to give the offeror control of one fifth of the voting power in the offeree company.

1.7 In its Report, the Macarthur Committee compared the provision in the Act defining a take-over scheme with the corresponding provision in the Australian legislation, and also with the provisions of The Overseas Take-overs Regulations 1964.(14) The Regulations contain a definition of the expression "take-over scheme" which is identical with that contained in the Act,(15) except that the Regulations operate on a 25 percent measure of control.(16)

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(12) S.180C(2)(a)-(e).

(13) The Report of the "Kimber Committee".

(14) See now The Overseas Investment Regulations 1974.

(15) Reg. 2(1)

(16) As does the Commerce Act 1975 in relation to "Aggregation Proposals": S.66(1).

The Committee took the view that the Australian legislation, and the Regulations, recognises that it is possible to obtain control of a company with 50 percent or less of the voting power. Accordingly the Committee recommended an amendment to the Act:

> "After consideration we would recommend in the light of conditions obtaining in New Zealand that the definition of the term "take-over scheme" be altered and made to apply to any scheme whereby control is sought over 25 percent or more of the voting power of an offeree company. This would of course include any shares already beneficially held".(17)

1.8 Whether the degree of control at which the Act becomes operational is maintained at its present figure or reduced to a lower figure, clarification of the Act is required to ensure that only those transactions which will actually confer the selected degree of control come within the scope of the Act and that where an offeror may already exercise that degree of control, further compliance with the Act is not required. At present the Act may be interpreted as requiring an offeror who already holds a majority of the voting shares in a company to comply with the requirements of the Act where offers are made to acquire further shares.

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(17) Para. 348.

'FIRST COME, FIRST SERVED' BIDS

2.1 The Act has also been criticised insofar as "first come, first served" offers are concerned. Such an offer is made when the buyer, usually acting through a broker or some other agent, indicates that he is prepared to receive offers from shareholders to sell their shares at a price stated by the buyer. Such an invitation will state that the offers will be accepted in the order of priority in which they are received, up to a stated percentage of the share capital.(18)

2.2 If by making such an offer it is intended to obtain the right to exercise more than one half of the voting power at a general meeting of the offeree company, then the question arises of whether the Act will apply. In Multiplex Industries Limited v. Speer,(19) Tompkins J. was firmly of the view that the Act did apply:

> "Section 2 says 'offer includes an invitation to make an offer'. Thus, for the purposes of the Act, the word 'offer' is given an enlarged and unusual meaning......... what reasonable meaning can be given to the extended definition of 'offer' if it does not mean an invitation to a shareholder to sell his shares?...............

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(18) An example of a "first come, first served" bid is provided by the A.S. Paterson & Company Limited bid for a minority interest in A.B. Consolidated Limited, discussed infra para. 3.

(19) [1965] N.Z.L.R. 592.

> I think the only sensible interpretation of the definition of 'offer' is that it means that it includes an invitation by a take-over offeror to a shareholder to sell his shares pursuant to a take-over scheme".(20)

Thus, the learned Judge was able to conclude that an invitation to make an offer to sell shares to the "offeror" under a take-over scheme was sufficient to constitute a take-over offer for the purposes of the Act. However, the invitation to shareholders in the offeree company must have been made, and the invitation must be made by (or on behalf of) the person intending to acquire the controlling interest in the offeree company.[21]

2.3 The Court of Appeal appears to have taken a similar view:

> "If an invitee, looking at a document placed before him and without spoken words orally communicated to him collaterally, can fairly deduce from the document before him that he is invited to make an offer upon certain terms, then, no doubt, whether the word "invited" or any other word is used or not, the document may be construed as a written invitation; but if the document merely sets out the terms of some contemplated or suggested offer, but its words convey no invitation expressly or impliedly to make such an offer, and if such an invitation is in fact made orally, then I am clear that there is no written invitation to make

(20) Ibid p.602.

(21) Ibid.

Idem

> an offer. What is in writing is the terms upon which the invitee is orally invited to make an offer, and no more".(22)

The Court held that, on a consideration of the facts of the case, there were no words either express or implied in the documents in question making any invitation to make an offer. Such invitation as was made was an oral offer and therefore the Act did not apply.

2.4 In Australia, Part VIB of the Companies Act 1961 contains provisions regulating invitations,(23) requiring the same procedure to be followed as that which must be followed when a take-over scheme is carried out pursuant to a take-over offer. The Eggleston Report recognised that invitations are often associated with a number of undesirable features.(24) The Committee's principal concern was that an invitation to offer shares for sale did not come within the provisions of the now-repealed Section 184 of the Companies Act 1961, the result being that a person making an invitation to acquire shares could make that invitation with the intention of acquiring more than one third of the voting shares in a company without being required to follow the take-over procedure required by the Act. However, the Committee also pointed out that by making an

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(22) [1966] N.Z.L.R. 122 per Turner J. at p.141.
(23) S.180C (3)-(5).
(24) Para. 22.

invitation through an agent, the bidder could avoid disclosing his identity, and that as sellers do not know whether the buyer intends to accept more than the percentage he has stated he will accept, the shareholder may be required to make an immediate decision without the advantage of the information that must be provided where a take-over scheme is within the terms of Section 184. As the Report of the Committee points out,

> "Inequality between shareholders is inevitable since many will be unaware of the offer until too late".(25)

2.5 The Macarthur Committee saw the principal disadvantage of the 'first come, first served' offer as allowing a bidder to become the effective controller of a company without the necessity of complying with the requirements of the Act. However, the Committee was unable to agree with the suggestion that 'first come, first served' offers are sufficiently undesirable to warrant prohibition. After considering the recommendations of the Company Law Committee in the United Kingdom[26] and requirement of United States law that shares be taken up by the purchaser on a pro-rata basis, the Macarthur Committee recommended that where the acceptance of an offer made in response to an

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(25) Para 22(e).
(26) The "Jenkins Committee". ref to Report

invitation to offer shares for sale would result in the purchaser of those shares gaining 25 percent or more of the voting power in a company, there must be compliance with the requirements of the Act.(27) In addition, the Committee recommended that any persons making a 'first come, first served' offer should be required to state the maximum number of shares intended to be acquired, and the number of shares in the offeree company to which that person is beneficially entitled.(28) However, the Committee apparently thought it unnecessary to recommend the adoption of a requirement similar to that embodied in United States legislation whereby a shareholder has ten days from the publication or mailing of the offer in which to act. By bringing within the scope of the Act an offer, the acceptance of which would result in the offeror gaining at least 25 per cent of the voting power in a company, the Committee appears to have considered a shareholder to be adequately protected. However, it would still be possible, by means of a 'first come, first served' offer together with the purchase of shares on the Stock Exchange at a later date, for effective control of a company to be acquired principally as the result of a 'first come, first served' offer that would be outside the scope of the Act. This is the very consequence the Committee was seeking to prevent.

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(27) Para 349. (28) Para 360(c).

2.6 In 1971 the Stock Exchange of New Zealand adopted its own rules setting out the terms on which its members may act in a 'first come, first served' offer. These rules require disclosure by the offeror of information which includes the maximum number of shares it is intended to acquire and the percentage of the capital of the offeree company which (together with any shares already beneficially held) it is sought to acquire. The rules provide 'first come, first served' offers must be "wholly for cash". The rules (which apply only to members of the Stock Exchange) do not give offerees any minimum time in which to decide whether they will dispose of their shares and allow an offeror to conceal his identity from the offerees.

THE A.S. PATERSON BID FOR A.B. CONSOLIDATED LIMITED

3.1 The contention that the Act is too restricted in its application insofar as the measure of control at which it becomes operative is concerned, and in its application to 'first come, first served bids", may be supported by reference to the recent take-over offer made by A.S. Paterson and Company Limited in respect of minority interest in A.B. Consolidated Limited.

