TAKE-OVER BIDS AND THE COMPANIES ACT

Since the Second World War the expression "take-over bid" has generally been used to describe an offer by an individual or a company to acquire enough shares in another company to give the offeror control over that company. The term is not a technical one and describes a transaction long familiar to lawyers and businessmen. Recent concern with the growing number[1] of these rapid changes in corporate control has often centered on their social and economic implications. A consideration of these important questions is beyond the scope of this paper and many would argue that they are beyond the ability of company law to usefully regulate. Most of these problems do not arise from the legal mechanics of the bid itself but from the motives of the participants or from the widening gap between corporate power and ownership.

No comprehensive legislative effort to deal with these phenomena in their modern form had been made until the enactment of the Companies Amendment Act 1963, Part One, which represents an attempt to extend the disclosure philosophy of English company law at the time of a take-over bid being made. Prior to 1964 several provisions of the Companies Act 1955 which regulated the merger of companies and the rights of their members dealt with the take-over bid in its commonest forms. Most of these sections were the subject of recommendations by the Jenkins Committee in its report on English company law in 1962.[2] In 1965, in Ontario, the Kimber Committee made exhaustive recommendations in respect of the securities legislation of that Canadian province, including the regulation of take-overs.[3] Now, just over five years after the Companies Amendment Act 1963 came into force, the Eggleston Committee has published its recommendations concerning similar disclosure legislation in Australia.[4] So far none of these committees' recommendations have been adopted in New Zealand. It is the aim of this article to survey and assess the adequacy of the exising provisions of our companies legislation which facilitate and control some of the aspects of take-over bids. Particular reference will be made to the relevant recommendations contained in these three reports which will almost certainly provide the foundation for future law reform in this area.

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1. In New Zealand during the first six months of 1969 there were 30 successful bids involving a listed company, *Evening Post,* 12 July 1969. After only 30 days trading on the N.Z. Stock Exchange in 1970 nine bids had been made; *Evening Post,* 14 February 1970.
2. *Report of the Company Law Committee,* 1962, Cmnd. 1749, hereinafter referred to as "the Jenkins Report".
3. *Report of the Attorney-General's Committee on Securities Legislation in Ontario,* hereinafter referred to as "the Kimber Report".
4. *The Company Law Advisory Committee's Second Interim Report to the Standing Committee of Attorneys-General,* (1969), hereinafter referred to as "The Eggleston Report".

I. THE COMPANIES ACT 1955

Directors and take-over bids

It is consistent with the recognition of a growing dichotomy between the ownership and control of companies that an offeror can, in many instances, obtain control of a company by acquiring far less than an absolute majority of the voting shares *de facto* control will lie either with the directors themselves who can direct the proxy machine or with some other minority who can mobilise other shareholders to vote with them. Directors in this position will often agree to sell their shares and in consideration of further payment appoint the bidder's nominees as directors and then retire. The Companies Act 1955 contains a series of provisions which are designed to hold directors accountable for such secret profits. Where the offer is for shares in the offeree company section 193 attempts to prevent a director obtaining an additional payment at the expense of the other shareholders. Under that section a duty is imposed on directors to communicate to offeree shareholders particulars of any retirement payments[5] to be made in connection with a take-over bid.[6]

Section 193(3) provides that unless such disclosure is made *or* the payment is not, before any shares are transferred, approved by a meeting of the shareholders of the class of shares to which the offer relates, any sum received by a director shall be impressed with a trust in favour of those shareholders who have sold their shares as a result of the offer made. In England there is weighty authority in favour of the view that to avoid being impressed with a trust the payment must have both been disclosed and approved by a meeting summoned for the purpose.[7] New Zealand practice, however, appears to be to ignore the latter requirement of formal approval if, after the payment has been disclosed, a majority of acceptances is received by the offeror. This interpretation of section 193 is supported both by the structure of the section and by the use, in subsection three, of the disjunctive "or"[8] in contrast to the use of the conjunctive "and" in sections 191 and 192.[9] It is submitted that although section 5(4) of the Companies Amendment Act 1963 deems the disclosure requirements of section 193(1) to have

5. The phrase used in ss. 191-194 is a payment to a director of a company by way of compensation for loss of office, or as consideration for or in connection with his retirement from office.
6. Section 193(1) contains a very wide definition of the kind of offers to which it relates but appears to exclude those for less than one-third of the equity shares of a company. Section 192 imposes a similar obligation where the offer is for the whole or any part of the undertaking or property of the company.
7. See Jenkins Report, paras. 92 and 93, Weinberg, *Take-overs and Amalgamations* (2nd ed., 1967) 292 and cf. Gower, *The Principles of Modern Company Law* (3rd ed., 1969) 542, n.82.
8. Cf. Uniform Companies Act 1961 (Australia), s.129(1).
9. Se *Re Duomatic, Ltd.* [1969] 1 All E.R. 161, at 169.

been complied with when the wider disclosure requirements of section 5 have been met it does not lend support to either of the above interpretations of section 193 (3).

A take-over bid is unlikely to succeed unless the directors of the offeree company react favourably to it. If they do not and the offeree is a public company the bidder will have to resort to share buying on the Stock Exchange where his success may eventually depend on the outcome of a hard fought and expensive battle for control of the proxy machine. The strategic position of directors makes them susceptible recipients of side-payments to secure their approval and favourable recommendation to their company's shareholders. The weakness of the above sections is that they are aimed at payments which relate to a director's retirement from office and do not apply if the director does not resign but merely recommends the acceptance of a bid.[10] While section 194 extends considerably the kind of payments covered by the two preceding sections it also expressly exempts *bona fide* payments by way of damages for breach of contract or pensions in respect of past services.[11] At common law a director may be accountable either to individual shareholders or to his company for payments which fall outside these sections.[12]

English courts have been reluctant to recognise the existence of a fiduciary relationship between directors and individual shareholders,[13] and in this respect section 193 represents a striking exception to established principle. Nevertheless, directors who deliberately place themselves in such a relationship with shareholders when negotiating a bid will be liable to account for any secret profits they receive.[14] In practice, however, the courts would be unlikely to infer such a relationship from mere negotiation with an offeror. In the United States, while the principle in *Percival* v. *Wright*[15] generally prevails, there has been greater readiness on the part of the courts to find the existence of a fiduciary relationship between directors and individual shareholders. This trend is exemplified by the decision in *Strong* v. *Repide*[16] where Peckham J. held that where "special facts" were known to a director it was fraudulent for him to purchase shares in his company without informing the other shareholders of the facts affecting their value. In that case the "special fact" was the director's knowledge of a likely

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10. In addition such a payment is probably not recoverable by the company as a bribe, see Gower, op. cit., 545-546.
11. Section 194 (2) and (3).
12. Cf. s.194 (4).
13. *Percival* v. *Wright* [1902] 2 Ch.421. The principle of this case was upheld as being the law in New Zealand in the Report of the Inspector to investigate the affairs of Holeproof Industries Ltd. (Printed by order of the Supreme Court dated 31 July 1967).
14. *Allen* v. *Hyatt* (1914) 30 T.L.R. 444 (J.C.), *Briess* v. *Woolley* [1954] A.C. 333.
15. [1902] 2 Ch. 421.
16. 213 U.S. 419 (1909).

sale of the company's assets. This liberal approach has been encouraged by the disclosure requirements imposed on "insiders" by the federal securities legislation.

In dealing with the liability of directors to account for profits made in transactions in their company's shares the Jenkins Committee recommended that a person—whether a shareholder or not—who suffers financial loss because a director has taken unfair advantage of confidential information concerning the company in any transaction relating to its securities should have a remedy against him.[17] While the enactment of such a provision would give a "defrauded" shareholder a remedy against a director who traded in his company's shares in anticipation of a bid being announced it would not solve the residual problem of side-payments to directors outside sections 191-194. The recent English companies legislation[18] failed to adopt this recommendation but does oblige directors and other insiders to disclose information concerning their holdings and dealings in their company's securities.[19]

Though not in a fiduciary relationship with individual shareholders directors do stand in such a position *vis a vis* the company itself. Thus any profits they might make in transactions entered into with knowledge of an impending bid may belong to the company on the application of the principle in *Regal (Hastings), Ltd.* v. *Gulliver.*[20] Unfortunately this will mean that the profits accrue not to the shareholders who have sold their shares in response to the bid but to the new owners who thus have their side-payments returned to them.[21] The intransigence of English law is again in marked contrast to the development by the United States' courts of more effective remedies against delinquent directors. Where the directors in selling their controlling shares have been guilty of a "sale of office" or where they have had reasonable grounds to suspect that the offerors would loot the corporation of its liquid assets when in control, they are accountable to the corpration.[22] For them to be liable in the former case the premium paid must be directly attributable to the surrender by the director of his office[23] and the election of the buyer's nominees. In the looting cases circumstances in which the directors were put on inquiry as to the purchaser's inten-

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17. Jenkins Report, paras 89 and 99(b). Cf. Uniform Companies Act 1961 (Australia), s.124 which seems little more than a codification of the general law though it extends it to cover officers of the company and not merely directors. The Eggleston Committee has recently reported on s. 124 and insider trading generally; The Company Law Advisory Committee's Fourth Interim Report to the Standing Committee of Attorneys-General (1970).
18. Companies Act 1967 (U.K.).
19. Insider trading is discussed infra, at p. 474ff.
20. [1942] 1 All E.R 378, at 391-392.
21. If the director commands a majority of the voting power of the company and acts speedily enough he will be able to ratify his action in general meeting; *Hogg* v. *Cramphorn Ltd.* [1967] Ch. 254, *Bamford* v. *Bamford* [1969] 2 W.L.R. 1107 (C.A.).
22. *Gerdes* v. *Reynolds,* 28 N.Y.S.2d 622 (Sup. Ct. 1941).
23. Ibid., 653.

