

COMMENTS

THE REGULATION OF TAKEOVERS: THE AMERICAN AND THE AUSTRALIAN EXPERIENCE

By
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In 1968, the United States Congress enacted amendments to the Securities Exchange Act 1934. The Williams Act, as the amendments came to be known, sought to regulate tender offers, or in Australian usage, takeover offers, by requiring the filing of disclosure documents. However, the legislature deliberately did not provide a definition of the term tender offer in an attempt to maintain flexibility and, to deter evasion of the legislative requirements. By contrast, the New South Wales, and the national, approach has been to provide for extensive and detailed regulation of takeovers. Yet it could be said that in practice both approaches inevitably confront the same dilemma; namely, whether a particular set of events will constitute a tender or takeover offer. On the one hand, there is the possibility that a share transaction quite unlike any previously characterised tender offer will be held to be a tender offer; while in the Australian context the possibility will be whether a particular transaction, which in substance would appear to be a takeover, manages somehow to avoid the intricate operation of the legislative scheme. The result in both cases can be uncertainty and an invitation to extensive litigation.

Nevertheless, there remains the question of how effective each approach is and, whether one is the more effective in light of the purposes of the respective legislation. It is proposed to discuss, in turn, the approaches adopted by the American and Australian legislators in this task of defining and regulating takeovers. Finally, consideration will be given to the question of whether it is really the actual mode of definition that is crucial to the regulation of takeovers or rather the means chosen to regulate the share transaction in question.

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I. THE AMERICAN EXPERIENCE

The regulation of tender offers in the United States is of relatively recent origin. The Securities Exchange Act 1934 was concerned with regulating, *inter alia*, proxy contests. This was a widely used form of takeover where a company obtained control, without actually purchasing shares, by securing the right to the proxy vote of the shares.² However, by the mid-sixties the costs and regulation of proxy contests stimulated the widespread use of the tender offer as a means of gaining control of the target company.³ Essentially a tender offer, or conventional tender offer as it is generally known, can be described as

a public offer or solicitation by a company, an individual or a group of persons to purchase during a fixed period of time all or a portion of a class or classes of securities of a publicly held corporation at a specified price or upon specified terms for cash and/or securities.⁴

Most attractive was its immunity, unlike the proxy method, from any sort of regulation or disclosure requirements, with the result that a tender offer could be undertaken quickly and in virtual secrecy.⁵ The concomitant of this was that shareholders were left without sufficient information and statutory protection.

The Williams Act was an attempt at filling this void by regulating tender offers and ensuring that shareholders would have sufficient information before the making of a tender offer.⁶ The lynchpin of the regulating provisions is section 14(d)(1) which prohibits the making of a tender offer where that tender offer would when completed result in the beneficial ownership of more than 5% (originally 10%) of a class of the target company's securities, unless at the time of the offer certain disclosure requirements are complied with. Other provisions relate to the conduct of the tender offer. There is regulation of the withdrawal of securities by tendering shareholders, paragraph (5); partial bids, paragraph (6); escalation of the bidding price, paragraph (7); and recommendations by the target company, paragraph (4). Regulation 10b-13 forbids the bidder purchasing shares on the open market from the time of the commencement of the tender offer until its expiration. Section 14(e) proscribes the making of untrue statements, fraudulent, deceptive or manipulative acts, and the utilisation of any material omissions.

What the Act does not do, however, is provide a statutory definition of tender offer. Thus, before the substantive regulatory provisions can come into play one must determine whether a particular transaction is a tender offer. While this was a deliberate move⁷ it creates a considerable degree of uncertainty. For the author of

1 H. A. Einhorn and T. L. Blackburn, "The Developing Concept of Tender Offer: An Analysis of the Judicial and Administrative Interpretations of the Term" (1978) 10 *Securities L. Rev.* 471.

2 C. Sutherland, "The Tender Offer Trap: A Transactional Proposal" (1981) 45 *Albany L. Rev.* 464, 466.

3 *Id.*, 467.