3.2 26 April 1976, a firm of merchant bankers acting on behalf of A.S. Paterson and Company Limited ("A.S.P.") announced a 'first come, first served' offer by A.S.P. of 50 cents cash for each share in A.B. Consolidated Limited ("A.B. Consolidated"). At the date the offer was made, A.B. Consolidated shares, with a par value of 50 cents, were selling on the Stock Exchange at 33 cents. The intention of the offeror was to acquire one third of the 7.8 million voting shares in A.B. Consolidated, although it was announced that A.S.P. would give "favourable consideration" to acquiring up to a maximum of 49 per cent of the ordinary capital of A.B. Consolidated. The offer was stated to be conditional upon A.S.P. receiving acceptances in respect of 1.9 million shares representing approximately 25 per cent of

A.B. Consolidated's ordinary capital. Two U.K. companies, Associated Biscuit Manufacturers Limited and Rowntree Mackintosh Limited, each held approximately 10 per cent of the ordinary shares in A.B. Consolidated. Thus, if A.S.P. could acquire one third of the voting shares in A.B. Consolidated and gain the support of these two shareholders, it would be able to exercise effective control over A.B. Consolidated.

3.3 A.B. Consolidated was, to a large extent, an obvious target for a take-over. Profits in recent years had shown a steady decline. In 1966 the ratio of after-tax earnings to shareholders funds was 8.6; in 1975 this figure was 2.6. In the six months ending 30 September 1975 the company had made a loss of $240,000. In addition, a substantial exchange loss had been suffered on a 1.5 million Eurodollar loan. However, for the year ending 31 March 1975, for each 50 cent share in A.B. Consolidated, there were assets with a nett value of $1-12.

3.4 It is interesting to note that the making of a 'first come, first served' bid caused some confusion among Stock Exchange members, some of whom were apparently under the impression that they could not

act for a company making such a bid. However, the matter was clarified by the Stock Exchange Association which announced that it had its own regulations to deal with such a bid, such rules having been developed because 'first come, first served' bids had, in the past, proved unsatisfactory for many shareholders.(29)

3.5 The immediate reaction to the offer by A.S.P. was a considerable amount of activity in the trading of A.B. Consolidated shares, both on and off the Stock Exchange. Within two weeks of the offer being made, 20 per cent of the ordinary shares in A.B. Consolidated changed hands on the Stock Exchange. As the result of purchases by existing shareholders in the offeree company, the price of shares in that company was being quoted at one or two cents above the value of the A.S.P. offer within two days of the offer having been made. Such purchases appeared to be intended to discourage offerees from accepting the offer from A.S.P. until the directors of A.B. Consolidated decided how they would oppose the bid. However, when large parcels of shares began exchanging hands, it appeared that a rival bid was likely. On 5 May 1976 a sale took place involving 622,000 shares representing approximately 9 per cent of A.B. Consolidated's issued capital, and on 11 May 1976 a further similar sale took place with the

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(29) Supra. para 2.6.

price paid for these shares being 10 cents in excess of the A.S.P. offer. By this time it became apparent many of the shares offered for sale were being acquired by Brierley Investments Limited, although no doubt speculators had entered the market in the expectation of an increased offer from A.S.P., or an increase in the price of their shares should A.S.P. succeed in their bid and increase the profitability of A.B. Consolidated.

3.6 It is also interesting to note that at this time a dispute developed between shareholders in A.B. Consolidated who had accepted the A.S.P. offer but who had requested the return of their acceptances because of the increased market value of the shares, and the merchant bank acting for A.S.P. who declined to return the acceptances on the ground that they were not legally permitted to return them.

3.7 The initial step in the defensive action taken by the directors of A.B. Consolidated was to announce its improved financial position for the year ending 31 March 1976, and declare a tax-free dividend of 5 per cent. The directors described the A.S.P. offer as "completely inadequate",

pointing out that the nett asset backing of each A.B. Consolidated share was $1.05, and that if the A.S.P. offer was accepted, shareholders would not be entitled to participate in the dividend "effectively reducing the 50 cent cash bid price to 47.5 cents" a share.

3.8 The principal defensive action taken by the directors of A.B. Consolidated was to assist Brierley Investments Limited in its acquisition of shares in A.B. Consolidated. On 12 May 1976 Brierley Investments was able to announce that it held 25 per cent of the ordinary share capital in A.B. Consolidated, such share capital apparently having been acquired at a cost of $1.1 million. However, on 17 May 1976, A.S.P. announced that it held more than 25 per cent of the voting shares in A.B. Consolidated following the acquisition of the shareholding in A.B. Consolidated of Rowntree Mackintosh Ltd. In addition, A.S.P. was able to state that the other large U.K. shareholder in A.B. Consolidated, Associated Biscuit Manufacturers Limited, while not disposing of its shares, had sided with A.S.P. At the same time it was announced that the take-over offer was unconditional, and that the cash offer had been increased from 50 cents per share to

57½ cents per share. As A.S.P. had, by this time, acquired sufficient shares to give it approximately 30 per cent of the voting control at any general meeting of A.B. Consolidated (disregarding the fact that its nominee might be appointed proxy by the remaining large U.K. shareholder), and as the increased offer was to apply to all acceptances received by A.S.P., it would appear the increased offer was largely intended to quell the dissatisfaction of those offerees who had accepted the A.S.P. offer of 50 cents and whose requests for the return of their forms of acceptance of that offer had been declined. These shareholders had indicated they were seeking legal advice and on one occasion the directors of A.B. Consolidated had closed the company's share register "pending legal clarification of the Paterson first come, first served offer", although it was re-opened when the Stock Exchange threatened to suspend trading in the shares of A.B. Consolidated.

3.9 On 19 May 1976 the directors of A.B. Consolidated announced the issue of 2,000,000 ordinary shares at a par value of 50 cents, a price below both the current market value for the shares and the price offered by A.S.P. It was explained that the issue was part consideration for the acquisition of assets in related food and food processing industries,

but the recipient of the shares was not disclosed. The new share issue represented 25.7 per cent of the pre-issue ordinary capital of A.B. Consolidated and 20.4 per cent of the post issue capital.

On 4 June 1976 it was announced that the new share issue had been alloted to Brierley Investments Limited.[30] In return, A.B. Consolidated had acquired the shares of Asparagus Limited, a company previously owned by a subsidiary of Brierley Investments Limited. The assets of Asparagus Limited, consisting principally of an orchard property, were valued in the company's accounts in 1975 at $350,000.

3.10 The consequences of this share issue were that, while prior to the issue A.S.P. held approximately 33⅓ per cent of the ordinary share capital in A.B. Consolidated, subsequent to this issue this figure was reduced to 25 per cent. However, the holding of Brierly Investments Limited of 25 per cent prior to the issue was increased to approximately 42 per cent following the issue.

3.11 It is submitted that it would have been desirable had the A.S.P. bid for a minority interest

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(30) It would be interesting to speculate whether in alloting these shares to defeat the A.S.P. bid there was a proper exercise of power on the part of the directors of A.B. Consolidated.

– give the authorities here – Bamford, Hogg, Howard Smith v. Ampol.

in A.B. Consolidated been within the scope of the Act so that the parties to the scheme would have been bound to comply with the requirements of the Act. As has been shown, current Australian legislation would have covered such a scheme. However, under New Zealand legislation, A.S.P. were able to make a bid for sufficient voting shares in A.B. Consolidated to give it effective control of the company without being required to disclose information that may have assisted the offerees in making a decision as to whether to accept or reject the offer. In particular, there was some doubt in the initial stages of the bid surrounding the shareholding in A.B. Consolidated by A.S.P. which would have been clarified had A.S.P. been required to disclose its shareholding in A.B. Consolidated. Furthermore, because the bid by A.S.P. was outside the scope of the Act, the offeree company was not required to issue a statement containing the information prescribed by the Second Schedule to the Act. The fact that compliance with the Act was not required is significant when it is considered that without the defensive action taken by the directors of the offeree company, it appears that A.S.P. would have succeeded in gaining effective control of A.B. Consolidated. However, it must be conceded that the failure by the offeror to provide the offerees with the information specified in

First Schedule was not as serious as it might have been had A.S.P. not made a cash offer.[31]

3.12 The result of the contest between A.S.P. and Brierley Investments Limited was that, disregarding the 2 million shares issued by A.B. Consolidated, these two companies acquired approximately 58 per cent of the ordinary voting shares in the offeree company during a period of just over four weeks. Many more shares also changed hands during this period, yet the schemes by which this major reconstruction in the shareholding of A.B. Consolidated was brought about were not within the scope of the Act.