tions have been where the price offered was excessive and where the buyer was an "infamous" looter of corporations. In these cases proceedings were brought in the liquidation of the looted corporation and the directors were liable to compensate the corporation for the damage done.[24] The Companies Act 1955 provides something of a remedy in like cases. Section 321 (1) provides that if in the case of a winding up it appears that any past or present director or other officer of the company has been guilty of any misfeasance or breach of trust in relation to the company, the Court may, on the application of, *inter alia,* the liquidator or any contributory,[25] examine the director's conduct and compel him to compensate the company accordingly. Mere negligence, however, would not justify the utilisation of this provision.[26]

In neither of the American developments noted above is the director or controller liable solely because he has sold his shareholding at a premium. One recent American decision, however, has led some lawyers to conclude that the director or controller is accountable to the company for that element of the price which represent the control of the company that his shares carry. In *Perlman* v. *Feldmann*[27] a director and dominant shareholder sold his shares for a price which carried a premium for the control of the corporation which the shares carried. As a result of the sale the corporation no longer received the interest free loans it had previously obtained from its customers. In a derivative action by a group of shareholders it was held by the Federal Court of Appeals that the amount paid for the control position should be determined and that the shareholders should receive their share of that payment in proportion to the number of shares that they owned. The conservative view of this case is that the defendants were liable because they were put on inquiry as to the injury which might result to the corporation, that is, the loss of a corporate opportunity through the sale.[28] Others see the decision as the judicial endorsement of the view first propounded by Berle and Means that the controlling shareholders must account because the premium they receive on the sale of their shares represents the proceeds of the realisation of a corporate asset in which each individual shareholder has a right to share.[29] On either view the case represents a significant extension to the two categories of liability cited above.

What English and New Zealand law there is relating to this question of "sale of control" makes it very unlikely that a similar doctrine could be developed by our courts. In *United Trust (Pty) Ltd.* v. *South*

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24. See e.g. *Insuranshares Corp.* v. *Northern Fiscal Corp.,* 42 F. Supp. 126 (1941), cf. *Bosworth* v. *Allen,* 61 N.E. 163 (1901).
25. Defined in s.212.
26. *Re B. Johnson & Co. (Builders), Ltd.* [1955] Ch. 634.
27. 219 F. 2d 173 (1955).
28. See Boyle, "The Sale of Controlling Shares: American Law and the Jenkins Committee" (1964) 13 Int. & Comp. L.Q. 185.
29. See Berle and Means, *The Modern Corporation and Private Property* (1932), Ch. VI.

African Milling Co.[30] the minority shareholders sought to impeach a sale of shares by the majority on the ground that it involved a sale of control. Finding for the majority Kuper J. said:

> The action of the majority can only be impeached if they receive a larger price at the expense of other shareholders. If the majority sell their control to a third party the minority is in exactly the same position as it was before the sale except that the control is to be exercised by B instead of A. Of course the position is different if the action of the majority is fraudulent, in the sense in which that word is used in relation to oppression of the minority, but in the absence of that essential the majority must be entitled, without hindrance, to sell their shares as a block at the best price they can obtain for those shares.[31]

This view has recently been endorsed in England. In *Re Grierson, Oldham & Adams, Ltd.*[32] Plowman J. held, in an application under the English equivalent of our section 208(1), that in computing the value of the company's shares to see if the price offered was fair, the element of control of the company was not to be taken into account.[33] These decisions make it unlikely that our courts would be prepared to adopt Professor Gower's suggestion that they treat such sales as examples of expropriation of corporate property, as in *Menier* v. *Hooper's Telegraph Works*[34] and *Cook* v. *Deeks.*[35] Even if the sale was regarded as an expropriation its subject-matter would not be property which belonged, in law, to the company.[36] Any change in the courts' approach is also unlikely because they lack a formula by which to ascertain the precise amount which was paid for control[37] and the existing provisions in sections 192 and 193 of the Companies Act are expressly limited to payments to directors by way of compensation for loss of office. In *Perlman's* case the Court felt that the decision would have been the same had Perlman not been an officer of the company.[38]

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30. 1959 (2) S.A. 426 (W).
31. Ibid., 433-434.
32. [1968] Ch. 17.
33. See also *Short* v. *Treasury Comissioners* [1948] 1 K.B. 116, a decision on appropriation under the Defence Regulations.
34. (1874) 9 Ch. App. 350.
35. [1916] 1 A.C. 554 (J.C.), See Gower, op. cit., 578.
36. Cf. the rider to Kuper J.'s judgement in the *United Trust* case (supra), which one writer suggests points to a sale where "looting" is or should be anticipated as being a fraud on the minority; Boyle, (supra). But the same writer concedes that the rigour of the rule in *Foss* v. *Harbottle* (1843) 2 Hare, 461; 67 E.R. 189, would probably prevent an English court going as far as the Court did in *Perlman* v. *Feldmann.*
37. Cf. *Perlman* v. *Feldmann* where the majority rejected the argument that the value of the control block shorn of its appurtenant power could not be calculated and placed the burden of proof as to the value component on the defendants.
38. 219 F. 2d 173, at 175 and 178.

The great practical advantage of the American position is that in a derivative suit to enforce a corporate right of action, once the measure of damages has been calculated, the proceeds may be divided up amongst the individual shareholders on a *pro rata* basis.[39] *Perlman* v. *Feldmann* is itself an example of such a derivative action although it is not entirely clear[40] whether the minority shareholders who were not joined in the plaintiffs' action or those who sold their shares after the date of the transaction also shared in the distribution of the premium. The English courts, however, have always insisted that the proceeds of a derivative action should accrue to the company. As has already been pointed out this is often highly unconscionable. The Jenkins Committee recommended in respect of section 209 of our Act that it be extended so that the Court, when it thought fit, could allow proceedings in the company's name against a third party on such terms as it directs.[41] If a like procedural provision were adopted independently of section 209 the courts would have considerably more freedom to avoid the result of cases like *Regal (Hastings), Ltd.* v. *Gulliver*[42] while preserving the flexible principles of the common law upon which they were based.[43] Such a provision would also overcome the problem of the principle in *Percival* v. *Wright.*[44] In relation to take-over bids in particular, sections 191-194 should be extended to cover payments besides those in anticipation of a director's retirement.

Facilitating the change in ownership

(i) Section 208(1)

Section 208 provides some relief from the unhappy position minority shareholders may find themselves in upon the successful completion of a take-over bid as well as facilitating the completion of the bid itself. Under it the successful bidder or transferee company has powers of compulsory acquisition of the minority shareholdings and

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39. As a general rule, however, the proceeds of a derivative action must go to the corporation whose right of action is being enforced; e.g. *Keenan* v. *Eshleman,* 23 Del. Ch. 234, 2 A. 2d 904 (Sup. Ct. 1938). In *Perlman's* case the Court allowed *pro rata* recovery to avoid the windfall that corporate recovery would have placed in the hands of the new controllers. This choice meant that Feldmann and his co-defendants were also entitled to share in the damages. See (1955) 68 Harv. L. Rev. 1274 and (1956) 69 Harv. L. Rev. 1314, where the problems of *pro rata* recovery in derivative suits are discussed.
40. 219 F. 2d 173, at 178.
41. Jenkins Report, paras. 206 and 212(e). The Companies Act 1967 (U.K.), s.37 adopts a mutated version of the latter recommendation which confers on the Board of Trade power to bring any civil proceeding in the name of a company. See note in (1968) 31 M.L.R. 183, 191 ff. See also Interim Report of the (Lawrence) Select Committee on Company Law (1967) (Ontario) Chapter VII, Section 4, 1-3.
42. [1942] 1 All E.R. 378.
43. Cf. the Australian experiment in the codification of director's duties; Uniform Companies Act 1961, s.124.
44. (1902) 2 Ch. 421.

the minority have a converse right to be bought out by the transferee company. It is thus common for offerors to make their offers conditional on 90 per cent. acceptance for as sole proprietor of the offeree company the offeror has complete freedom to reorganise it without concern for the rights and interests of minority shareholders.

In *Blue Metal Industries Ltd.* v. *Dilley*[45] the Judicial Committee of the Privy Council, affirming the judgment of the High Court of Australia,[46] held that the Australian section similar to section 208 does not apply to a scheme or contract involving the transfer of shares in a company to two other companies jointly, but only applies to a scheme or contract involving the transfer of shares to another company alone. Though in agreement with the High Court that this conclusion was supported by the language of section 208 itself, the Board also rested its finding on what it saw as the purpose and policy of that section. Their Lordships found that it was not the intention of the legislature to permit the involuntary asquisition by a private interest of the property of another merely because an overwhelming majority thought fit to agree to it but that the section was essentially a structural one whose purpose was the amalgamation or merger of two companies—the transferor company becoming a wholly owned subsidiary of the transferee company by virtue of the device of compulsory acquisition furnished by the section. This view was reinforced, their Lordships thought, by the context in which section 208 appeared, complementing as it did section 207. The Board's interpretation of section 208 coincides with that advanced by the Jenkins Committee who recommended against the extension of the section to give the power of compulsory acquisition to individuals as well as companies because it did not think it reasonable to give to an individual a power which is designed to facilitate the merger of companies.[47] This seems to conflict with the original purpose of section 208(1) as stated by the Greene Committee, whose recommendations led to the introduction of the section, which was to prevent potential "oppression of the majority by the minority",[48] an even stronger possibility when control is vested in an individual. There seems to be no reason why both these interpretations of section 208(1) cannot be preserved together. Indeed the Eggleston Committee has recommended that the Australian counterpart of section 208 should apply to natural persons.[49]

For section 208 to operate there must be a scheme or contract involving the transfer of shares or any class of shares in one company to another company. Most of the reported cases of section 208 concentrate more on the word "scheme" than on the word "contract". In *Re*

45. (1969) 43 A.L.J.R. 206.
46. (1967), 116 C.L.R. 445; 41 A.L.J.R. 189.
47. Jenkins Report, para. 283.
48. *Report of the (Greene) Company Law Amendment Committee* (1926); Cmnd. 2657, para. 84.
49. Eggleston Report, para. 51.