4 E. R. Aranow and H. A. Einhorn, "Essential Ingredients of the Cash Tender Offer" (1972) 27 *Business Lawyer* 415.

5 H. R. Daar, "Expansion of the Williams Act: Tender Offer Regulation for Non-Conventional Purchases" (1980) 11 *Loy. Chi. L. J.* 277, 279.

6 Note 2 *supra*, 464.

7 Note 1 *supra*.

the share transaction there is the risk that one might, after the transaction is underway, discover that it was in fact a tender offer and, therefore, if the necessary disclosure requirements have not been satisfied, be in breach of the Act.⁸ Alternatively, it could be argued that this produces a positive effect in that offerors might choose to comply with the requirements as a matter of course rather than risk later discovery and its consequences. Further, the uncertainty generated by the failure to provide a definition may be taken advantage of by the company which is the subject of the transaction. As a defensive tactic, designed to frustrate the takeover attempt, the target company may seek relief from the court by arguing that a tender offer existed and hence the share transaction was in breach of the legislation. Indeed much of the litigation in this area would seem to arise from that situation.⁹

While the legislature, at least until recently, may have resisted defining the term, the courts and the Securities Exchange Commission (S.E.C.) have had to give some flesh to the legislative skeleton. Interestingly, the courts and the S.E.C. would appear to have rejected, to some extent, the definitional hints provided by the legislature. It is clear that the legislative history of the Williams Act refers to the conventional tender offer.¹⁰ Senator Williams stated in Congress that to require disclosure of privately negotiated and open market transactions would be a hindrance to the free and open market system.¹¹ However, Senator Williams recognised that these transactions could pose similar problems, for example, with regard to secrecy.¹² While it might be argued that the Williams Act sought only to regulate conventional tender offers, this would clearly be an unfortunate conclusion for it would facilitate avoidance of the application of the legislation.¹³ Certainly it has not been the judicial nor the S.E.C.'s interpretation. If the conventional tender offer is not to be the transaction which defines the limits of the Act, how far can its boundaries be pushed?

Shortly after the 1968 amendments the S.E.C. announced that special bids, that is, the purchase of very large blocks of securities, would be considered tender offers.¹⁴ Special bids resemble tender offers: they are addressed to all shareholders; are offered at a premium price; and, specify the number of shares to be purchased.¹⁵

8 This is not meant to ascribe to the offeror an undue degree of naivety. The risk is certainly present when one considers that in *Yellow Freight System, Inc.*, note 25 *infra*, an offer to eight institutional sellers was held by the SEC to be a tender offer.

9 E.g., *Kennecott Copper Corporation v. Curtiss-Wright Corporation* 584 F. 2d 1195 (1978); *Cattle-men's Investment Company v. Fears* 343 F. Supp. 1248 (1972); *Nachman Corp. v. Halfred, Inc.* [1973-1974 Transfer Binder] Fed. Sec. L. Rep. (CCH) 94,455; *D-Z Investment Company v. Holloway* [1974-75 Transfer Binder] Fed. Sec. L. Rep. (CCH) 94,771; *S-G Securities, Inc. v. Fuqua Investment Company* 466 F. Supp. 1114 (1978).

10 N. I. Korval, "Defining Tender Offers: Resolving a Decade of Dilemma" (1980) 54 *St John L. Rev.* 520, 530; Note, "The Developing Meaning of Tender Offer under the Securities Exchange Act of 1934" (1973) 86 *Harv. L. Rev.* 1250, 1261.

11 113 *Congress Record* 856 (1967) cited in Korval, note 10 *supra*, 531.

12 113 *Congress Record* 855 (1967) cited in G. E. Humes, "Private Solicitations under The Williams Act" (1981) 66 *Cornell L. Rev.* 361, 366, n.45.