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(31) As the offer was made on behalf of A.S.P. by a merchant bank and not a member of the Stock Exchange, this would have been possible (supra para 2.6).

INCREASES IN THE VALUE OF AN OFFER

4.1 Section 9 of the Act permits an offeror to vary the terms of a take-over offer without having to repeat the issue of documents required by the Act[32] insofar as the variation of the offer increases the amount of cash that is offered for the shares which it is sought to acquire,[33] or extends the time for the acceptance of the offer.[34] It is not uncommon for the date of acceptance of an offer to be extended, nor is it uncommon for the price offered for the shares to be increased. Where the price offered for the shares is increased, the question may arise of whether those shareholders in the offeree company who have accepted the original offer at the lower price are bound to accept that price while other shareholders will be entitled to receive a higher price for their shares. In its report, the Eggleston Committee stated the problem in the following terms:

> "Where an offer is made, and is accepted by some, and subsequently market pressures force the bidder to offer more to the remaining shareholders. In such a case there are two views possible. One is that those who came in early should receive

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(32) but notice of the variation must be served on the offeree company: S.9(2).

(33) S.9(1)(a).

(34) S.9(1)(b).

> the same benefits as those who held out. The other is that, provided each was given time to consider, the early acceptors, who were presumably more anxious that the deal should go through, should not share in the benefits obtained by the more cautious or more reluctant shareholders who forced an increase in the price".(35)

The Committee took the view that the better solution would be to require that an offeror who increases the price offered to some shareholders must pay the increased price to those who have already accepted his offer.

4.2 Section 180 L of the Australian Act now provides that where the consideration that is offered for shares it is proposed to acquire pursuant to a take-over scheme is increased, each person whose shares are acquired either before or after the consideration is increased is entitled to receive that increased consideration. As a corollary, Section 180 M provides that while a take-over offer is open, no person whose shares may be acquired under the take-over scheme may be given any benefit (except in pursuance of a variation made in accordance with Section 180 L of the Act) which has not been provided for by the original take-over offer.

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(35) para 18(b).

4.3 According to the ordinary principles of contract, it would appear that in New Zealand, as the Act stands at present, once an offer is declared unconditional by an offeror, shareholders who have agreed to part with their shares at a lower price than others will be bound to accept that lower price. This view would appear to accord with that of the Macarthur Committee which stated in its report that while the Act was not clear as to whether shareholders who have accepted an offer at the first and lower price are bound to accept that lower price, it may well be the case that they are so bound. Accordingly the Committee recommended "that if the price of an offer is increased, it should apply to all the acceptors".[36]

4.4 The Committee could see no reason why Section 9 (1)(a) of the Act should give an exemption relating to the variation of an offer by increasing "the amount of any cash sum that is offered as consideration or part consideration for the shares that are proposed to be acquired", without giving a similar exemption to an increased offer of securities. The Committee recommended:

> "That Section 9 be extended so that a variation of offer without further compliance be permitted in the case

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(36) para 360(h). Where the Stock Exchange rules in respect of 'first come, first served offers' apply (supra para 2.6) a bidder is required to undertake that he will not make a higher offer within a specified period unless earlier acceptors also get the higher price.

> of an increased offer of securities
> in respect of the same class included
> in the original offer".(37)

Section 180 (L) of the Australian Companies Act permits an offer to be increased without further compliance with the provisions of that Act not only where the increased consideration is in the form of cash, but also where it is in the form of shares, stock, debentures or an option to acquire unissued shares.[38]

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(37) para 360(1).

(38) S.180L (2) (a)-(f).

POWER OF ATTORNEY

5.1 A take-over offer which is required to comply with the First Schedule to the Act will generally have attached to it a form whereby the offeree may signify his acceptance of the offer to acquire his shares. This form of acceptance, when executed by the offeree, may merely recite the fact that the offer has been accepted. However, if the directors of the offeree company are likely to be opposed to the take-over offer, a power of attorney may be incorporated into the form of acceptance appointing the offeror the proxy of the offeree, (or if the offeror is a company, appointing the offeror the proxy of the offeree with a power of substitution by the offeror to appoint persons to act on its behalf). The effect of this power of attorney will be to allow the offeror to attend any general meeting of the offeree company and to exercise the offeree's vote at that meeting.

5.2 The significance of including a power of attorney in the form of acceptance may be illustrated by referring to the recent take-over offer made by The Southland Frozen Meat and Produce Export Company Limited ("S.F.M.") for 51 per cent of the ordinary shares in The New Zealand Refrigerating Company Limited

("N.Z. Refrigerating"). Included in the form of acceptance provided to offeress by SFM was a provision whereby the offerees agreed to:

> "Authorise and appoint The Southland Frozen Meat and Produce Export Company Limited (with power of substitution by The Southland Frozen Meat and Produce Export Company Limited in favour of such person(s) as The Southland Frozen Meat and Produce Export Company Limited may appoint to act on its behalf) as attorney and agent to act for the transferor(s) and to do all matters of any kind or nature whatsoever in respect of or pertaining to the stock units specified in the Schedule as The Southland Frozen Meat and Produce Export Company Limited may think proper and expedient and which the transferor(s) could lawfully do or cause to be done including the appointment of a proxy or proxies for any meeting of The New Zealand Refrigerating Company Limited attendance in person thereat and voting thereat and the execution of all documents in the name of the transferor(s) which The Southland Frozen Meat and Produce Export Company Limited may consider necessary for all or any of the foregoing purposes."

5.3 The power conferred by accepting offerees upon SFM to appoint persons to attend general meetings called by N.Z. Refrigerating, and to vote at those meetings in such manner as SFM may think proper and expedient, was important insofar as the principal defensive tactic adopted by N.Z. Refrigerating to counter the SFM bid was to seek a merger with a third company, Waitaki Industries Limited. As the Chairman of N.Z. Refrigerating pointed out in a statement made to the Stock Exchange on 17 March 1965:

> "As any merger arrangements between the New Zealand Refrigerating Co Ltd and Waitaki Industries Ltd would, in certain circumstances, require the approval of a meeting of the New Zealand Refrigerating Co Ltd stockholders, it would be most dangerous for the Southland Company to have such a power to vote against any N.Z.R. merger with Waitaki."

5.4 The terms of the power of attorney embodied in the form of acceptance of SFM's take-over offer were sufficiently wide to allow SFM to be able to exercise the vote of a N.Z. Refrigerating shareholder before SFM's offer was declared unconditional. However, the terms of the take-over offer made by SFM specifically provided that an offeree who accepted the offer could withdraw their acceptance at any time prior to the offer being declared unconditional.

5.5 As there is no right recognised by common law to vote by proxy, such a right depending for its existence upon the terms of the contract between a company and its members as expressed in its regulations, there must be strict compliance with the requirements of the offeree company if such a power of attorney is to be effective. For example, the instrument must be attested in the manner required by the articles, and must be deposited in the manner and within the time specified. However, providing there has been compliance with the requirements of the

articles of the offeree company (which may require that only a member entitled to vote at a general meeting may be a proxy), there appears to be no reason why an offeree may not execute a power of attorney in favour of an offeror.[39]

5.6 Where a power of attorney in favour of the offeree is embodied in the form of acceptance of the offer, that power of attorney may be expressed to be irrevocable. Where such a power of attorney is given for valuable consideration, the power may not be revoked at any time without the consent of the donee, nor is it revoked by the death, mental deficiency or bankruptcy of the donor.[40] If the power of attorney is expressed to be irrevocable for a fixed period not exceeding one year, then whether or not the power of attorney is given for valuable consideration, the power may not be revoked during the specified time and similarly it is not revoked by the death, mental deficiency or bankruptcy of the donor within that time.[41]

5.7 Powers of attorney have been the subject of recent attention in the United Kingdom where the Powers of Attorney Act 1971 was passed following the recommendations of The Law Commission chaired by The Honourable Mr Justice Scarman.[42] Similarly,

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(39) For a discussion on proxies as a special form of power of attorney refer: Alcock F.B. Powers of Attorney Ch. VII (1935).