Bugle Press Ltd.[50] Lord Evershed M.R. seems to have accepted that the offer made under such a scheme must be for the whole of the transferor company's capital. This is the interpretation which the Jenkins Committee wants clarified.[51]

In *Australian Consolidated Press Ltd.* v. *Australian Newsprint Mills Holdings Ltd.*[52] the High Court of Australia held that an offer to purchase shares though made directly to the shareholders in the transferor company amounted to a scheme involving the transfer of shares. Dixon C. J. said:

> "Scheme" is a vague and elastic word. Doubtless it connotes a plan or purpose which is coherent and has some unity of conception. But the rest of the section shows that it is dealing with some plan, proposal or project which contemplates the the acquisition of the whole of the shares in the "transferor" company by the "transferee" company or the whole of a specific class of such shares. That seems enough in itself to warrant the application of the word "scheme" to the proposal.[53]

Fullagar and Menzies JJ. said of the word "contract" that it:

> . . . no doubt presupposes the agreement of the company which makes an offer with some other person, but not necessarily the company whose shares are to be transferred.[54]

These views seem to endorse the view of one writer that even if the shares were acquired by purchase on the Stock Exchange that purchase would constitute a "contract involving the transfer of shares".[55]

The scheme or contract must be aproved by the holders of not less than nine-tenths in value of the shares whose transfer is involved. In the *Consolidated Press* case it was held by the High Court that if an offer is made to acquire all the shares in a company some of whose shares are divided into classes it is enough that the holders of nine-tenths in value of all the shares in the company approve and that 90 per cent. acceptance by each class is unnecessary. The Jenkins Report recommended that section 208 be amended to make it clear that an offer expressed as a single offer for shares of more than one class should be treated as comprising as many offers as there are classes of shares involved.[56] This recommendation would also remove doubts about whether the section applies when a bid is made in respect of part only

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50. [1961] Ch. 270, at 286.
51. Jenkins Report, paras. 283 and 294 (l) (i).
52. (1960) 105 C.L.R. 473.
53. Ibid., 479.
54. Ibid., 484.
55. Weinberg, op. cit. n. 7, 158-159, cf. *Rathie* v. *Montreal Trust Co.* (1953) 4 D.L.R. 289, per Rand J. at 297 ff.
56. Jenkins Report, paras. 284 and 294 (l) (ii)

of the shares of a class. The Australian courts seem to think that it does[57] but this interpretation, as Weinberg has pointed out,[58] undermines the thesis on which the section is based.

When the requisite aproval is obtained the transferee company *may* give notice that it desires to acquire the minority shares. At this point the dissentient may apply to the court who may, if it thinks fit, *order otherwise.* The approach of the courts to section 208 (1) has been a very conservative one and the dissenting shareholder[59] has a very heavy onus to discharge in establishing that the terms of acquisition are unfair. The professed logic behind this is that since 90 per cent. of the shareholders concerned have accepted the offer its fairness cannot readily be challenged by the court in the absence of very strong reasons. Without legislation requiring further disclosure by the companies concerned it was very difficult for dissentients to have enough information to make a case under section 208. Proof of the failure of the transferor company to supply information about its principal asset was no defence to compulsory acquisition in *Re Evertite.*[60] Nor is it a defence to show that the offeror company in a share-for-share bid has failed to go into sufficient details about its financial position.[61] To make the minority shareholder's position even more desperate the courts have refused to grant discovery of the transferee company's documents.[62] In Australia, simultaneously with the introduction of the disclosure requirements of section 184, the parallel of our section 208 was amended in 1961 to provide that on the transferee company giving notice under the section any dissenting shareholder might require the company to supply him with a written statement of the names and addresses of all other dissenting shareholders.[63] The purpose of this legislative action on behalf of the minority is presumably to enable dissentients to discuss with one another the possibility of their taking defensive action.

The only instances where dissenters under section 208 (1) have succeeded have been where the transferee company and the nine-tenths majority have been in substance one and the same. In *Re Bugle Press Ltd.*[64] two shareholders held nine-tenths of the capital and a third, the remaininng ten per cent. The two former shareholders incorporated a new company which then attempted to compulsorily acquire the minority shareholder's interest. Despite the problems of a literal application of the section Lord Evershed M.R. held that once the identity of the transferee and the majority was proved the court should *prima*

57. *Consolidated Press* (supra) and *Lewis Emanuel & Son Ltd.* v. *Lombard Australia Ltd.* (1963) 80 W.N. (N.S.W.) 611, per McLelland C.J. at 612.
58. Weinberg, op. cit. n.7, 147-148.
59. Defined in s. 208 (5).
60. [1945] Ch. 220.
61. *Re Sussex Brick Co. Ltd.* [1961] Ch. 289 n., at 292-293.
62. *Re Press Caps Ltd.* [1948] 2 All E.R. 638, but *quarere* whether discovery can be obtained against the transferor company; *Re Evertite,* supra, per Vaisey J. at 223.
68. Uniform Companies Act 1961 (Australia), s.185 (3).
64. [1967] Ch. 270.

facie order otherwise because the section was being used by the majority to expropriate the minority. Thus the burden shifted to the transferee company to show that the court should order compulsory acquisition. This approach has been followed in Canada.[65] Replying to the suggestion that the requirement of singularity in section 208 might be avoided by joint corporate offerors who incorporated a new company, controlled by them, which could then operate the section. The Privy Council has said:

> If such an arrangement were merely a device or cover for plural acquisition, the Court has ample resources to ascertain its true character and to disapprove it.[66]

Under the proviso to section 208(1) if the shares already held in the transferor company of the class or classes whose transfer is involved exceed one-tenth in value of the aggregate of the shares held and those whose transfer is involved, acceptances must be gained in respect of at least three-fourths in number of the holders of the shares to which the offer relates for compulsory acquisition to apply. It is also necessary that the transferee company offer the same terms to all the holders of the shares whose transfer is involved, or if different classes are involved to each class. This should also be a requirement where the proviso is not applicable.[67] Since it can readily be avoided this proviso could usefully be repealed.[68]

(ii) Sections 205-207

Limitations of space do not permit a detailed discussion of these sections which only apply where the offeror and the offeree company are in preliminary agreement as to their merger[69] since the procedure of

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65. *Esso Standard (Inter-America) Inc.* v. *J. W. Enterprises Inc.* (1963) 37 D.L.R. (2d) 598. In Canada the courts have construed s.128 of the Canada Corporations Act strictly against the offerer, seemingly on the basis that it is "confiscatory" in character: *Re John Labatt Ltd. and Lucky Lager Breweries Ltd.* (1959) 20 D.L.R. (2d) 159, per Mason J. at 161.
66. *Blue Metal Industries Ltd.* v. *Dilley* (1969) 43 A.L.J.R. 206, at 210.
67. Jenkins Report, para. 294 (l) (i).
68. Jenkins Report, para. 294 (i) (vii) and Weinberg, op. cit., 153-154.
69. Another method by which companies whose boards agree on their merger can achieve this end is the "reverse bid"—a device which has been common in the United Kingdom (see e.g. Ferris, *The City*, Penguin Books, 1962 at 99 and 108) and which has also occurred at least once in New Zealand see (1969) 2 *New Zealand Company Director* 33, 38). In a "reverse bid" the company "being acquired" assumes the role of offeror and makes a share-for-share bid to the members of the offeree company. When completed the shareholders of the latter company own a majority of the shares in the offeror company which is then the holding company. The main advantage of this method is that if 90 per cent of the shareholders in the offeree company accept the offer its success is assured despite the opposition of a minority in the smaller company as only an ordinary resolution will be needed to effect any increase in the capital of the offeror company necessitated by the scheme; Companies Act 1955, s.70(l) (a), subject to any pre-emptive rights contained in the articles. Lacking the safeguards of s.208 the minority can only resort to s.209 to defend themselves against a scheme which they consider is to their prejudice. These difficulties emphasise the need for enlarging s.209 along the lines suggested in the Jenkins Report (see p. 30 post).

amalgamation must be initiated by the offeree or transferor company under section 205(1). Amalgamations of the two companies can be achieved under these provisions without requiring as high a level of approval from the shareholders of the offeree company as is necessary under section 208,[70] and there are no time limits as in that section.

A useful description of the various ways in which companies can utilise the sections to facilitate their merger is contained in Weinberg's text.[71] The two principal methods are by the offeree company becoming a wholly owned subsidiary of the offeror company through an exchange of shares or by the transfer of the undertaking of the offeree company to either the offeror or to a new company by means of a simple vesting order. While these sections were probably drafted with the consolidation of smaller-sized companies in mind because of the modern trend towards *de facto* control they will also be practicable where larger companies are concerned.

