

ATTORNEY-GENERAL FOR THE STATE OF VICTORIA v.
WALSH'S HOLDINGS LTD¹

Company Law—Take-over offer—Companies Act 1961, sections 180M, 180R, 180T.

The new Part VIB of the Uniform Companies legislation² by prescribing in detail the procedure of a take-over bid and the minimum standards of disclosure, seeks to ensure so far as it is practicable that (1) shareholders in the target company have an opportunity to make an informed and unrushed decision whether to accept the offer to sell their shares or to remain in the company, and (2) that all shareholders whose shares are sought be treated alike.

To this end, partly as a result of the Eggleston Committee recommendations,³ the new legislation places limitations upon the offeror to ensure that the bidder's identity is known to the shareholders, that the shareholders and directors will have a reasonable time to consider the proposal, that the bidder supplies information necessary to enable a proper judgment of the merits of the bid to be made,⁴ and that each shareholder will be dealt with in a fair and equal way in regard to the benefits offered.⁵

Legislative control of take-over is a comparatively recent development. The present legislation has its antecedents in section 184 of the 1961 Uniform Companies Act. Some extra-legal regulation of take-overs is also to be found in the Australian Associated Stock Exchange Listing Manual.⁶

The ambit of initial legislation on take-overs was narrow and concerned only with the fair treatment of shareholders. Section 184 of the Uniform Companies Act 1961 applied only to take-over offers which were actual offers. It did not apply to invitations to make offers to sell, or to first-come-first served invitations. Only offers made by or on behalf of a corporation were regulated. Bids by natural persons or joint bids were not covered, nor were offers which sought to secure not less than 33⅓% of the voting power at a general meeting of the offeree company. The court's construction of section 184 further limited its operation.⁷

'Offer' under the new legislation is an offer to acquire shares in the company or an invitation relating to shares in a company whether made by a company, by an individual or jointly by two or more persons whether natural or artificial,⁸

¹ Supreme Court of Victoria Gowans J. [1973] V.R. 137.

² Inserted by Act No. 8185 (1971) and in operation from 1 January 1972.

³ *Second Interim Report* (1969).

⁴ See s. 180E.

⁵ See Eggleston Committee Report 8, and ss 180C, 180L, 180M.

⁶ See s. 5.

⁷ See *Blue Metals Industries Ltd v. Dilley* (1969) 43 A.L.J.R. 206 and *Colortone Holdings Ltd v. Calsil Ltd* [1965] V.R. 129, 132 per Gillard, J. who said non-compliance with s. 184 merely exposed the offeror corporation to a possible maximum fine or three months imprisonment or both.

⁸ See *Nash Take-over Legislation—the responsibilities of Directors and Secretaries* for offers which are not take-over offers within the meaning of the Act.

which when added to the offeror's present holdings will give the offeror 15% or more of the voting power at a general meeting of the company.

Section 180C(1) stipulates what the offeror must include in his offer to acquire shares in the offeree company, both before the offer is dispatched and upon its being dispatched. A Part A Statement under the Tenth Schedule must be given to the offeree company not earlier than 28 days and not later than 14 days before the offer is dispatched to the shareholders: section 180C(1)(b).

In return, the board of the offeree company must give a Part B Statement which must contain the matters prescribed in Part B of Schedule 10: section 180G.

To secure that the shareholders are able to make an unhurried decision section 180E provides that the offer is to include a term that it will remain open for at least a month unless withdrawn.

As all shareholders whose shares are sought should be treated alike, the legislation provides the manner in which the take-over may be varied, what matters may be varied⁹ and the formalities to be complied with in communicating a variation.

Thus if the offeror varies 'the price' under section 180L he must provide the offeree company, the offeree and each offeree to whom a like take-over offer has been made with a notice setting out the necessary modifications to a Part A Statement and must lodge a copy of this with the Registrar forthwith. The increased price must be paid to all subsequent and prior vendors. Shareholders, therefore, may only receive those benefits from the offeror which are in accordance with the terms of the Part A Statement, or a published variation thereof, except in so far as the offeror acquires shares at an official meeting of a Stock Exchange in the ordinary course of trading on the Stock Exchange:¹⁰ section 180M.