(40) Property Law Act 1952; S.136. (41) Ibid; S.137.

(42) Report on Powers of Attorney (1970) Law Com. No. 30.

in New South Wales,[43] and Ontario,[44] Law Reform Commissions have considered and reported upon the law relating to powers of attorney. However, no consideration has been given in these Reports to the manner in which a power of attorney may be used by an offeror to facilitate a take-over offer. The Eggleston Committee did not consider the matter and there is no provision regulating the use of powers of attorney in Part VIIB of the Companies Act 1961 (Commonwealth). The Macarthur Committee briefly referred in its report to the use of irrevocable powers of attorney, stating that while the Committee could see merit in the use of irrevocable powers of attorney once an offer has become unconditional, the use of such powers of attorney before the offer became unconditional was undesirable.[45] Accordingly the Committee recommended:

> "That voting by an offeror on behalf of an accepting offeree pursuant to an irrevocable power of attorney in general meetings of the offeree company before the offer has become unconditional be prohibited."(46)

However, it may be considered appropriate that restrictions should be placed not only on the point

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(43) Report of the L.R.C. on Powers of Attorney L.R.C. 18 (1974).

(44) Report on Powers of Attorney (1972): Ontario L.R.C.

(45) para 352.

(46) para 360 (f).

in time during a take-over scheme at which an offeror may vote on behalf of an accepting offeree at a general meeting of the offeree company pursuant to an irrevocable power of attorney, but that restrictions should also be placed on the scope of the power conferred in such a power of attorney. It would seem justifiable that the power of attorney should stipulate that it applies only to certain matters relating to the take-over offer and not simply recite that the offeror may do "all matters of any kind or nature whatsoever" which the offeree may do in respect of his shares in the offeree company.

NON-GENUINE OFFERS

6.1 The Macarthur Committee gave consideration to the desirability of extending the provisions of the Act to prohibit a "bluffing bid" being made in an attempt to defeat a genuine take-over offer, or to distort the market price for shares in a company during the currency of the bid.(47) The Committee noted that the City Code on Take-overs and Mergers requires evidence to be produced guaranteeing the offeror's financial ability to carry out the take-over scheme, and the Report of the Eggleston Committee which stated:

> "It has been suggested that some form of security might be required as evidence of good faith. We see practical difficulties in making such provision, but we think it should be an offence to make a take-over offer, or to give notice of intention to do so without having any real intention of doing so, or without having any reasonable or probable grounds of expectation of being able to provide the consideration for the offer or proposed offer. It would often (but not always) be difficult to prove the offence, but the existence of such a provision would, we think, discourage the making of irresponsible announcements which could have the effect of creating a false market."(48)

6.2 The recommendations of the Eggleston Committee have been adopted in Section 180Q of the Australian Companies Act which prohibits a person who does

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(47) para 356.
(48) para 37.

not intend to make a take-over offer from announcing that he intends to make such an offer. It also prohibits a person from making a take-over offer if he has no reasonable grounds for believing that he will be able to perform his obligations if the offer is accepted.

6.3 The Macarthur Committee appeared to envisage the need for a similar legislative provision in New Zealand when they recommended "that it be constituted an offence to make a 'bluffing' or non-genuine offer.[49] However, it may be considered that, to some extent, Section 11 of the Act constitutes a deterent to the making of a take-over offer which is not bona fides. Subsection (2) of Section 11 provides that the offeree company may recover from the offeror "any expenses properly incurred by the offeree company, in relation to the take-over scheme....". In Canterbury Frozen Meat Company Limited v Waitaki Farmers Freezing Company Limited,[50] Wilson J. rejected the submission put forward by counsel for the defendant that the subsection covered only such expenditure as was incurred by the offeree company in fulfilling its obligations under the Act. As the learned Judge observed, if the intention of the Legislature had been to restrict the obligation of an offeror

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(49) para 360 (j).
(50) [1972] N.Z.L.R. 806.

in this way, it could have specifically referred to the sections of the Act pursuant to which the expenditure had been incurred, instead of using "the rather indefinite words" adopted in subsection 11(2) of the Act.[51] The Court was also unable to accept the alternative submission that the only expenses contemplated by the Act in addition to those incurred by the offeree company in fulfilling its obligations under the Act were those expenses "coming within the objects of the offeree company or incidental thereto and expended bona fide in the interests of the company". As Wilson J. pointed out:

> "The purpose of the Act, as I read it, is to protect shareholders from making an unwise choice through ignorance or through collusion between the offeror and the directors of the offeree company. Any expenditure reasonably incurred by the company....to achieve that purpose is properly incurred and may be recovered from the offeror under the authority of S.11(2), whether or not it is within the company's objects."(52)

6.3 It appears from the decision in <u>Canterbury Frozen Meat Company Limited v Waitaki Farmers' Freezing Company Limited</u>[53] that expenditure will be "properly incurred" for the purposes of Section 11(2) of the Act if it is expenditure incurred in fulfilling the offeree company's obligations under Section 5 or Section 7(2) of the Act; if the expenditure is

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(51) Ibid; p.810.

(52) Ibid; p.811.

(53) Supra n.50.

incurred "in countering propoganda by the offeror which is calculated to influence the offeree's choice"; if it is incurred in protecting the interests of the offerees in relation to the take-over scheme; or if it is incurred in refunding directors expenses pursuant to Section 11(1) of the Act.

6.4 It will be apparent that as a result of the provisions of Section 11 of the Act and the liberal interpretation that has been adopted in respect of that section, an offeror may assume responsibility for the payment of a reasonably large sum of money representing the expenses properly incurred by the offeree company in relation to the take-over scheme.[54] The prospect of such liability may act as a deterrent to potential offerors who intend making a take-over offer, but who would not be acting bona fides in so doing (and possibly to potential offerors who would be acting bona fides). However, much will depend on the circumstances surrounding the take-over scheme in question, as it may be the case that an offeror is prepared to take the risk of incurring expenses pursuant to Section 11 of the Act having regard to the possible gains to be made.

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(54) e.g. in circumstances such as the unsuccessful SFM bid in respect of N.Z. Refrigerating.

THE EFFECT OF NON-COMPLIANCE WITH THE ACT

7.1 Section 4(1) of the Act prohibits an offeror making a take-over offer unless it is made in compliance with the provisions of the Act. Section 4(2) provides that a take-over offer sent to any offeree shall comply with the requirements of the First Schedule to the Act but, as Casey J. observed in Carr v New Zealand Refrigerating Co. Ltd,(55) "contains no specific words of prohibition". Section 12 of the Act makes it clear that, except as otherwise provided in the Act,(56) the parties to a take-over scheme may not contract out of the provisions of the Act. Section 13 of the Act provides for a penalty in the event of non-compliance with the provisions of the Act on the part of either an offeror, or an offeree company. The penalty is in the form of a fine not exceeding one thousand dollars. However, the Act does not specify whether a take-over scheme which contravenes the Act, because of a default on the part of either the offeror or the offeree company, may nevertheless be validly effected.

7.2 The problem of whether non-compliance with the requirements of the Act has the effect of rendering a contract made in contravention of the

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(55) [1976] 2 N.Z.L.R. 135; p.144.
(56) S. 3(a).

Act void, was considered by Tompkins J. in Multiplex Industries Limited v Speer[57] where it was held that such a contract was not only illegal, but unenforceable:

> "The attainment of the objects of the Act would not be effected if take-over offers in breach of the Act were nevertheless still effective and the company making the offer in contravention of the Act merely had to face a fine. I think the terms and objects of the Act make it clear that take-over offers made in contravention of the Act are not only illegal, but unenforceable."[58]

In the Court of Appeal,[59] it was submitted on behalf of the offeror that a breach of the provisions of the Act concerning offers, although it may constitute an offence, does not have the effect of invalidating contracts made pursuant to the acceptance of such offers. However, the Court found that the offers made by the offeror in that case did not come within the scope of the Act, and therefore was not required to consider the question. Nevertheless, the view has been expressed that the Court of Appeal implicitly upheld the finding of Tompkins J. in the Court below.[60]

7.3 The view expressed by Tompkins J. in Multiplex Industries Limited v Speer[61] may be contrasted with the approach adopted by Gillard J. in Colortone Holdings

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(57) [1965] N.Z.L.R. 592. (58) Ibid; p.605.