Despite the broad definition of a "take-over scheme" in section 2 of the Companies Amendment Act 1963 it is submitted that neither of the foregoing schemes of arrangement are comprehended by it. Since an acquisition of shares must be involved the transfer of the undertaking of the offeree company under section 207 is outside the Act. As for a share-for-share exchange under section 205, again the Act would seem inapplicable since although shares are being acquired this is not being achieved by the "making of offers". That this is what the legislature intended can be inferred from the provisions of section 206 requiring a measure of disclosure by the offeree company.[72] In addition the sanction of the court must be obtained and this will not be forthcoming unless dissentient members are provided for.[73]

Preventing oppression of the minority

It is difficult to imagine that a take-over bid *per se* could often give rise to a successful aplication under this section, since a course of conduct seems to be required. However, a minority in a company taken over by a larger company might qualify for the relief provided by section 209 if the minority group could show that the new controllers were managing the affairs of their new acquisition in the interests of the larger company rather than those of the acquired company's shareholders.

The decision of the House of Lords in *Scottish Co-operative Wholesale Ltd.* v. *Meyer*[74] left open the question whether the court can grant relief under the section where the parent company is the sole

70. Section 205(2).
71. Weinberg, op. cit. n. 7, chapters 6 and 7.
72. Unlike the 1963 Act this includes the disclosure of the directors' shareholdings; *Coltness Iron Co., Ltd.*, 1951 S.L.T. 344 (Sc).
73. *Re Sandwell Park Colliery Co., Ltd.* (1914) 1 Ch. 589.
74. [1959] A.C. 324.

source of oppressive conduct.[75] In that case the nominee directors of the parent company were held guilty of oppressive conduct in their management of the affairs of its subsidiary. The difficulty with the wider view is that it appears to conflict with the oft-repeated rule that a shareholder can exercise his vote in his own selfish interests even if these are opposed to those of his company.[76] It is submitted that although the new approach is a healthy one it may in future be restricted to circumstances where, as Lord Keith pointed out, the two companies are "engaged in the same class of business".[77] Despite this the *Meyer* decision presents a deterrent to offerors wishing to acquire control of a competitor without having to purchase ninety per cent. of its shares and may thus encourage the making of general offers.[78] Lord Denning was aware of the unenviable position of directors who are on the boards of both companies. An Australian Judge has said that to require a nominee director to approach each company problem with a completely open mind "is to ignore the realities of company organsations".[79]

(ii) Section 208(2) preserves the principle of equality by giving the dissentient minority in the transferor company the right to be bought out if 90 per cent. in value of the shares or a class of shares of the transferor company are held by the transferee company pursuant to a scheme or contract under section 208(1). This may mean that an abandoned minority can obtain relief similar to that available under section 209 even though they are unable to satisfy the requirements of that section. The chief limitation on their right is the time limit contained in section 208, especially if the offeror company uses less direct methods to acquire control, to which, as we have seen, section 208 may apply. If the rationale of section 208 expounded by the Privy Council in *Dilley's* case is accepted it is difficult to appreciate the need for the present arbitrary limits.

II. THE COMPANIES AMENDMENT ACT 1963

In 1961 the New Zealand Stock Exchange Association adopted a recommended procedure for use in public take-over offers which broadly

75. Ibid., per Viscount Simonds, at 343 and Lord Keith at 362, cf. Lord Morton, at 346.
76. See *Carruth* v. *I.C.I. Ltd.* [1937] A.C. 707, per Lord Maugham at 765, but cf. *Re Broadcasting Stations 2GB Pty. Ltd.* [1964-5] N.S.W.R. 1948, per Jacobs J. at 1662.
77. *Scottish Co-operative Wholesale Ltd.* v. *Meyer,* op. cit., at 362.
78. The section is available even though those in control of the company lack a majority holding; *Re H. R. Harmer, Ltd.* [1958] 3 All E.R. 689, *Re Associated Tool Industries Ltd.* [1964] A.L.R. 73. Thus in *Benjamin* v. *Elysium Investments (Pty.) Ltd.* 1960 (3) S.A. 467 (E.C.D.) the court granted relief even though the two shareholders in a company each held fifty per cent. of the ordinary shares. In the view of O'Hagan J. the remedy was open to any shareholder who did not posses the power of control; see McPherson (1961) 24 M.L.R. 368. For a more detailed discussion of this Section see the article by Fletcher in this Review at p. 479 post.
79. *Re Broadcasting Station 2GB Pty. Ltd* [1964-5] N.S.W.R. 1648, per Jacobs J. at 1663.

followed the English and Australian codes but this was superseded in 1963 with the enactment of the disclosure requirements contained in Part One of the Companies Amendment Act 1963.[80] In referring the Bill to the House the Attorney-General said:

> The first provision of the Bill dealing with takeovers is designed to lay down a set of requirements to which those making takeover bids must conform. The Government does not want to discourage takeover bids—that is not the Government's business. It wishes simply to ensure that shareholders are given certain information about the offer made, and that they are also given a certain time in which they can study the terms and obtain expert advice.[81]

It seems apropriate at this juncture to mention some of the justifications for the imposition on companies of these additional onerous obligations of disclosure. In essence they seek to remedy an inequality of contractual rights. The offeree shareholder, like the consumer, should have all the information he needs on which to balance the risk of retaining his shareholding against that of acquiring shares in the offeror company or accepting the price he is offered. Such disclosure will also help to prevent the speculative use of information by "insiders" and encourage responsible management. It is sometimes suggested that the growing volume of information which companies must disclose about themselves is wasted on the average investor. But the availability of more information will increase the demand for skilled professional advisers as well as the expertise required of them. It is essential at the outset to bear in mind the limited objectives which the 1963 Act seeks to achieve.[82] These were underlined by the Court of Appeal in *Multiplex Industries Ltd.* v. *Speer.*[83]

(i) The scope of the Act

The approach adopted by the Court of Appeal makes the meaning of the phrase "take-over scheme"[84] only of secondary importance to that of the "take-over offers"[85] made in prosecuting such a scheme. The High Court of Australia has said of the word "scheme" that it:

80. Hereinafter referred to as the "1963 Act".
81. N.Z.P.D. (Hansard) 24 September 1963, Vol. 336, p. 2017.
82. See "The Scope and Application of the Companies Amendment Act 1963" (1966) 4 Victoria University of Wellington L.R. 149.
83. [1966] N.Z.L.R. 122, cf. [1965] N.Z.L.R. 592 (S.C.).
84. Section 2(1) defines a "Take-over scheme" as "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."
85. Section 2(1) defines "Offer" and "Take-over offer" to include an offer, or an invitation to make an offer, in writing for the acquisition of shares under a take-over scheme.

> . . . indicates a less exact notion than the word "contract" and there is, so far as we can see, no reason why one company's proposal to take-over the shares in another company should not be comprehended within the word "scheme" notwithstanding that there is no preceding arrangement between the companies covering the acquisition and transfer of shares.[86]

In view of the wide range of transactions comprehended by the expression "take-over scheme" future disputes are likely, as in the *Multiplex* case, to centre on the meaning of the more exactly defined phrase "take-over offer".

Unlike similar Australian legislation our Act only applies to take-over offers in writing. In the Supreme Court in *Multiplex* Tompkins J. was prepared to bring the facts of the case within this requirement. Otherwise, he thought,

> . . . it would be a simple matter to evade the whole of the protective machinery of the Act by a take-over offer inviting shareholders to sing written offers, sent by the offer to them, to sell their shares on the terms contained in the offer, instead of the take-over offeror offering to buy them on those terms.[87]

The Court of Appeal reversed this decision holding that whichever form the offer takes the Act's prohibition does not apply unless the offer is in writing. It rejected the contentions of the first and second respondents that once it could be said a take-over scheme existed its effectiveness depended on written offers being made in compliance with the Act's provisions and of the third respondent that oral invitations answered by written offer would be more common in practice than written invitations followed by oral offers. North P. thought that the language of the Act was too plain to permit of any other construction and pointed to the different language of the Australian section in support of this conclusion.[88] He seemed, however, willing to concede that if an oral invitation to make an offer was followed up by a written offer then the statute would apply.[89] Turner J. preferred not to express an opinion on this point.[90]

The chief justification for the decision of the Court of Appeal seems to have been the language of section 4 which Turner J. spoke of as "the principal operative section of the Act."[91] The court saw the prohibition imposed by that section as restricted to take-over offers

86. *Australian Consolidated Press Ltd.* v. *Australian Newsprint Mills Holdings Ltd.* (1960), 105 C.L.R. 473, per Fullagar and Menzies JJ., at 484-485, where their Honours were referring to the words "scheme' 'and "contract" in an Australian equivalent of our s.208.
87. [1965] N.Z.L.R. 592, 603.
88. See Uniform Companies Act 1961, s.184 and Sch.10.
89. [1966] N.Z.L.R. 122, 133.
90. Ibid., 141.
91. Ibid., 139.

within section 2. This interpretation was endorsed by the penalties which the Act imposed if the requirements of section 4 were not fulfilled.[92] Certainly this seems to place a heavy onus on the person seeking to show illegality,[93] and seems to amount to an application of the common law maxim that penal statutes must be strictly construed. The practical effect of the decision has not only been to provide a precedent for avoiding compliance with the Act but has also returned to the legislature the task of achieving the width of application it apparently desired. The Act should be amended by deleting the words "in writing" thus bringing it into line with its Australian cousin and with the Overseas Take-overs Regulations 1964.[94]