Where two or more take-over offers that constitute a take-over scheme have been made the Minister or the offeree company may apply to the court for orders appropriate to protect the person affected where breaches of the requirements occur: section 180R. The court is given wide powers under section 180R as to the orders it may make, but in doing so it must consider whether any such order would unfairly prejudice any person: section 180T.

The importance of the case under review lies in the fact that the court was required to interpret and apply section 180M, section 180R and section 180T of the new legislation.

⁹ See ss 180L and N.

¹⁰ S. 180M(1) 'While a take-over offer under a take-over scheme remains open—

(a) the offeror;

(b)

(c)

(d)

shall not, except in pursuance of a variation made in accordance with section 180L, give, offer to give or agree to give to a person whose shares may be acquired under the take-over scheme any benefit (whether by payment of cash or otherwise) not provided for in the particulars of the take-over scheme as set out in the Part A statement given in respect of the take-over scheme under section 180C.

(2)

(3) Nothing in this section prevents the acquisition of shares in a company at an official meeting of a Stock Exchange in the ordinary course of trading on the Stock Exchange.'

Walsh's Holdings Ltd (hereinafter called "Walsh's") was the offeror of the proposed take-over of Leviathan Ltd (hereinafter called Leviathan). It began its activities in May 1972 but its offer was initially opposed by Leviathan's directors. Shortly after, Sportscraft Holdings Pty Ltd (hereinafter called Sportscraft) which had acquired a substantial holding of shares in Leviathan, made a rival offer. Both Walsh's and Sportscraft's moves met with technical difficulties.

On 12 June Walsh's gave to Leviathan and lodged with the Registrar a further Part A statement, under which a conditional take-over for the shares of Leviathan was to remain open until 31 August in the absence of withdrawal. The consideration offered was \$2.10 per share, with stamp duty and expenses to be borne by Walsh's.

Meanwhile Sportscraft had ceased formal take-over attempts but continued to buy shares in Leviathan.

On 15 June, Leviathan's directors gave a Part B Statement to Walsh's having decided to recommend acceptance of Walsh's offer. Walsh's were concurrently buying Leviathan shares on the open market.

On 7 July, on the floor of the Stock Exchange and while the take-over offer remained open, the sharebroker of the first group of intending vendors approached the operator of the firm of sharebrokers acting for Walsh's to ascertain whether Walsh's would consider purchasing a substantial holding in Leviathan at the price of \$2.15. As a result, on 10 July, and in accordance with the vendor's brokers instructions, the formalities of the sale were concluded on the trading floor of the Stock Exchange by Walsh's operator making out a sales slip in triplicate and handing a copy to the vendors operator, lodging the third with the Stock Exchange for reporting. This constituted a 'special' sale within Stock Exchange parlance. No part of the dealing appeared on the board of the Exchange. In this first transaction seven registered shareholders were involved, each of whom, on the day of the sale, were issued separate purchase contract notes by Walsh's operator. The price of \$2.15 was shown on each note and each note also included an escalation clause under which there was an undertaking that the price would be increased if the formal cash offer were raised within a specified period.

On the 11 and 12 July two further series of purchases took place on the floor of the Stock Exchange which were settled by the vendors themselves and the operator acting for Walsh's, in accordance with the practice where there is a common sharebroker for vendor and purchaser (there was some modification of the relevant rule of the Stock Exchange). Contrary to the formal take-over offer, expenses and stamp duty were to be borne by these three groups of vendors. The transactions in fact yielded a net price slightly in excess of \$2.10 to the first two series of vendors. The third group benefited additionally from an increase which had been announced by Walsh's in the meantime but which was not dealt with as a formal variation under the Act.

Walsh's, as a result of these dealings and acceptances of their take-over offer, acquired 98.71% of the ordinary shares; dissenting shareholders equalled 1.29%.