(59) [1966] N.Z.L.R. 122.

(60) Afterman & Baxt Cases and Materials on Corporations and Associations (1972); 571.

(61) Supra; n.57.

Ltd v Calsil Ltd,[62] a decision of the Supreme Court of Victoria. The latter case was concerned with Section 184 of the Companies Act 1961,[63] subsection (2) of which provided that no take-over offer could be made unless certain prescribed formalities were observed. As Gillard J. noted, "the language of Section 184 is quite mandatory in form".[64] Among the formalities required by the subsection to be observed, the offeror, Calsil Ltd, was bound to give the offeree company, Colortone Holdings Ltd, within a prescribed period, written notice of the take-over scheme, together with particulars of the terms of the take-over offers to be made pursuant to the scheme. When the take-over offers were made, they were to have attached to them a copy of the statement given to Colortone Holdings Ltd. (To this extent the provisions of Section 184(2) of the Commonwealth Act was similar to Section 4(1) and 4(2)(a) of the New Zealand Act). It was contended on behalf of Colortone Holdings Ltd that the terms of the offer made to the shareholders in that company were different from those communicated to it by Calsil Ltd.

The learned Judge held that "the plaintiff....has succeeded in showing that Calsil has breached the provisions of S.184 by making an offer to the

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(62) [1965] V.R. 129. (63) see now Part VIIB of that Act.
(64) Supra; at p.130.

Colortone shareholders in terms the particulars of which it had not informed Colortone by its earlier notice in writing".[65]

However, counsel for Colortone Holdings Ltd did not contend that an offer made in contravention of the section was null and void as being illegal, and the case proceeded on the basis that although the offers made by Calsil Ltd may not have complied with the requirements of the Act, they were nevertheless valid offers. For this reason it may be considered that the decision did not satisfactorily resolve the question of whether non-compliance with the Act in making a take-over offer renders a contract made upon the acceptance of the offer illegal and unenforceable.

7.4 The decisions in Multiplex Industries Limited v Speer[66] and Colortone Holdings Limited v Calsil Ltd[67] have recently been considered in Carr v New Zealand Refrigerating Co. Ltd.[68] It has been stated above how, faced with a take-over offer in respect of its shareholding by SFM, the directors of N.Z. Refrigerating sought a merger with Waitaki Industries Ltd in an endeavour to defeat the SFM bid.[69] In fact, the merger took the form of a

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(65) Supra; at p.137. (66) Supra; n.57.
(67) Supra; n.62. (68) Supra; n.55.
(69) para 5.3.

take-over offer by N.Z. Refrigerating for at least 75 per cent of the shares in Waitaki Industries Ltd. The plaintiffs, one a shareholder in Waitaki Industries Ltd and the other a stockholder in N.Z. Refrigerating, both employees of SFM, sought an order restraining N.Z. Refrigerating from proceeding with the take-over scheme on the ground that there had been a failure by the offeror to comply with the requirements of the Act. It was held that in carrying out the take-over scheme, N.Z. Refrigerating had failed to totally comply with the requirements of Section 4(2) of the Act insofar as there had been an omission to provide information about the Stock Exchange listing of certain convertible debentures. Nevertheless, there had been substantial compliance with the requirements of the Act and "the only omission was of minor importance and unlikely to prejudice any offeree....".

Casey J. was able to distinguish the approach adopted by Tompkins J. in Multiplex Industries Limited v Speer on the ground that in that case the Court was concerned with the enforcement of a contract in circumstances where the contract had been entered into following a "total failure" to comply with the requirements of the Act. He

was therefore able to reject the submission advanced by counsel for the plaintiffs that the decision in Multiplex Industries Limited v Speer requires even the most trivial instances of non-compliance with the Act to have the effect of rendering a take-over offer void. The learned Judge referred to "the much quoted and commonsense warning by Devlin J. in St John Shipping Corporation v Joseph Rank Ltd(70)....against a too-ready assumption of illegality or invalidity of contracts when dealing with statutes regulating commercial transactions".(71) He also pointed out that the validity of a take-over offer where there had not been total compliance with the requirements of the Act was not determined simply by classifying a requirement as being directory or mandatory. Rather, it is necessary to consider the place of the requirement in the scheme of the Act and the degree and seriousness of the non-compliance:

> "In my view the aims and language of the Act suggest that in relating to the contents of the preliminary statement and the offer, the intention of S.4 is that the schedule should be substantially complied with, looking at the document as a whole in the light of the circumstances in each case. This can be achieved within the dichotomy of 'mandatory' or 'directory' stipulations by holding that the requirements of

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(70) [1957] 1 Q.B. 267.

(71) Supra; at p.145.

> the schedule are 'directory' in the sense....that substantial compliance is required. Alternatively (and more simply) I would prefer to say that Parliament intended these provisions to be substantially complied with; if they are not, subsequent transactions in the scheme are avoided."(72)

7.5 In Carr v New Zealand Refrigerating Co Ltd,(73) the failure to comply with the requirements of the Act was the omission of information in the take-over offer. It was not contended that there was any defect in the preliminary statement provided to the offeree company. In the course of his judgement, Casey J. placed some importance on the difference in wording between subsection (1) of Section 4 (concerning the provision of the preliminary statement to the offeree company) and subsection (2) of Section 4 (concerning the take-over offers sent to offerees). He pointed out that in Multiplex Industries Limited v Speer(74) Tompkins J. "did not discuss the differences in wording between S.4(1) and S.4(2) and apparently treated them as both avoiding non-complying statements and offers". It is interesting to note, therefore, that in adopting a test of "substantial compliance", the learned Judge made no endeavour to distinguish between the application of that test to a failure to comply with subsection (1) and subsection (2) of Section 4 of the Act.

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(72) Supra; p.148. (73) Supra; n.55.
(74) Supra; n.57.

7.6 The effect of the decision in Carr v N.Z. Refrigerating Co. Ltd[75] appears to be that where there has been a total failure to comply with the requirements of the Act (because no preliminary notice has been given to the offeree company, or a statement has not been given to the offerees), the principal expounded by Tompkins J. in Multiplex Industries Limited v Speer[76] that take-over offers made in contravention of the Act are illegal, is still valid. However, if there has been a failure to fully comply with the requirements of the Act, but nevertheless there has been substantial compliance with those requirements, the take-over offer (and subsequent transactions) will not be invalid. In order to determine whether there has been substantial compliance with the requirements of the Act, it is necessary to look at the documents in question "as a whole in the light of the circumstances in each case". If the only omissions are of minor importance, and there is no evidence to suggest that any offeree has been prejudiced by these omission, then there will have been substantial compliance with the requirements of the Act.

7.7 Where there has not been substantial compliance with the provisions of the Act in carrying out a take-over scheme, contracts entered into in the

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(75) Supra; n.55.
(76) Supra; n.57.

course of that scheme will be illegal contracts. Pursuant to Section 6 of the Illegal Contracts Act 1970, and subject to the provisions of the Act, every illegal contract[77] "shall be of no effect and no person shall become entitled to any property made under a disposition made by or pursuant to any such contract". However, Section 7(1) of the Illegal Contracts Act provides that notwithstanding the provisions of Section 6 of that Act, any party to an illegal contract (or a person claiming through such party) may apply to the Court for relief. On such an application (or in the course of any proceedings) the Court may grant "relief by way of restitution, compensation, variation of the contract, validation of the contract in whole or part or for any particular purpose, or otherwise howsoever as the Court in its discretion thinks just".

7.8 In Carr v New Zealand Refrigerating Co. Ltd,[78] without discussing the point in any detail, Casey J. expressed the view that even if the omission in the statement provided by N.Z. Refrigerating to the shareholders in Waitaki Industries Ltd pursuant to Section 4(2) of the Act amounted to non-compliance with a mandatory requirement of the Act, having regard to the minor nature of the omission, relief would very likely have been available under the provisions

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(77) As defined in S.3.
(78) Supra; n.55.

of the Illegal Contracts Act in respect of any contract arising from the acceptance of N.Z. Refrigerating's offers.