In the Supreme Court Tompkins J. said that what he termed "take-over offers in reverse" were outside the scope of the Act. His Honour was referring to the situation where shareholders in a company offered to sell their shares without offers or invitations first having been made to them under a take-over scheme.[95] The Court of Appeal seems to have endorsed his view in finding that options given by offeree shareholders could not constitute offers by the offeror for the acquisition of shares but were offers by the persons giving the options to the offeror company.[96] As the invitations soliciting these options were oral the court found that no take-over offers, within the meaning of the Act, had been made. Earlier the appellant had submitted, *inter alia,* that any invitation which Multiplex did make was an invitation to offer an option over shares to Multiplex and not an invitation to sell shares. Support for the distinction was pointed to in section 2(2) (a). This argument was not pursued but in considering whether written options which Multiplex invited from shareholders in Steelcase Engineering Ltd. amounted to take-over offers by Multiplex all the members of the Court of Appeal agreed that, on the facts of the case, the person giving the option was making the offer which Multiplex accepted.[97] This finding seems strong

92. See s.13.
93. Supra, per North P. at 135-136.
94. See infra at p. 471 ff. Doubts about whether purchases on the Stock Exchange would then be within the scope of the Act could be removed by an express provision excluding them from it orbit (see infra p. 465, n. 10).
95. The "reverse bid" referred to earlier (ante p. 41 n. 69) appears to be covered by the Act only to the extent that the company being acquired is obliged to furnish the "offeree" company with the information required in the Act. The smaller company's shareholders, however, will not receive similar information concerning the company which is acquiring control of their company under the scheme. This anomaly should be remedied by an amendment to the Act although such a task will call for no mean feat of draftsmanship. A "take-over" of a small company by a larger one can also be achieved through a simple increase in capital by the smaller company. This method is outside the scope of the Act, and, as has been seen, is relatively free from legal control. Issues to overseas companies, however, are subject to the restrictions imposed by the Capital Issues (Overseas) Regulations 1965 (S.R. 1965/157).
96. See e.g. [1966] N.Z.L.R. 122 at 141, per Turner J.
97. Supra, per North P. at 135, Turner J. at 141 and McCarthy J. at 150. Turner J. thought that the acceptance of the option, had it taken the form of a written offer, would have been caught by the Act.

support for there being no difference between an invitation to make an offer to sell and in invitation to offer an option, even though the latter offer is supported by consideration.[98]

> Section 2(1) of the Act defines an "offeror" as . . . a person who makes a take-over offer, whether in concert or jointly with any other person or not.

Person includes a company.[99] Recently the High Court of Australia has held, in *Colonial Sugar Refining Co. Ltd.* v. *Dilley*[1] that section 184 of the Uniform Companies Act 1961 does not apply to a take-over offer by two companies jointly but only where the offer is made by a single company. The court based its conclusion on the wording of section 184 and the Tenth Schedule to the Act which, in its view, was not extended by the Australian counterpart of Section 4 of the Acts Interpretation Act 1924. Unlike the New Zealand legislation section 184 does not contain a definition of the word "offeror". It is submitted that the definition of "offeror" in section 2(1) is too plain for *Dilley's* case to have any application in New Zealand. This argument is endorsed by the Eggleston report which recommends that section 184 be amended so that it applies to offerors who act jointly or in concert, thus overruling the decision in *Dilley's* case.[2] However clear the law may be practical problems may still arise from joint offers as some of the provisions of the Act were clearly not drafted with plurality in mind.[3]

A take-over scheme is not within the Act unless it aims at the acquisition of shares in a company which, together with any to which the offeror may already be beneficially entitled, carry the right to exercise or control the exercise of more than ~~half~~ the voting power at any general meeting. Section 2(2) includes shares which the offeror is entitled to acquire under an option or on the fulfilment of any condition and, if the offeror is a company, 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 to in the computation of the offeror's majority.[4] Where the shareholders of a company are

98. Cf. the Eggleston Report which recommends that a provision be inserted to clarify this point; para. 24. Such a provision could usefully be adopted in New Zealand as the principal motive of many take-over bids is to acquire losses which can be deducted from future profits. The giving of options is a convenient device to avoid the possible barrier to such deduction presented by the Land and Income Tax Act 1954, s. 137(3).
99. See s.2(2)(b) and Acts Interpretation Act 1924, s.4.
1. (1967), 116 C.L.R. 445, affirmed (1969) 43 A.L.J.R. 206 (J.C.)
2. Eggleston Report, para. 29.
3. See e.g. s.10 and (1969) 43 A.L.J.R. 206, at 211.
4. The present definition has enabled offers to be made expressly for a minority interest only, thus avoiding the requirements of the Act; e.g. the bid by J.B.L. Consolidated Ltd. for Sandford Ltd. (see Stannard, "Takeovers in New Zealand Today" (1970) 48 *Accountants' Journal*, 259, 263). It is sub mitted that if a bid was silent as to the amount of shares sought and more than a majority holding was subsequently acquired it would not be for the offeror to deny that this interest was acquired pursuant to a "take-over scheme" under the Act.

small and scattered control often lies in the hands of individuals or companies who hold less than a majority of its equity capital. A majority requirement is thus a severe limitation on the Act's effectiveness, especially in the case of large public companies. In this respect we could well follow the Australian example and change the definition of a take-over scheme to include a scheme involving the acquisition of one-third of the voting power of the offeree company.[5] This would bring the 1963 Act in line with the provisions of section 193 of the principal Act.

The Eggleston committee recommended against a specific provision dealing with partial bids whereby if more acceptances were received than had been sought each acceptance is reduced rateably according to the number of securities in respect of which the offer was accepted by the offeree.[6] It has been argued against such a provision that although each shareholder is treated equally he remains "locked in" the company, with an often inconveniently small shareholding and is unable to take advantage of compulsory acquisition under section 208 (2). Unless the majority requirement were amended, as suggested above, such a provision would be of only limited application and superfluous in cases where the minority had no better cause for invoking compulsory acquisition than they had before the bidder was in control. The writer agrees with Weinberg that a more realistic and flexible solution would be the implementation of the recommendations of the Jenkins Report concerning section 209[7] so that it would be easier for minority shareholders who complained that the affairs of the company were being conducted in a manner unfairly prejudicial to their interests to petition the court for a wider range of relief than is presently the case.[8] The Eggleston Committee thought that where an offer was made for a stated proportion of the shares, which was less than the figure caught by the Act, there did not appear to be anything to prevent acceptance of more than the stated proportion. Accordingly they recommended a provision that an offeror who announces that he is seeking less than the proportion fixed by section 184 should not acquire additional shares which would take his holdings above that proportion within four months from his announcement, unless he complies with the Act.[9] To make this provision effective the Committee recommended that it be provided that a person should not make an offer to buy shares to shareholders generally unless the offer stated the maximum percentage of shares to be acquired. Whilst these recommendations go some way towards meeting the problem, they could be avoided, in some instances, by anonymous purchases on the Stock Exchange. Indeed the Committee recommended that an

5. The Eggleston Report recommended that the figure be reduced to 15 per cent. See also the Overseas Take-overs Regulations 1964 (S.R. 1964/221) reg. 2(1) (25 per cent.) and the News Media Ownership Act 1965, s.4(1) (b) (15 per cent.).
6. Eggleston Report, paras. 21 and 22.
7. Jenkins Report, para. 212.
8. Weinberg, op. cit. n. 7, 83.
9. Eggleston Report, para. 25.

express exception be created in respect of offers made in the normal course of trading on a stock exchange.[10] As our own Act stands, a purchase of a majority interest in a company through a broker on the stock market would not come within its provisions but care should be taken as to the format of any large scale purchases of this kind. Where the offeror is acting on behalf of some other person or company he should be obliged to reveal the identity of his principal.

The Act expressely provides that it does not apply to schemes involving the making of offers for the acquisition of any shares in a private company where all the offerees have consented in writing beforehand to waive compliance; section 3(a). This seems a sensible exception as the Act's requirements would otherwise impose onerous obligations on small private companies but its extension to public companies, though logically unexceptional, might lead to administrative difficulties. The Eggleston Committee recommended that the exception contained in section 3(a) be adopted in Australia and that section 184 not apply to offeree companies with less than 15 shareholders.[11] This latter recommendation goes further than the only other express exception to our Act, that of offers made to no more than six members of any company; section 3(b). This exception also seems reasonable in view of the many small private companies in New Zealand with very few shareholders and the possible hardship which could arise if a person holding 49 per cent. of the shares in a company and wishing to acquire a further two per cent. had to comply with the Act. On the other hand in the case of many medium sized public companies direct offers to large shareholders could enable an offeror to obtain a majority interest without having to comply with the Act. This consideration may have been in the minds of the members of the Eggleston Committee when they recommended that the number of members be set at three.[12]

(ii) The requirements of the Act

When the Act does apply it imposes on certain participants in a take-over bid extensive obligations to disclose the information listed in the Schedules to the Act. These obligations cannot be avoided by agreement.[13] Between 28 and 14 days before any offers are dispatched the offeror must submit to the offeree company a statement containing particulars of the terms of the offers to be made under the scheme which comply with the relevant parts of the First Schedule. Though it must identify itself a corporate offeror need not say who its holding or subsidiary companies are. The offeror must state the proposed method and duration of payment and disclose the shares in the offeree company to which it is already "beneficially entitled". This obligation does not extend to any shareholdings which directors of the offeror company may have in either their own or in the offeree company.[14]

10. Ibid., paras. 25 and 35.
11. Ibid., para. 33.
12. Ibid., para. 34.
13. Section 12.
14. Cf. Companies Act 1961 (South Australia), Sch.10, Part B, para. 1(a) and (c).

