SOUTH AUSTRALIA

FORTY-NINTH REPORT

of the

LAW REFORM COMMITTEE

of

SOUTH AUSTRALIA

to

THE ATTORNEY-GENERAL

RELATING TO THE CONSIDERATION OF THE PROPOSED BILL REGULATING COMPANY TAKEOVERS

1980

The Law Reform Committee of South Australia was established by Proclamation which appeared in the *South Australian Government Gazette* of 19th September, 1968. The present members are:

THE HONOURABLE MR. JUSTICE ZELLING, C.B.E., *Chairman.*

THE HONOURABLE MR. JUSTICE WHITE, Deputy Chairman.

THE HONOURABLE MR. JUSTICE LEGOE, Deputy Chairman.

D. W. BOLLEN, Q.C.

M. F. GRAY, S.-G.

J. F. KEELER.

D. F. WICKS.

(The Honourable Mr. Justice Legoe did not sign this report as he did not participate in all the discussions on it.)

The Secretary of the Committee is Miss J. L. Hill, C/- Supreme Court, Victoria Square, Adelaide 5000.

FORTY-NINTH REPORT OF THE LAW REFORM COMMITTEE OF SOUTH AUSTRALIA RELATING TO THE CONSIDERATION OF THE PROPOSED BILL REGULATING COMPANY TAKEOVERS

To:

The Honourable C. J. Sumner, M.L.C.,
Attorney-General for South Australia.

Sir,

Your predecessor referred to us the consideration of the draft bill prepared by Commonwealth Parliamentary Counsel for the regulation of company takeovers. We have considered the matter and report as follows:—

Our first comment is of a general nature. The Committee fully appreciates the complexity of the subject matter and the need for careful, indeed in some cases minute, regulation of the procedures envisaged in the reform. Nevertheless the Committee feels that the drafting of the bill leaves much to be desired. It is in many places extremely verbose. It is not easy to follow. It is necessary frequently to jump from one area of the bill to another to appreciate the full force of what is being enacted, and the setting out of the individual clauses leaves much to be desired. We do not think that the complexity of the subject matter or the way in which the problem has to be tackled justify the drafting of the bill in this way. After all the projected law is a command from the sovereign parliament to the subject and the subject should have some reasonable way of finding out exactly what it is that he is being asked to do in ordering his corporate affairs so that he may adequately comply with the law.

The second general matter which we should mention is that one member of the Committee feels that the reform goes further than is needed and that it would be sufficient if a proper code were enacted protecting the rights of minority shareholders so that they are not discriminated against, unfairly or indeed at all, in a situation where there is a projected change of control of the company. The remainder of the Committee accept the criticism that the rights of minority shareholders do need better laws for their enforcement, but they intend to make recommendations to you on this topic in respect to the remit on locus standi which is also before us at the moment. The majority feel that in any event, proper procedural amendments would not go far enough in any individual case unless the minority has something on which they could base their case. Their case could only hope to be argued successfully in the Courts if they were possessed of the sort of information that this bill makes it mandatory for them to be given. Accordingly the majority think that whilst this bill has defects, as we have said and as we will develop further in our detailed discussion of the bill, it is nevertheless in principle a necessary reform of the law.

We turn now to specific comments on the specific sections of the bill and for this purpose we have followed the numbering as it occurs in the Company Takeovers (Australian Capital Territory) Bill 1979. We may say that we have been assisted in this task by the consideration of two papers: one by A. B. Greenwood, Assistant Commissioner of the Corporate Affairs, containing explanatory notes on changes in the

substance of the existing law, and the other a paper by Mr. G. F. K. Santow, Solicitor, called The Minority/Majority Shareholder—In Perspective.

1. *Section 180A subsection (2):*

(a) Definition of "business rules".

The Committee has some unease with regard to this definition particularly when read with the definition of "marketable parcel". We understand perfectly well that a stock exchange may regulate its own internal affairs. We doubt, however, whether it is right to enable it by statute to govern the activities or conduct of other persons in relation to the stock market of the stock exchange. This would mean that by altering their business rules the stock exchange and not Parliament would effectively alter rights and interests of individual shareholders in companies affected by the alteration and we think this is to be avoided. The same criticism therefore also applies to the definition of "marketable parcel".

(b) Definition of "company".