7.9 In considering whether the Court should grant relief pursuant to the Illegal Contracts Act, it is required by Section 7(3) of that Act to have regard to:

> "(a) The conduct of the parties; and
> (b) In the case of the breach of an enactment, the object of the enactment and the gravity of the penalty expressly provided for any breach thereof; and
> (c) Such other matters as it thinks proper..."

As McMullin J. observed in Dreadon v Fletcher Development Co. Ltd,[79] "there is an overriding direction that the Court shall not grant relief if it considers that to do so would not be in the public interest".

7.10 It would be interesting to speculate whether the provisions of the Commerce Act 1975 might have any effect on the granting of relief under the Illegal Contracts Act in respect of a contract arising out of an offer which does not comply with the requirements of the Act. Pursuant to the Commerce Act, a take-over scheme which constitutes

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(79) [1974] 2 N.Z.L.R. 11;20.

an "aggregation proposal" coming within any of the classes described in the Third Schedule to that Act may not proceed unless the Minister of Trade and Industry consents to the proposal. Such consent will not be forthcoming if the Minister forms the view that the aggregation proposal may be against the public interest.(80) If the take-over scheme does not constitute an "aggregation proposal" coming within any of the classes described in the Third Schedule to the Commerce Act, the Minister may require the Commerce Commission to conduct an enquiry if (inter alia) "he considers that the merger or take-over may be or is likely to be contrary to the public interest...."(81) Section 21 of the Commerce Act deems certain trade practices to be contrary to the public interest, while Section 73 of that Act provides:

> "In determining for the purposes of this Part of this Act whether the existence of any complete or partial monopoly or of any oligopoly or of any circumstances that are tending to bring about any complete or partial monopoly or oligopoly or whether any aggregation proposal or any merger or takeover is or is likely to be contrary to the public interest regard shall be had not only to the provisions of Section 21 of this Act but also to any economic or other effects which any such monopoly, oligopoly, circumstances, aggregation proposal, merger, or takeover has or is likely to have on the well-being of the people of New Zealand and which would not take place in the absence of the monopoly,

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(80) Sections 66-69. (81) S.70.

> oligopoly, circumstances, aggregation proposal, merger, or takeover."

The element of public interest in a take-over scheme is therefore closely associated with considerations of social policy, including economic and political considerations. The question therefore arises of whether, if the Minister has consented to a take-over scheme (or has not required an enquiry to be held if his consent is not a pre-requisite to the take-over scheme), the Court would be likely to find that to grant relief under the Illegal Contracts Act would not be in the public interest. Perhaps it could be expected that for the purposes of the Illegal Contracts Act the Court would adopt a more restrictive view of the expression "public interest" and rather than consider broad issues of social policy, confine its attention to the objects of shareholder protection and the maintenance of confidence in the share market intended to be secured by the Act. While a take-over scheme may be in the public interest, it may cease to be in the public interest if it is not carried out in accordance with the requirements of the Act.

7.11 Apart from the power to grant relief under the Illegal Contracts Act, the Court may grant

an injunction in respect of a take-over scheme which is carried out in breach of the requirements of the Act. However, in Carr v New Zealand Refrigerating Co. Ltd[82] Casey J. held that "infringement of S.4 of the Act, not invalidating the offer, does not confer any right to an injunction on an offeree, nor constitute such a threat to his proprietary interest as to support such a right".[83] The learned Judge pointed out, however, that it does not necessarily follow that no such right will exist where the offer has been invalidated by a substantial failure to comply with the Act. It was also held that a shareholder in an offeror company has no right to an injunction against the offeror as in failing to comply with requirements of the Act the offeror company is not acting ultra-vires.

7.12 In Australia, Part VIIB of the Companies Act 1961 contains specific provisions regulating the failure to comply with the provisions of that part of that Act. Pursuant to section 180R, the Court now has power, where it is satisfied that a provision in Part VIB of the Act has not been complied with, to make "such orders as it thinks necessary or expedient to protect the rights of person affected by the take-over scheme". Included in the orders that the Court may make are:

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(82) [1976] 2 N.Z.L.R. 135. (83) Ibid; p.149.

"(a) an order restraining the registration of transfers of shares in the offeree company;
(b) an order restraining the disposal of any interest in shares in the offeree company;
(c) an order cancelling a contract, arrangement or offer relating to the take-over scheme;
(d) an order declaring a contract, arrangement or offer relating to the take-over scheme to be voidable; and
(e) for the purpose of securing compliance with any other order under this section, an order directing a person to do or refrain from doing a specified act."(84)

In addition, Section 180S allows the Court to excuse non-compliance with the Act resulting from inadvertence, mistake, or circumstances beyond the control of the person who has brought about the failure to comply where it is satisfied that the failure ought to be excused. However, before making an order pursuant to Section 180R, or an order under Section 180S declaring an act or matter not to be invalid, Section 180T requires the Court to be satisfied that any order made would not unfairly prejudice any person.

What is the conclusion reached as to effect of the C. Act?

(84) For an illustration of the application of S.180R see A.G for the State of Victoria v Walsh's Holdings Limited [1973] V.R. 137.

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CONDITIONAL ACCEPTANCES AND THE BRIERLEY BIDS FOR NORTHERN STEAM

8.1 Most take-over offers will be expressed to be conditional upon the acceptance of the offer in respect of a minimum number of shares. It is therefore required by paragraph (b) of Part B of the First Schedule to the Act that the take-over offer must specify whether or not the offer is conditional upon acceptances being received in respect of a minimum number of shares, and, if so, that minimum number. The Macarthur Committee noted that a practice has developed whereby the number of shares it is sought to acquire is stated, but with a qualification added allowing the offeror to accept a lesser number of shares if he should so desire.(85)

8.2 An interesting example of this practice is to be found in the take-over offer made in February 1970 by Brierley Investments Limited to the shareholders of The Northern Steam Ship Company Limited.

8.3 The Northern Steam Ship Company Limited ("Northern Steam") was a company with a poor record of earnings during the ten year period prior to the take-over bid being made by Brierley Investments Limited.

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(85) para 351.

The highest profit it had made during this period was $130,000. The average dividend paid during the seven year period prior to the take-over bid was 3.2 per cent per annum and no dividend had been declared for the financial years ending 31 July 1968 and 31 July 1969. The earnings on shareholders funds during those two years had been respectively 3.2 per cent and 1.4 per cent. At the date the take-over offer was made, one dollar shares in Northern Steam were trading at 72 cents. The result of the company's activities was such that in August 1969 one shareholder in the company, much to the displeasure of the directors, was seeking appointment as proxy by other shareholders in order to secure the passing of a resolution at a general meeting of the company approving the appointment of an independent consultant to determine why the company was no longer profitable.

However, while Northern Steam may not have been providing much by way of a return in the form of dividends to its shareholders, the net value of the company's assets was approximately $2.8 million, the result being that each one dollar Northern Steam share represented assets of $1.61. This gave rise to speculation that the company would go into liquidation, or at least make a partial

return of capital from the sale of its assets. The company was therefore an obvious target for a take-over.

8.4 In February 1970, Brierley Investments Limited made a formal take-over offer to the shareholders of Northern Steam. For every five shares in Northern Steam, the shareholder was offered one 50 cent share in the offeror company and one dollar in cash. (In fact, therefore, the offer was for 10 cents of Brierley Investments Capital and 20 cents cash for each Northern Steam share). As shares in Brierley Investments Limited were being traded at $3.85 immediately prior to the making of the take-over offer, the value of the offer was 97 cents for each Northern Steam share. The value of this offer exceeded any share price for Northern Steam since 1962. The offer was expressed to be in respect of all the 829,221 one dollar shares in Northern Steam, although at the date the take-over offer was made, the offeror had already acquired 84,792 shares in Northern Steam through purchases made on the market. As the offeror company was seeking to acquire sufficient shares in Northern Steam to be able to exercise control of more than half the voting power at a general meeting of Northern Steam, the offer was expressed to be conditional upon the acceptance of sufficient shares to give it this power. However, Brierley Investments

Limited attempted to reserve the right to acquire a lesser number of shares if it so desired. The clause in the take-over offer purporting to comply with the requirements of paragraph (b) of Part B of the First Schedule stated:

> "the offer is conditional upon acceptances in respect of a minimum number of 335,000 shares (or such smaller number as Brierley Investments may nominate by written notice to Northern Steamship)".