In a share-for-share offer details of the company whose securities are being offered must be disclosed including the profit and loss of the company and its subsidiaries for the prior five financial years and, if the offer is made later than six months after the close of the last financial year, an estimate of the current trend since then. Information as to the company's dividends and its capital structure must also be disclosed as well as information about the securities being offered and some comparative details about the shares of the offeree company. Failure to supply any of this information must be explained. Considerably less information is thus required when the consideration offered is wholly in cash but when this is the case no provisions exist to secure payment. In Australia the Eggleston Committee felt that a requirement of some form of security as evidence of good faith would create practical difficulties and recommended instead that it be an offence to make a take-over offer, or 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 of proposed offer.[15] The Committee conceded that it would often be difficult to prove an offence but thought the mere existence of such a provision would be a deterrent to irresponsible announcements. Provisions of this nature underline the importance of the disclosure of the bidder's identity.

Every take-over offer must comply with the First Schedule and have attached to it a copy of the notice of the scheme served on the offeree company and, where applicable, a copy of the information required to be furnished by the offeree company under section 5(2)(a).[16] On the dispatch of offers the offeree company must be notified.[17] A take-over offer cannot be left open indefinitely. Part A of the First Schedule requires that the offer be dated and contain a statement that, unless totally withdrawn, it remains open for acceptance for at least one month from that date.[18] Where an offer is conditional, a date must be specified as the latest date on which the offeror can declare the offer to have become unconditional. It is common for an offer to be made conditional on acceptance being received in respect of a minimum number of shares. Does the word "conditional" in Part A include such an offer which also reserves to the offeror the right to accept any lesser number than the stated minimum? If only a minimum figure is specified then both the offeror and the offeree will be bound if that required minimum is obtained but where, in addition, the offeror reserves the right to accept any lesser number he choses, he can bind acceptors whether or not that minimum is reached.[19] In the United Kingdom the

15. Eggleston Report, para. 37, cf. Jenkins Report, para. 294(i).
16. Section 4(2).
17. Section 6.
18. The offer must be open for a month as well as state that it is; *R. A. Brierley Investments Ltd.* v. *Landmark Corporation Ltd.* (1966) 40 A.L.J.R. 425, at 427.
19. Cf. the City Code on Take-overs and Mergers (1969), R.20, which states that an offer should not be declared unconditional unless the offeror has obtained 50 per cent. of the equity capital.

London City Code and its predecessors make it fairly clear that the word "conditional" was intended to encompass the latter kind of condition and the wording of the New Zealand provision lends itself more readily to that interpretation.[20] There is no provision in the Act, as is contained in the Board of Trade Rules, that the offer must state whether or not it is conditional on a minimum number of acceptances being received[21] to indicate a more restricted meaning of the word "conditional". The only other provision dealing with conditional offers is section 8 which requires that the offeror, on declaring his offer unconditional, shall send *every* member of the offeree company a notice stating the number and proportion of shares of each class in the offeree company which he then holds or controls. In Australia the Tenth Schedule requires that the offer remain open for a further seven days to allow further acceptances but there is no such provision in our Act and thus section 8 is rendered nugatory unless acceptance is still possible. If such a provision were enacted in New Zealand it would enable the offeree who had considered the offer inadequate, to decide, having regard to the offeror's success, whether he still wanted to be a shareholder.

It may be that if the offeror does not declare his offer unconditional before the expiry date then none of the acceptors are bound. The Eggleston Committee thought that the offeror should be obliged to publish on the last day on which his offer can be declared unconditional a notice stating whether or not the condition had been fulfilled and that if he failed to then the offer should be deemed to have lapsed unless the condition had in fact been fulfilled by the specified date.[22]

One justification for the reservation of a right to accept less than the stated minimum might be that section 9 does not permit variations other than the two specified in the Act. But a more realistic view of that section is that it allows other variations provided that the provisions of the Act are complied with in respect of them. When an offeror, after making his bid, subsequently increases the consideration offered, he should also be obliged to pay the higher price for shares offered in response to his initial offer.[23]

On receipt of the notice from the offeror, the offeree company must either inform the Stock Exchange Association or otherwise ensure that

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20. Cf. Wallace and Young, *Australian Company Law and Practice,* Sydney, 1965, 1156 and Weinberg, op. cit., 115 who suggests that the meaning of such clauses is that the offeror cannot declare the bid unconditional until the time for the fulfilment of the minimum figure has expired. The clause seems wide enough, however, to enable the offeror to revoke the condition at any point of time before it has expired or been fulfilled—an interpretation which has judicial support; *Ridge Nominees Ltd.* v. *Inland Revenue Commissioners* [1962] Ch. 376, per Buckley J. at 383.
21. Licensed Dealers (Conduct of Business) Rules 1960 (S.I. 1960 No. 1216) (U.K.), Sch. 1, Part II, para. 2(2).
22. Eggleston Report, paras. 38-41, cf. Jenkins Report, paras. 277 and 294(f)
23. See Securnties Act 1966 (Ontario), s.83(l). A similar provision has received the endorsement of both the Jenkins and Eggleston committees; paras 294 (e) and 20, respectively.

what does this mean?

its shareholders are informed of the impending bid.[24] Thus the offeree company's shareholders are made aware of the bid irrespective of whether they receive offers in respect of their own shares. The offeree company must send to the offerees, either directly or through the offeror, a statement complying with the requirements of the Second Schedule to the Act and in addition such information as the directors think fit.[25] This statement must indicate whether or not the directors' recommend acceptance or that they do not desire to make any recommendation and must furnish details of their holdings in both companies and state whether they have accepted or intend to accept the offer in respect of their own shares. An interesting requirement is a statement of whatever information is available to the directors as to the intent of the offeror regarding the future employment of the directors and employees of the offeree company. This provision is compatible with the fears of the Jenkins Committee that any requirement that the offeror disclose his intentions as to the future of the company and its employees might encourage inaccurate or misleading forecasts.[26] By merely asking the offeree to reveal any disclosures which have been made the New Zealand provision is less likely to evoke wild promises or encourage connivance.

The information required as to the shares of the offeree company is exclusively concerned with the market prices of such shares and this raises the question of whether a more realistic index of value should be required? Disclosure of the Government valuation of the company's real assets goes some way towards this but is too narrow in that a company's most valuable assets do not necessarily take the form of real property and may be unrealistic in view of current market values. If the offer is made later than six months after the end of the last financial year of the offeree company an estimate of the trend of profit or loss since then must be provided. This can give rise to a harsh situation if the bid is made within the six month period and the annual report for the previous financial year has not yet been published.[27] The offerees may thus have no information as to their company's profits for a period of up to eighteen months and their position is aggravated for unlike the offeror in a share-for-share offer, the offeree company has no obligation to state any material change in its total indebtedness since the end of the last financial year.[28]

Section 11(2) imposes on the offeror what at first sight seems to be the onerous obligation of paying "any expenses properly incurred by the offeree company in relation to the take-over scheme". Such a provision would appear to be a severe deterrent to the making of bids and,

24. Section 5(1).
25. Section 5(2) and (3).
26. Jenkins Report, para. 267.
27. See, e.g. the H. & J. Court, Ltd. case discussed in (1969) 2 New Zealand Company Director, 33.
28. Sch. 1, Part C, para. 3(h) cf. Licensed Dealers (Conduct of Business) Rules 1960 (U.K.), Sch. 3 (8).

as the Eggleston Committee has said, represents a pre-judgment of the merits of take-over bids in general.[29] It seems inconceivable that the Legislature intended the section to have such a blanket operation and it is more likely that it is only intended to operate when a bid is successful. In such a case making the new owner or majority shareholder foot the bill would be little different from imposing the cost on the offeree company as under section 11 (1). If this restricted interpretation of the section is not accepted then we are likely in the future to witness numerous disputes about the meaning of the words "properly incurred."[30]

In general the procedural requirements set out above secure the disclosure of an adequate amount of information to ensure the fairness of the bid's performance. The Act, however, should be amended to make these rules apply in every situation where it was intended that they should. The comprehensiveness of the rules themselves is an indication that there is a need for the disclosure to shareholders of such information irrespective of whether a take-over bid is imminent. Thus the question arises whether shareholders should be entitled to have this information whenever they intend to sell their shares and not only when they do so to an offeror whose *modus operandi* is caught by the Act?

(iii) The effect of non-compliance

Beyond the penalty provisions contained in section 13, which impose on the defaulting participants to a take-over scheme liability to a fine of up to $1,000, the Act is silent as to the effect of its contravention. In *Multiplex* v. *Speer*[31] Tompins J. held that the effect of non-compliance on contracts for the acquisition of shares by Multiplex was to render them illegal and unenforceable. The learned judge based this view on the language used in sections 4 and 12 and on the scope and purpose of the Act which he thought would not be attained if take-over offers in breach of the Act were still effective. The Court of Appeal did not find it necessary to comment on this point but did stress the prohibitiory character of section 4. The difficulty with this argument is that section 4 does not expressly prohibit the making of contracts pursuant to offers made in contravention of its provisions but only the making of such offers themselves and a contractual prohibition must therefore be implied. Another problem which *Multiplex* does not attempt to answer is whether a distinction should be drawn between total failure to comply with the Act and a minor breach of its requirements.