The action was brought by the Attorney-General under section 180R(1) against the respondents Walsh's for contravention of section 180M(1). Sports-

craft, which had accepted Walsh's offer since the disputed purchases, was an intervener.

The remedies sought were interlocutory injunctions, a declaration that in the first three series of purchases a prohibited benefit was given, and in addition orders cancelling the purchases, declaring acceptances given since to be voidable at the instance of the acceptors within a specified time and manner, and requiring Walsh's to pay interest to acceptors from the date of acceptance. Also sought were orders rendering all acquisitions voidable, and an order for an equalization payment to be made to all shareholders.¹¹

Gowans J., stated¹² that two inquiries were pertinent here—(1) as to whether a benefit was given, and (2) as to whether it was additional to that provided in the take-over offer.

With this in mind, he considered each of the three series of purchases in detail and found that as the net amount per share receivable by the shareholders exceeded the take-over figure of \$2.10 though only marginally, the price was higher than the Part A Statement stipulation. Furthermore, the fact that there was to be an immediate payment to one of the sellers for their shares, that 'the obligation to buy was not conditional on the achievement of any quota,¹³ and that 'the agreement to escalate the price when the offer was increased was of a different quality from the benefit the other shareholders could look to from the increase',¹⁴ these factors, in combination and separately amounted within the meaning of section 180M(1) to Walsh's having given, while the take-over scheme remained open, a benefit to persons whose shares might be acquired under the take-over scheme, which was not provided for by the Part A Statement particulars.

As to whether the exception in section 180M(3) applied, Gowans J. stated that 'acquisition' within the meaning of that section related to the passing of a proprietary interest in the shares at the time of the conclusion of a purchase. Since what was done on the floor of the Stock Exchange is regarded as binding the parties, there was an acquisition of shares at an official meeting of the Stock Exchange. However, it was not 'in the ordinary course of trading on the Stock Exchange' which implied 'anonymous competitive bargaining in an open forum according to the common and usual course of that activity and without unusual features in the bargaining suggestive of collateral objectives'.¹⁵ Here

the nomination of this particular buyer by the seller and the acknowledgement by the buyer of its identity as the take-over offeror and the specification of a fixed price in excess of the buyer's take-over offer and which was to stand independent of the open market price and the provisions for escalation according to increases in the take-over offer together with the acceptance of these terms only . . . was nothing but a private bargain between the shareholders and the offeror . . . channelled into a process available in the Stock Exchange and making use of its mechanics . . . an acquisition of shares for the purpose of the take-over, and not an acquisition of shares in the ordinary course of trading on the Stock Exchange.¹⁶

¹¹ [1973] V.R. 137, 149.

¹² *Ibid.* 142.

¹³ *Ibid.* 143.

¹⁴ *Ibid.*

¹⁵ *Ibid.*

¹⁶ *Ibid.* 145.

Gowans J., held therefore, that Walsh's had contravened section 180M(1) by giving a benefit other than as provided for in the Part A Statement.

To contravene that prohibition is an offence punishable under section 180W, the penalty being a fine not exceeding \$500 or imprisonment for a period not exceeding three months, or both.

In regard to the court's power under section 180R to 'make such orders as it thinks necessary or expedient to protect the rights of a person affected by the take-over scheme', Gowans J. concluded that the reference to 'a person affected by' the scheme contemplates the offeror, the offerees, the offeree company and any rival offeror. 'Whether any of these have rights which it is necessary or expedient to protect depend to a degree upon the nature of the non-compliance.'¹⁷ He decided that the shareholders other than those involved in the first three series of purchases, Leviathan and Sportscraft (as a shareholder if not as a rival take-over offeror) had rights to the observance of section 180M which may call for protection. Under section 180R the court could thus on the application of the Minister or the offeree company make orders to protect the shareholders' rights to observance of that provision. However, as the court must first satisfy itself that the order would not unfairly prejudice any person¹⁸ Gowans J. saw no justification for making an order declaring all acquisitions under the take-over scheme void or voidable.¹⁹ Nor were the circumstances such as to warrant all acceptances since the breach being declared to be avoided or rendered voidable except in the case of Sportscraft. Nor did the terms of the section justify the making of any orders for payment. Since what is prohibited is the giving of benefits, the court recognized that removal of the benefit was the obvious measure. However, as the benefit given was complex, it did not lend itself to removal.