The offer was to remain open until 30 March 1970.

8.5 The initial reaction of the directors of Northern Steamship to this offer was to declare the proposed consideration "totally inadequate" and to recommend a rejection by the offerees of the take-over offer. A 2 per cent interim dividend declared in December 1969 allowed the directors to call attention to the "vast improvement in the trading position of the company". The directors were also able to anticipate a tax paid profit for the year ending 31 March 1970 in excess of $100,000 (compared with $10,072 in 1969) and a final dividend of 8 per cent.

8.6 By March 1970 the value of shares in Brierley Investments Limited had risen to $4.50 which meant

that the effective price offered for Northern Steam shares was $1.04 per share. Then, for the first time, the directors of Northern Steam alleged that by declaring the offer to be conditional upon the acceptance of a minimum number of shares or such lesser number of shares as the offeror may nominate, Brierley Investments Limited had failed to comply with the requirements of the Act. Brierley Investments Limited was given notice of the alleged failure to comply with the requirements of the Act by Northern Steam, and asked to withdraw its offer to Northern Steam shareholders. When Brierley Investments Limited failed to respond, Northern Steam sought a ruling from the Court on the validity of the take-over offer. Shareholders were advised by Northern Steam that contracts arising from the take-over bid "may be unenforceable". Brierley Investments Limited refuted the allegation that its offer did not comply with the requirements of the Act, but one month later advised Northern Steam that the number of shares required to be accepted before the offer became unconditional was one share. At the same time Northern Steam was advised the take-over offer was unconditional.

8.7 The date for the Court hearing to determine the legality of the take-over offer by Brierley Investments

Limited was 6 May 1970. However, on 29 April 1970, the directors of Northern Steam wrote to shareholders advising them that an agreement had been reached between Northern Steam and Brierley Investments Limited. Under the terms of the agreement, Brierley Investments Limited (or its Chairman) was not to hold more than 25 per cent of the ordinary shares in Northern Steam "either now or at any time in the future". The letter pointed out that Brierley Investments Limited had entered into a contract to this effect, and that "the holding by Brierley Investments together with the holdings of...directors makes it extremely improbable that Northern Steam could, in the future, be the subject of a successful take-over, unless it was clearly to the advantage of all shareholders". The Chairman of Brierley Investments Limited was invited to join the board of Northern Steam.

8.8 Unfortunately, the legality of the take-over offer made by Brierley Investments Limited was never tested judicially. However, it would appear that, notwithstanding the claim made by the Chairman of Brierley Investments Limited that his legal advisors considered the take-over offer complied with the requirements of the Act,[86] the take-over offer did not conform with the requirements of the Act insofar as the offeror attempted to reserve to itself a

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(86) "Dominion" 14 March 1970.

right to acquire a number of shares less than the number of acceptances in respect of which the offer was stated to be conditional. It has been stated above[87] that once a take-over offer has been made, that offer may not be varied without the need for further compliance with the Act except to the extent permitted by Section 9(1) of the Act. Section 9(1)(a) permits a variation of the amount of cash offered for the shares that it is proposed to acquire; Section 9(1)(b) permits a variation in the time that the offer is to remain open for acceptance. Section 9(2) of the Act requires notice of any such variation to be given to the offeree company. From the wording of Section 9 of the Act it would appear that the section is intended to be exhaustive as to the manner in which an offer may be varied without the need once again to follow the procedure prescribed by the Act. As any variation in the number of acceptances upon which an offer to acquire shares is conditional is in effect a variation of the terms of the offer, and as any such variation is not permitted by the Act, to purport to alter the number of acceptances upon which an offer is conditional must be in breach of the Act. However, the position is not as clear where an offeror attempts to reserve the right to reduce the number of acceptances upon which an offer is conditional, but does not attempt to exercise that right. However, as has also been stated above,[88] it does not necessarily follow that contracts arising

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(87) para 4.1. (88) para 7.1 et. seq.

out of a take-over offer which contravene the requirements of the Act will necessarily be unenforceable, either by offeror or offeree, because of their element of illegality.

8.9 The Macarthur Committee expressed the view that stating an offer to be conditional upon acceptances being received in respect of a minimum number of shares and qualifying that statement by specifying that the offeror may accept a lesser number of shares is "wrong and without statutory authority".(89) Accordingly the Committee recommended that the Act should prohibit such a practice.(90)

8.10 In the United Kingdom, the London City Code on Take-overs and Mergers provides that an offer may not be made for the whole of the equity share capital of a company, or a proportion of that capital which, if the offer is accepted in full, would result in the offeror being in a position to exercise more than half the voting power at a general meeting of the offeree company, unless that offer is stated to be conditional upon the offeror acquiring (or agreeing to acquire) by the close of the offer shares conferring over half the voting power at a general meeting of the company. Accordingly, no such offer may be declared unconditional unless the offeror has

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(89) para 351. (90) para 360(e).

acquired (or agreed to acquire) more than 50 per cent of the voting rights attributable to the share capital.[91]

8.11 In Australia, the matter has been approached differently. The Eggleston Committee took the view that if a condition is attached to an offer to the effect that the offer is conditional upon acceptance in respect of a minimum number of shares, neither offeror nor offeree should be bound unless the condition is fulfilled.[92] If, however, the offeror expressed the offer to be subject to the offeror's right to declare the offer unconditional in respect of any lesser number of shares than the minimum number specified in the take-over offer, the offeror should have the option of declaring the offer unconditional in respect of that lesser number of shares and thereby bind those offerees who had accepted the offer.

8.12 Under legislation in force at the time of the Eggleston Committee's deliberations, the offeror was required to specify in the take-over offer the last day on which the offer could be declared to be free from a condition requiring the acceptance of the offer in respect of a minimum number of shares, and to allow a further period of not less than seven days during which the offer remained open for acceptance.[93]

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(91) Rule 20. (92) para 38.

(93) Companies Act 1961 (Commonwealth) Cl.4 Pt.A 10th Sched.

Shareholders who had not decided whether they should accept the offer were therefore given a period of time in which they could accept the offer, knowing that the offer had become unconditional in respect of some of the members of the offeree company. However, as the Eggleston Committee pointed out, while the offerees will know how many shares were held by the offeror at the date the take-over offer was made, they have no means of knowing how many further shares the offeror has acquired by the time the offer is declared unconditional.[94] The Committee therefore recommended that where a take-over offer has been made conditional upon acceptances being received in respect of a minimum number of shares and the offeror has reserved the right to declare the offer unconditional in respect of acceptances received, for a lesser number of shares, the offeror should be required to comply with certain disclosure requirements when the offer is declared unconditional. The procedure recommended by the Committee was for the offeror to publish, on or before the date specified in the take-over offer as the last date on which the offeror may declare the offer to be unconditional, a notice in a newspaper in general circulations in the appropriate State containing a declaration to the effect that the offer had been freed from any condition as to a minimum number of acceptances and including a statement of the

(94) para 39.

total number of shares which the offeror knows to have been acquired, either by him or on his behalf. A similar notice would be required to be provided to each Stock Exchange on which the shares of the offeree are listed.[95]

8.13 The Eggleston Committee also recommended that in any case in which a take-over offer has been declared conditional upon acceptances in respect of a minimum number of shares having been received, the offeror should be required to declare whether the condition has been fulfilled within 24 hours of the date stated by the take-over offer to be the latest date upon which the offer may be declared unconditional.[96] Such a declaration would be required whether or not a declaration had already been made in respect of the acceptance of a lesser number of shares than that specified in the take-over offer. It would be required to state the total number of shares which the offeror had acquired to date. Failure to comply with these requirements would mean the take-over offer would lapse, unless the condition had in fact been fulfilled.[97]

8.14 These recommendations of the Eggleston Committee have, in substance, been enacted in Section 180N of the Companies Act 1961, the result being that offerees who may wish to accept a take-over offer in respect

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(95) para 41(a). (96) para 41(b).
(97) para 41(c).

of their shares only if it appears that they will be ultimately left as a small minority, will receive adequate information on the degree of success of the take-over offer and on the basis of this information will have at least seven days in which to decide whether to accept the offer. However, pursuant to Section 180N(8) of that Act, where an offeror has failed to publish the notice required by the section, "all contracts formed by the acceptance of take-over offers under the take-over scheme are void". While this provision may seem harsh, in Re Northern Territory Land Company Limited[98] Zeilling J. made an order pursuant to Section 366 of the Companies Act 1961 enlarging the time within which the notice required by Section 180N of the Act could be published and the period for which the take-over offer should remain open. Section 366 of the Australian Act provides that no proceedings under the Act shall be invalidated "by any defect irregularity or deficiency of notice or time" unless the Court is of the opinion that because of the failure to comply some substantial injustice has been brought about which the Court is unable to remedy by the making of an order. The learned Judge stated that he had "grave doubts" as to the application of Section 180S of the Act[99] in its application to a failure to comply with the requirements of Section 180N

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(98) (1972) 6 S.A.S.R. 611.
(99) supra para 7.12.