In the same year as Tompkins J. delivered his judgment in *Multiplex* the Supreme Court of Victoria reached a rather different conclusion in a case concerning offers in breach of section 184.[32] Although the

29. Eggleston Report, para. 45.
30. See *Peel* v. *London and North Western Railway Co.* [1907] 1 Ch. 5.
31. [1965] N.Z.L.R. 592 (S.C.)
32. *Colortone Holdings Ltd.* v. *Calsil Ltd.* [1965] V.R. 129.

court did not have to decide whether such offers were invalid it seems to have agreed with counsel that they were not.[33] In that case the plaintiff offeree company and its chairman of directors were refused an interlocutory injunction restraining the defendant from proceeding with a proposed take-over of the plaintiff company. Gillard J. could not see how the offeree company, since it had its own obligations towards its members under the section, could have a correlative right in respect of similar duties imposed on the offeror company. Though he conceded that the plaintiff shareholder was a member of a class that the section's aim was to protect, he did not agree that the plaintiff had any personal right which the court should enforce:

> Any jeopardy to his shares arises not from the fact that the offer was made in contravention of section 184 but rather that an offer was made.[34]

The crux of these findings was that although there had been non-compliance with section 184 the offeree shareholders had not in fact been prejudiced by it as they had received all the information they were entitled to receive albeit from a different source. The granting of an injunction would also have interfered with the contracts of sale which some shareholders had already concluded with the offeror. The case is probably best seen in relation to the equitable nature of the relief sought and the special circumstances which led to its denial.

Two legislative sources can also be advanced to support the view that contravention does not result in illegality and avoidance. Regulation 15 of the Overseas Take-over Regulations 1964 provides that in two specified instances any contract for the sale of shares resulting from the acceptance of any take-over offer, and any consequent transfer of shares, is unlawful and void. This express assignment of illegality to two specific major breaches, as well as implying that other lesser breaches do not attract the same stigma, indicates that Parliament did not intend to invalidate contracts which were entered into following offers in breach of the 1963 Act or it would have included an express provision to that effect.

Section 10 of the 1963 Act provides that sections 53, 54 and 56 of the principal Act shall apply, with the necessary modifications, in respect of any take-over offer as if it were a prospectus. This means that an offeree shareholder who has suffered loss or damage due to untrue statements made by an offeror upon which he has relied may have a remedy in compensation under section 53. This remedy is also available against any person who has given his consent to the inclusion in the offeror documents of an untrue statement purporting to be made by him

33. Even if they were Gillard J. thought that an "acceptance" by a shareholder, unless it were infected by the earlier illegality, would constitute a valid offer which would be impliedly accepted by the offeror in making an allotment of shares and seeking registration of the transfer of shares with the offeree company; supra, at 138.
34. Supra, at 139.

as an expert.[35] The application of section 53 provides a solution to the problem of the immaterial omission, mentioned earlier.[36]

The shortcoming of the penal and compensatory provisions contained in the Act is that they do not prevent take-over bids in breach of the Act. The Eggleston Committee has recently recommended that the Attorney-General and the offeree corporation should have power to apply to the court for an injunction restraining further proceedings on any offer which contravenes the Act.[37] In view of the decision in *Colortone* and the silence of our legislation such a provision could well be adopted in New Zealand and extended to confer the right to apply for an injunction upon shareholders in the offeree company. The Committee also recommended that the court should have power to excuse any failure to comply with the requirements of the Tenth Schedule in appropriate cases.[38] At present section 14 of our Act provides that regulations can be made varying the requirements of the schedules to the Act and granting exemptions from all or any of its provisions, in any particular case or class of cases but the power to grant exemptions in individual cases might perhaps be most effective in the hands of either the Registrar or a Companies Commission.[39] In the absence of such reform the offeree shareholder who accepts the offer may still have a remedy against the offeror by way of rectification[40] or in damages for fraud in the same way as subscribers who take up shares in a company in reliance upon the contents of a prospectus. After *Hedley Byrne & Co. Ltd.* v. *Heller & Partners Ltd.*[41] an action in tort for negligent misrepresentation may be available if a duty of care arising out of a "special relationship" can be established.

III. THE INTERNATIONAL OFFEROR

In 1964 the Overseas Take-overs Regulations were brought into force under the Reserve Bank of New Zealand Act 1964. The aims of the Regulations are very different to those of the domestic legislation of 1963.[42] They purport to enable the Government to control the overseas ownership of New Zealand companies, apparently in the hope that overseas investment will thus take forms more beneficial to the New Zealand economy, such as direct capital investment in local subsidiaries

35. Section 4(3) and ss.50 and 53(1) of the principal Act, cf. the Jenkins Report paras. 282 and 294(k).
36. See *Bundle* v. *Davies* [1932] N.Z.L.R. 1097; [1932] G.L.R. 379.
37. Eggleston Report, para. 46(c).
38. Eggleston Report, para. 43.
39. See infra p. 57, n. 71.
40. Companies Act 1955, s.124.
41. [1964] A.C. 465.
42. Highlighted by the recent abortive bid by I.C.I. (N.Z.) Ltd. for Guthrie Bowron Ltd., consent to which was declined by the Minister of Finance. Later the directors of Guthrie Bowron criticised the Minister's decision and said that they would have recommended the acceptance of the I.C.I. bid but strongly opposed a rival bid from a domestic company—Phillips and Impey Ltd. See *Evening Post,* 13 June, 1969.

and branches and the reinvestment of undistributed profits earned locally. Few other nations have attempted such comprehensive control over foreign investment in existing domestic companies irrespective of the nature of their activities[43] but many prohibit participation in certain key industries because of their strategic or public importance.[44] An example of such a prohibition in New Zealand is the News Media Ownership Act 1965 under which the voting power in any news company that a member domiciled outside New Zealand is entitled to exercise, must not exceed 15 per cent. of the total voting power of the company.[45] Together with other recent controls in this area[46] the Regulations would appear to present a substantial deterrent to overseas capital investment in New Zealand but in practice they have been administered fairly liberally in accordance with a policy of encouraging overseas investment in the national interest.[47]

Where take-over offers[48] are made or proposed to be made to offerees by or on behalf of any overseas person[49] the offeror or his agent must send to the designated Registrar at the Reserve Bank a notice in writing stating that offers are being made and containing details similar to those required of offerors under the 1963 Act. Where the consideration offered takes the form of securities the details required are considerably less than those required under the 1963 Act but a certain minimum of this information is required even where the consideration is wholly in cash.[50] Further particulars must be furnished of the offeror's holding company, if it has one, its holdings in other companies in New

43. See *Legal Aspects of Foreign Investments,* (ed. Friedmann and Pugh) (1959).
44. A recent example is the Companies (Life Insurance Holding Companies) Ordinance 1968 (A.C.T.) which seems to give the two "specified" insurance companies to which it applies a discretion as to whether to take advantage of the protection against foreign ownership which it affords them; ss.11 and 12 and Nochimson, "The M.L.C. Ordinance—A New Legal Approach to Foreign Investment" (1969) 43 A.L.P. 101. See also Friedmann and Pugh, op. cit., 323 (Japan). Future Australian legislation will probably also be on selective basis; *Australian Financial Review,* September 17, 1969.
45. See (1966) 2 N.Z.U.L.R. 87 and Broadcasting and Television Act. 1942-1966, Part IV, Division 3, inserted by Act No. 38 of 1965 (Australia).
46. See also Capital Issues (Overseas) Regulations 1965 (S.R. 1965/157); Exchange Control Regulations 1965 (S.R. 1965/158); (1966) 2 N.Z.U.L.R. 90 and Neil, "Some Restrictions on Overseas Investment in New Zealand" (1967) 1 Auckland University L.R. 53.
47. Since the introduction of the Regulations eight applications by overseas companies have been declined and 340 allowed to proceed in amended form; *Evening Post,* 30 May 1969.
48. Defined in reg. 2(1).
49. Overseas person is defined in reg. 2 as any person not ordinarily resident in New Zealand or any company incorporated outside New Zealand or its subsidiary or any company in which 25 per cent. or more of the equity shares are held by overseas persons. Under reg. 2(2) a person is deemed ordinarily resident in New Zealand if he is domiciled in New Zealand. A person ordinarily resident overseas could thus be ordinarily resident in New Zealand for the purpose of these Regulations if his domicile of origin was New Zealand and he had not acquired a domicile in any other country.
50. Regulation 4(2) (c).

Zealand besides the offeree company and the proposed method and source of payment. Under regulation 6 the offeror may be required to supply "from time to time" such further information in relation to the take-over offers as may reasonably be required for the purpose of enabling the Minister of Finance to exercise his powers under the Regulations. These disclosure requirements are considerably more onerous than those imposed by the 1963 Act yet it is hard to justify this difference simply by pointing to the different purposes of the legislation.

Within 14 days of registration of the notice the Minister must determine whether or not the offers should be further considered with a view to requiring his consent thereto. Offers made must state that they are subject to the Regulations but if the Minister determines that no further consideration is necessary the offers become effective on receipt by the offeror of notice to that effect. If the Minister determines that further consideration is required the offers become effective either on notice of the Minister's consent or on the expiration of six weeks after the date of registration. The Minister may for the purpose of the Regulations refuse his consent or grant it either unconditionally or upon or subject to such terms as he thinks fit. This wide discretionary authority might seem adequate but under regulation 12(1) the Minister is presented with a discretion to delegate to any person any of his powers under the Regulations, including the power of delegation itself.[51] This unfettered discretion can be compared with Japanese law, which provides a set of criteria for the competent Minister to apply in deciding whether to allow certain foreign investments in Japanese corporations.[52]

IV. RECENT CANADIAN DEVELOPMENTS

In 1966 the Canadian province of Ontario enacted a Securities Act following on the recommendation of the Kimber Report of the previous year. The Act is a comprehensive attempt to provide for disclosure on a continuing basis rather than merely on a particular occasion such as the issue of a prospectus or the making of a take-over offer. The purpose behind this wider disclosure was to provide fuller information to the ordinary investor with the aim of increasing public confidence in the securities market. Concurrent with this legislative reform there has been a programme of staff reorganisation and recruitment to administer and enforce the new Act. It is beyond the scope of this article to survey all of the developments contained in the Act[53] but two Parts of it are especially relevant to the control of take-over bids.