While stating that in other circumstances more drastic orders might be made, in the circumstances of the present case, Gowans J. thought it appropriate to (1) declare Walsh's contravention of section 180M; (2) make an order declaring any contract between Sportscraft and Walsh's in consequence of its acceptances of Walsh's take-over offer voidable at the instance of Sportscraft; and (3) grant an injunction restraining Walsh's from giving any notice pursuant to section 180X(3) to any shareholder who has not accepted its take-over offer, or to Sportscraft after it has given notice of avoidance as aforesaid.

As to costs, Walsh's were ordered to pay the Attorney-General's costs. Leviathan was to bear its own costs as it had supported Walsh's submissions and these were not upheld. And Sportscraft, since it had no standing and could have left the action to the Attorney-General, without intervening, was ordered to pay its own costs.

It can justifiably be said that Gowans J. was concerned to give the new legislation as much scope and 'bite' as he could under the circumstances. Compared with Australian legislative intervention as noted above, the control of take-overs in England depends partly on statute²⁰ and partly on a flexible

¹⁷ *Ibid.* 147.

¹⁸ See s. 180T(1).

¹⁹ Under s. 180N(8).

²⁰ S. 14 of the Prevention of Fraud (Investments) Act 1958 sets out who may legitimately distribute circulars containing offers to purchase shares and take-over bids.

and voluntary code of extra-legal provisions known as *The City Code of Take-overs and Mergers*,²¹ and The Stock Exchange rules.²²

The legal control consists solely of the Board of Trade Rules²³ which apply only to licensed dealers through whom few take-over offers are made. The City Code fills in some of the gaps not covered by these rules (as does the Stock Exchange Memorandum) in that its rules of commercial morality apply to dealers exempted under the Prevention of Fraud (Investments) Act.²⁴

The Code²⁵ is policed by The Take-over Panel through an executive whose role is supervisory and consultative. In the case of disagreement there is appeal from the executive's decision to the Panel. There is a further right of appeal to the Appeal Committee whose decision is final.²⁶

Emphasis is particularly placed on equal treatment of all shareholders (General Principle 8); and as does the Uniform Companies Act 1961, the Code provides that if more than the bid price is paid to any shareholders the increased price must be paid to all.²⁷ The ultimate sanction available against breaches of its rules is exclusion from the finance raising facilities of London.²⁸

Though it may be too early to judge the effectiveness of the City Code, it is argued that the Panel lacks teeth and as Gower points out 'its role is to see that the rules are observed, not that the terms of the scheme are fair'.²⁹ However that may be, it is interesting to note that although the approach differs, both the Uniform Companies Act legislation and the English regulations seek to allay the same problems. If the construction given by Gowans J. to section 180 of the new Part VIB of the Uniform Companies Act is any indication, it would seem that the legislation will not lack effect in securing fair and equal treatment of all shareholders in participating in the benefits of a take-over scheme.

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²¹ (3rd ed. 1972.)

²² See Weinberg, *Take-overs and Mergers* (3rd ed. 1971) which is the prime reference work.

²³ See Gower *Principles of Modern Company Law* (3rd ed. 1969) 625 ff.

²⁴ See s. 2(1)(a) of that Act. However the Code does not apply to private companies.

²⁵ For a list of the institutions in the business community which have combined to issue the Code see Ford, *Company Law* (1974) 442.

²⁶ See Weinberg *op. cit.* 107 ff.

²⁷ See Rules 31 and 32 and Practice Note No. 5.

²⁸ See Cooper & Cridlan *Law and Procedure of the Stock Exchange*, (1971) 95-7.

²⁹ Gower, *op. cit.* 646.