The Committee considers that it is at least arguable that this definition is an "express provision" within the meaning of Section 383 of the Act and that this would need to be watched.

(c) Definition of "marketable securities".

The last words "and any prescribed interest" involve so many things today that it means almost anything on paper issued by a company that is saleable. We think that Parliament should say exactly what is to be controlled and what is outside the control. The definition of "prescribed interest" in Section 76(1) is so wide that it will bring into the net many things which are not as it seems at first sight to be really intended to be controlled by this bill. There is a printing error in the reference to "prescribed interest" at the top of page 6 of the bill. It should read "Section 76 subsection (1)".

(d) Definition of "officer".

We think that in subclause *(a)* "director, secretary or employee" is too wide. We understand the rule applying to directors or secretaries but we think it should only apply to employees of the company who have power to bind the company. The alternative and possibly more realistic way is to delete the words "or employee" entirely because decisions of this kind are normally made at board level.

(e) Definition of "target company".

This is a typical example of our comments on drafting. Subclauses *(e)* and *(f)* are particularly bad in this respect and ought to be redrafted so as to be easily read and understandable.

(f) Definition of "offeror".

Parliamentary Counsel points out that "offeror" normally means a person who makes an offer and not only a person who despatches or proposes to despatch an offer. This may be of some importance because if some point is to be taken of a contractual nature in relation to misrepresentation, lack of consensus or any other point on the offer, it might be argued

on the present definition that the offering only commences from the time of despatch. We think the definition should be altered to conform to that more naturally used in the law of contract.

(g) Subsections (6) and (8).

These need to be redrafted. They are circular in some of their effects. The word "associate" and the word "associated" are used in two different senses, and both subsections need redrafting. There is a practical difficulty in subsection (8) *(b)*. It could be very difficult for any person to act as adviser to a company whether as lawyer, sharebroker or however, unless he is prepared to disclose his own private shareholdings, which one would have assumed was not what was intended by this bill.

(h) Subsections (7) and (12).

These subsections and their correlative Section 180ZW are of such complexity that it is not in our opinion useful for ordinary business dealings. Here again there must be some better way to set this out so that ordinary people can understand the law, even if by doing so the law misses one exceptional case in a very large quantity of cases.

(i) Subsection (11).

The words "prima facie" should be inserted before "deemed". It should be possible for a person to show that the factual situation did not in truth occur.

(j) Subsection (16).

It would, we think, be better to express this as commencing from a time forty-eight hours from the time of posting the last of the offers or invitations to be despatched. It is in general a criticism of this Act that it works at the moment as if all offers or invitations are to be despatched on the same day. In the case of post offices lesser than a General Post Office this may not even be physically possible, and in any event cases may occur where due to printing delays, or for any other of many imaginable reasons, the despatching does not take place all on the same day. Provided the time runs from the last of those days the offeree is not prejudiced.

2. *Section 180B.*

The words "by telex" ought to be inserted after the words "by telegraph" in the fourth line.

3. *Section 180C.*

There may be cases where shares ought to be placed for the good of the company in the hands of some particular person or class or recipients and we therefore suggest a new subsection (i) reading—

"(i) the placement of shares which have been held, prior to such placement being made, by the Court or a Judge thereof to be beneficial to the company as a whole."

There should then be a consequential subsection dealing with applications to the Court and directions by the Court.

4. *Sections 180C and 180G.*

The Committee's opinion is that there should be an exemption written into both of these sections where all the shares are not taken up by allotment or there has to be a disposal of a remaining bulk of shares which nobody wants to take up.

5. *Section 180D.*

The point is taken in Mr. Santow's paper that this section is not wide enough in that it does not catch the dealings of two or more companies outside Australia which have effect within Australia. We think the criticism is probably correct, but having regard to the difficulties as to the extraterritorial actions of companies which have been raised for example by the American anti-trust actions with regard to the Westinghouse Corporation, we do not recommend any alteration. However we felt it was our duty to draw your attention to it as Attorney, as it will in the ultimate result be a policy decision.

6. *Section 180E.*

In our opinion there is a lacuna between this section and Section 180ZL. We feel that Section 180ZL ought to be prefaced with words indicating the situation at the end of the operation of Section 180E. Further, we feel that there should be some criteria inserted defining the jurisdiction which a Court exercises under Section 180ZL, in relation to Section 180E. We shall return to this when we come to Section 180ZL.