51. This is now a common provision in statutes granting powers to Ministers and government officials. The relationship of this provision to the common law rules of delegation is highly intricate. However in the light of *Hawke's Bay Raw Milk Producers Co-operative Co. Ltd.* v. *New Zealand Milk Board* [1961] N.Z.L.R. 218 (C.A.) it may be said thaat the provision does not give an absolute power of delegation.
52. See Article 8 of the Foreign Investment Law of 1950 (Law No. 163 of 1950) in Friedmann and Pugh, op. cit., 331.
53. The Securities Act 1966, Stat. Ont. 1966, c.142, as am. 1967, c.92, hereinafter referred to as "the Act".

Part IX of the Act is founded on Part III of the Kimber Report and is analogous to our own 1963 Act. A take-over bid is defined as an offer, other than an exempt offer, made to Ontario shareholders to purchase enough equity shares to give the offeror, together with those he presently owns, twenty per cent. of the offeree company's shares.[54] Exempt offers include offers by way of private agreement with individual shareholders or by purchase on the stock exchange or on the over-the-counter market. Offers to purchase shares in private companies or in public companies with less than 15 shareholders are also exempt. Application can be made, under section 89, to a Judge of the High Court for an order declaring a take-over bid to be an exempt offer.

Section 81 sets limits on the time an offer can remain open for acceptance and gives the offeree the right to withdraw his acceptance during the first week of the bid's currency. These provisions endorse the view expressed in the Kimber Report that it is essential that the management of the offeree company have ample time in which to inform its shareholders of their analysis of the bid and that those shareholders in turn have an adequate opportunity to assess the information they are given.

The most significant part of the Securities Act is that dealing with insider trading. The adoption of such provisions in New Zealand will be the next logical step in the development of our laws dealing with take-over bids and disclosure generally.

For the purposes of Part XI of the Act an "insider" includes not only a director or other senior officer[55] of the company but also any person or company who beneficially owns ten per cent. or more of the equity shares of the company and the directors or senior officers of such companies.[56] The Kimber Report recommended that the latter group be deemed "insiders" because of the confidential information they were likely to receive or the influence they were likely to exercise due to the size of their holdings.[57] In the interests of precision the Report also recommended that the definition not include the relatives and business associates of insiders.[58] Junior officers and professional persons were omitted because the Committee thought that their discipline was best left to management or professional bodies.[59] With the increasing complexity of corporate organisation a sounder basis for determining who is an insider for the purposes of liability might well be the possibility of an

54. Section 80(g).
55. Section 1 (1) 29. defines "senior officer" as, "i. the chairman or/any vice-chairman of the board of directors, the president, any vice-president, the secretary, the treasurer or the general manager of a company or any other individual who peforms functions for the company similar to those normally performed by an individual occupying any such office, and ii. each of the five highest paid employees of a company, including any individual referred to in subparagraph i.."
56. Cf. Securities Exchange Act 1934 (U.S.), s.16.
57. Kimber Report, para. 2.10.
58. Ibid., paras. 2.05 and 2.12.
59. Ibid., paras. 2.08 and 2.09.

individual having access to confidential corporate information rather than his function in the company to which he belongs.[60] As the Act stands, trading by an insider of one company in the shares of another company of which he is not an insider is not subject to its provisions.[61] The adoption of this alternative proposal would go a long way towards bridging this gap.

Insiders are obliged to file with the Commission a report of their beneficial ownership in the capital securities of the corporation and similarly to report changes in these holdings as they take place.[62] The Commission is required to keep these reports open for public inspection and to publish a monthly summary of new reports.[63] As well as creating various offences in respect of failing to comply with these disclosures requirements the Act allows the Commission to apply to the High Court for an order requiring an insider to report in compliance with section 109.[64] This injunctive remedy, previously found only in the United States securities legislation, has several distinct advantages over the conventional penalty provisions. Not only will the burden of proof on the Commission be lighter as plaintiff than as complainant but, if an injunction is granted, refusal to comply with its terms will found proceedings for contempt of Court. Most significantly, the injunctive remedy secures the fulfilment of the Act's requirements.

The second feature of the insider trading legislation is the provision of remedies against those who engage in improper trading. Section 113(1) represents a radical innovation in Canadian company law:

> Every insider of a corporation or associate or affiliate of such insider, who, in connection with a transaction relating to the capital securities of the corporation makes use of any specific confidential information for his own benefit or advantage that, if generally known, might reasonably be expected to affect materially the value of such securities, is liable to compensate any person or company for any direct loss suffered by such person or company as a result of such transaction, unless such information was known or ought reasonably to have been known to such person or company at the time of such transaction, and is also accountable to the corporation for any direct benefit or advantage received or receivable by such insider, associate or affiliate, as the case may be, as a result of such transaction.

61.. Kimber Report, para. 2.32.

60. See (1969) 12 Can. Bar J. 125. Cf. *S.E.C.* v. *Texas Gulf Sulphur Co.*, 401 F. 2d 833 (1968) where it was held that any employee who has knowledge of undisclosed corporate information is an insider under Rule 10b-5 promulgated by the S.E.C. under the Securities Exchange Act 1934, s.10(b).

62. Section 109. The Commission has power to exempt an insider from these requirements; s.116 (1).

63. Section 110.

64. Section 112.

The first head of liability abolishes the doctrine of *Percival* v. *Wright*[65] that no fiduciary relationship exists between the director of a company and its shareholders. Section 113(1) creates such a liability but unlike the United States legislation[66] does not make liability automatic on a profit being made by an insider. Since, however, the loss must be a direct one the remedy may not lie in respect of purchases on the stock exchange.[67]

The second basis of liability is to the company whose shares are being traded and of which the defendant is an insider. The Kimber Committee thought there was sufficient uncertainty as to the common law position to justify codification of this head of liability. At common law the liability of directors to account to their company for a breach of their fiduciary obligations is strict[68] but the use of the word "improper" in section 113 may lead the courts to investigate the motives of the insider in proceedings brought under that section. Such a declaratory provision carries the risk that its interpretation may result in a loss of the flexibility of the common law.[69]

The Kimber Report sensibly recognised that a company is unlikely to bring such an action against its own directors or other insiders. It therefore recommended that the legislation provide that a shareholder who has reason to believe that a cause of action has arisen against an insider by reason of unlawful trading may, whether or not he is the person aggrieved, request the company to maintain such an action and that if it refuses within a specified time the shareholder should be allowed to apply to the High Court for any order authorising the Commission to institute the action on behalf of the company.[70] These recommendations were enacted as section 114 of the Act, but despite the recommendation contained in the Kimber Report[71] that the legisla-

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65. [1902] 2 Ch. 421.
66. Securities Exchange Act 1934, s.16 (b).
67. The Eggleston Committee in its report on insider trading, which recommends that a provision similar to s.113 be enacted in Australia, doubted whether a purchase of shares which was likely to rise as a result of an announcement to be made would amount to a "direct loss" by the vendor; The Company Law Advisory Committee's Fourth Interim Report to the Standing Committee of Attorneys-General (1970), paras 4, 6, 10 and 11. The committee thought this result was justified since the vendor had suffered no greater loss by selling to an insider than if he had sold elsewhere. Cf., Rule 10b-5 (supra, n. 60) and *Karden* v. *National Gypsum Co.* 69 F.Supp. 512 (1946), on the merits, 73 F.Supp. 798 (1947). For a useful discussion of the United States position see Loss, "The Fiduciary Concept as Applied to Trading by Corporate 'Insiders' in the United States" (1970) 33 M.L.R. 34.
68. *Keech* v. *Sandford* (1726) Sel. Cas. T. King, 61; 25 E.R. 223; *Regal (Hastings) Ltd.* v. *Gulliver* [1942] 1 All E.R. 378.
69. Cf. Uniform Companies Act 1961 (Australia), s.124.
70. This accords with the view of Professor Loss who thinks that in the United States proceedings under s.16(b) should be brought by the S.E.C. and not by an individual shareholder, thus avoiding the champerty which is common in the United States. See Kimber Report, para. 2.28 and Loss "Recent Developments in Securities Regulation" (1963) 63 Colum. L.Rev. 856.
71. Kimber Report, para.. 2.30.

tion be drafted so as to avoid liability on insiders under both heads in respect of a particular transaction, the Act, as it stands, does nothing to prevent such dual liability arising.

These Canadian developments present a neat package of reform. Not only is a wider and more uniform basis of disclosure secured than by previous legislation but more flexible legal remedies are provided against insiders who, upon hearing that a take-over bid is imminent, trade in anticipation of its announcement. More onerous disclosure requirements will inevitably lead to the prices of shares representing more accurately their real value and when this occurs the number of take-over bids attracted by companies whose shares are quoted at under-value should decline. But the ends of reform cannot be achieved by legislation alone. With the anactment of increasingly sophisticated disclosure requirements the need for an effective administrative watchdog increases. It is already conceded that in New Zealand the existing government agencies are inadequate to police even our existing securities laws.[72] The imposition of additional obligations is an idle exercise unless the legislature is satisfied that those upon whom they are to be imposed are reasonably capable of meeting them and that the necessary machinery exists to ensure their equitable implementation.

R. K. Paterson.*

72. See Duncan and Molloy, "A Companies Commission" [1969] N.Z.L.J. 277.

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