"because Section 180N has its own built-in subsection relating to failure to comply".[100]

8.15 If it is accepted that some amendment to the law in New Zealand is necessary, the choice as to the form which that amendment should take appears to be between two alternatives. The first is to adopt the approach taken by the Macarthur Committee that for a take-over offer to specify that it is conditional upon acceptances being received in respect of a minimum number of shares "or such lesser number as the offeror may determine" is a practice which should be expressly prohibited by the Act.[101] The second is to follow the Australian approach and to permit such offers, but subject to providing adequate safeguards to ensure that offerees are fully informed on the progress of the take-over bid. If it may also be accepted that the principal object of the Act is not to discourage take-over bids, but to ensure that shareholders are provided with adequate information concerning the offer and to have time in which to study the offer and, if necessary, obtain independent advice, it is submitted that the Australian approach is to be preferred.

8.16 That this whole issue is not merely of academic interest may be illustrated by referring to the sequel to the take-over bid made in February 1970 by

(100) supra; p.614. (101) para 360(e).

Brierley Investments Limited for the shares in Northern Steam. In February 1976, Brierley Investments Limited, pursuant to Section 4(1) of the Act, gave notice to the directors of Northern Steam that it intended making a take-over offer in respect of all the 829,221 shares in Northern Steam that it did not already own. On 8 March 1976 a formal take-over offer was made to the shareholders in Northern Steam. The offer was a cash offer of $1.45 for each ordinary share of $1 in the offeree company and was not conditional upon acceptances being received in respect of anyminimum number of shares. While pointing out that they would be prepared to consider a rival bid, on 9 March 1976 the directors of Northern Steam recommended that offerees accept the offer from Brierley Investments Limited because of "certain circumstances confronting the company", presumably a reference to the uncertainty surrounding the sale of certain assets and substantial tax liabilities. The directors pointed out that while the return from assets on a controlled liquidation of Northern Steam would exceed the offer of $1.45 per share by approximately 70 cents, if the cash offer was accepted, "this would represent certain cash in a shareholder's hands".

While an endeavour was made by a Northern Steam shareholder to acquire a large number of Northern Steam

shares on the market, no rival bid was forthcoming. On 13 March 1976 it was announced that Brierley Investments Limited had gained control of 429,996 shares in Northern Steam, giving Brierley Investments Limited the right to exercise approximately 51 per cent of the voting power at a general meeting of Northern Steam. Two nominees of Brierley Investments Limited joined the Chairman of that company on the board of directors of Northern Steam. The total cost of the transaction to Brierley Investments Limited was estimated at $1.4 million,(102) $168,000 of this having been incurred in 1970 in acquiring a 25 per cent share holding in Northern Steam and the balance in the 1976 bid. While the exact value of the assets of Northern Steam has not been publicised, the directors of that company have stated that it could be between $1.99 and $2.20 per share.(103)

8.17 Thus, notwithstanding the fact that Brierley Investments Limited's first take-over offer may be considered to have contravened the requirements of the Act insofar as it was expressed to be conditional upon the acceptance of the offer in respect of a minimum number of shares or such lesser number as the offeror might nominate, and notwithstanding the fact that when confronted with this possible illegality Brierley Investments Limited undertook

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(102) "Dominion" 21 February 1976.
(103) Ibid.

not to hold more than 25 per cent of the ordinary shares in Northern Steam either at the time the undertaking was given or at any time in the future, Brierley Investments Limited was able to succeed in acquiring voting control in Northern Steam. While one effect of the undertaking given in 1970 may have been to secure for Northern Steam shareholders a better price for their shares when Brierley Investments Limited eventually acquired a majority of the voting shares in Northern Steam, to some extent those same shareholders may have been prejudiced insofar as the 25 per cent acquisition by Brierley Investments Limited in 1970, made it unlikely that any counter bidder could succeed against Brierley Investments Limited in 1976, thus leaving Brierley Investments Limited reasonable freedom to name their price.

CONCLUSIONS

9.1 Having regard to the manner in which take-over schemes are regulated to by statute in Australia and other jurisdictions, and to some of the deficiencies that have become apparent in the Act, it is suggested that it would be appropriate if the Legislature in New Zealand gave consideration to extensively amending the Act in order that it may more appropriately regulate take-over schemes and control a number of practices which have developed in recent years.

9.2 Clearly there can be little justification for distinguishing between oral take-over offers and written take-over offers in determining whether the Act is to apply.

9.3 While it is not easy to determine the degree of control at which the Act should become operational, having regard to the A.S.P. bid in respect of a minority shareholding in A.B. Consolidated, the figure of 25 per cent or more (of the voting shares in a company) recommended by the Macarthur Committee would appear to be the minimum acceptable figure.

9.4 While 'first come, first served' bids appear to be within the scope of the Act, it seems that further legislative control of such bids is

desirable. While the Stock Exchange has developed its own rules in order to regulate invitations to make an offer to sell shares, the A.S.P. bid in respect of a minority shareholding in A.B. Consolidated indicates that these rules alone are not satisfactory.

9.5 Where the offeror has increased the value of a take-over offer, in circumstances where the Stock Exchange rule does not apply, it is suggested that it is not adequate to rely upon the "goodwill" of the offeror to ensure that all shareholders will be entitled to receive the higher price to be paid for the shares in the offeree company. Australian legislation affords the shareholder adequate protection by requiring that if the value of an offer is increased, all accepting offerees receive the benefit.

9.6 As there may be considerable gains to be made in a take-over bid, and as those gains may be at the expense of the shareholders in the offeree company, it appears desirable that the Act should seek to discourage the making of a take-over offer which is not made in good faith.

9.7 It also appears desirable that close consideration should be given to the use of powers of attorney in favour of an offeror which are commonly included in the form of acceptance of an offer. Such

consideration could form part of a general enquiry in to the law relating to powers of attorney.

9.8 The law concerning the effect of non-compliance with the requirements of the Act has recently been clarified by the Court. However, it would appear more satisfactory if the Act was amended to specify those powers that the Court may exercise where there has been non-compliance with the requirements of the Act.

9.9 Take-over offers which are expressed to be conditional upon acceptances being received in respect of a stated minimum number of shares, with an attempt by the offeror to reserve the right to accept a lesser number of shares, appear to be in need of strict legislative control if offerees are to be protected from undesirable practices adopted in the course of a take-over scheme. If the choice is between the prohibition of such a practice, and its strict control to ensure that shareholders interests are protected, the latter alternative appears more desirable.

9.10 It is not intended to suggest that the concepts on which the Act has been designed are in any way unsatisfactory. Rather, it is a case of the need to extend the protection at present afforded by

the Act. This can only be achieved by the enactment of a comprehensive amendment to the Act similar to that effected in Australia by the repeal of Section 184 of the Companies Act 1961 and the enactment of part VIIB of that Act. With the enactment of the Commerce Act 1975 intended to protect the element of "public interest" in take-over schemes, it may be considered an opportune time to undertake a review of the Companies Amendment Act 1963 to provide further protection to shareholders in an offeree company.

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