7. *Section 180F.*

Subsection (3) goes beyond the matter referred to in paragraph 47 of the briefing paper presented at the Ministers' meeting on December 1 last. In any event subsection (3) needs redrafting and simplifying. Mr. Santow refers to a difficulty in relation to subsection (1) of this section. He puts the problem this way:— If A acquires twenty per cent of the shares of a public company, B, which in turn owns forty per cent of another company C, A is deemed to have forty per cent of C and thus is in breach of Section 180E and he refers to Section 180ZW(4) *(e)*. It appears to the Committee that the exemption in Clause 180F does not help in these circumstances, and we draw your attention to the difficulty.

8. *Section 180G.*

The Committee has already dealt under Section 180E with the problem of shares that no-one wants to buy and simply refers once more to the same problem. We feel that Section 180G might also be extended to relax the prohibition of the acquisition of shares in a very small company with a capital of say less than $100 000, as the machinery of this statute is so difficult and complex that it is unlikely to be either necessary or indeed practically useable in the case of a very small company. This however is a policy question for you and we simply mention the matter for your consideration.

9. *Section 180J.*

We have already referred to the problem created by subsection (2) subclause *(d)* that the offers must be despatched on the same day and we reiterate those criticisms.

10. *Section 180P.*

We doubt the utility of having both subsection (1) and subsection (2) side by side. We express no opinion on their validity but rather we raise it as a question of drafting to be taken up with Parliamentary Counsel.

11. *Section 180Q.*

We think that the words "indicate or imply" in the first line are far too vague and the same applies where the words appear later in the section. We think it might be better to use some other form of words such as "an offer made by an invitor shall not be valid if it is conditional on" and then follow with the desired prohibited situations.

12. *Section 180R.*

We think that subsection (2) subclause *(b)* is too widely stated and that it might be better to say bluntly either that the offeror must make a cash offer or put his recommendation to the Registrar for approval.

13. *Section 180Z.*

We think that subsection (10) is too wide in the state in which it now stands. We think it would be better to enact that any person who comes within that subsection may have to pay compensation if the other person suffers actual damage as a result of the false or misleading matter.

14. *Section 180ZA.*

We feel that both the cost of implementation and the difficulty of application of this section should be kept in mind in any question of drafting. We think that "entitlement" for the purposes of subsections (2) to (4) of the section should not include the entitlements of an associate and we think that the words "relevant time or relevant period" should be defined where they appear in each subsection, as the relevancy in each case may be quite different and yet the same words are used.

15. *Section 180ZB.*

We realize that there are other sections dealing with deeming of offers or invitations but we do not like deeming situations and we feel that there should be provision for actual notice if the other person is known. The clause will in any event have problems if the *pro rata* provisions fall to be applied in any such situation.

16. *Section 180ZF.*

Here there is a typographical error in which Section 180J(2) *(g)* (vi) should read 180J(2) *(g)* (vii).

17. *Section 180ZL.*

We reiterate the comments made under Section 180E. There is an obvious lacuna as the Sections now stand. We do not think that shares coming within subsections (4) and (6) should vest in the Registrar. In our opinion these are trust properties which should in the first instance at least vest in Public Trustee. There should be

power for Courts to make vesting orders with the usual power for the Master of the Court to sign in the case of a recalcitrant party.

18. *Section 180ZM.*

Mr. Santow comments on this section—

> "Clause 180ZM only applies once takeover offers or invitations have been despatched or a takeover announcement made. It is hard to see why this section should not apply earlier than this from the time a part A statement is served",

and the Committee agrees.

19. *Section 180ZN.*

This should be widened to cover all possible cases some of which are dealt with in other sections. In previous Acts there have been difficulties seen in the decided cases in such conflicts between sections and we think Section 180ZN should commence with words such as "Irrespective of what is said in any other section".

20. *Section 180ZS.*

In subsections (8) and (10) there ought to be stated the grounds on which the Court can act. Those grounds presumably would be those of injustice or unfairness but it should be stated in the section. There ought to be a general power to extend time given to a Court under subsections (18) to (20).

We have the honour to be

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Law Reform Committee of South Australia

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