13 Note, note 10 *supra*, 1271.

14 SEC Securities Exchange Act of 1934, Release No. 8392 cited in Note, note 10 *supra*, 1261.

15 Korval, note 10 *supra*, 532.

However, unlike conventional tender offers they are not conditional upon the acquisition of a certain number of shares and the shares can be purchased immediately.¹⁶ Clearly, the focus of the S.E.C. was upon the regulation of transactions which could have the same effect as a tender offer.¹⁷ The decision of the S.E.C. ensured that shareholders would have adequate information and would be given a fair opportunity to respond, free from the pressure to act quickly.¹⁸

The initial judicial response to the Act also made quite clear an intention to entertain transactions beyond the conventional model. *Cattlemen's Investment Company v. Fears*¹⁹ involved a series of negotiated purchases from a large proportion of the shareholders by means of invitations via the telephone, mail and personal visits which were made within a short period of time.²⁰ This was something quite different from the conventional model, but, the Court nevertheless held it to be a tender offer because it contained at least as many dangers to the shareholders as the conventional tender offer.²¹ Thus the Court was concerned not with examining the elements of the transaction in order to determine its possible similarity with the tender offer, but with whether the transaction in question was one in which shareholders needed protection. Eubanks J. stated that "[t]he Act is, however, a remedial statute and should be interpreted liberally to carry out the legislative intent."²² He considered that

the purpose of The Congress, in the enactment... is to provide investors who hold equity interests in public corporations, material information with respect to the potential impact of any effort to acquire control of a company, sufficient time within which to make a decision as to whether to dispose of or to retain their securities, and to assure fair treatment of the investors... In truth, the contracts utilized by the defendant seem even more designed than a general newspaper advertisement, the more conventional type of "tender offer", to force a shareholder into making a hurried investment decision without access to information, in circumvention of the statutory purpose.²³

The S.E.C. accepted the validity of the *Cattlemen's* approach and its application.²⁴ Its own willingness to be flexible can be seen in its *Yellow Freight System, Inc.* ruling²⁵ in which contracts with eight shareholders to purchase a very large block of shares were held to be tender offers because they contained clauses which permitted any remaining shareholders to adopt the agreement. It has been argued that this type of decision highlights the dangers facing well-intentioned parties because of the uncertainty over what will be classified as a tender offer.²⁶ There may be some force to this criticism given that the eight sellers were institutional investors.²⁷

16 *Id.*, 531.

17 *Id.*, 532.

18 Note, note 10 *supra*, 1261, n. 65.

19 343 F. Supp. 1248 (1972).

20 *Id.*, 1250. It is interesting to contrast the approach of Mr Justice Kaye in *Cuming Smith & Co. Ltd v. Westralian Farmers Co-operative Ltd.* [1979] V.R. 129 which presented a not entirely dissimilar set of events.

21 *Id.*, 1252.

22 *Id.*, 1251.

23 *Id.*, 1251-1252.

24 Note 1 *supra*, 476.

25 [1972-1973 Transfer Binder] Fed. Sec. L. Rep. (CCH) 79,192.

26 Note, note 10 *supra*, 1268.

27 But see also *Id.*, 1280, n. 150.

The judicial response has, however, been more equivocal. Despite the acceptance by the S.E.C., the *Cattlemen's* decision was not wholeheartedly embraced by the courts. In *Gulf & Western Industries, Inc. v. Great Atlantic & Pacific Tea Company, Inc.*,²⁸ the Court held that the purchase of ordinary securities on the open market, even where the intention was clear, did not constitute a tender offer. The Court was not prepared to give unlimited scope to the term.²⁹ Not only did the courts appear desirous of containing the definition, they seemed unwilling to entertain anything which did not fit into the conventional tender offer. In the decision of *Kennecott Copper Corporation v. Curtiss-Wright Corp.*,³⁰ the Court regarded the conventional tender offer as being the subject of Williams Act regulation, taking the view that any wider interpretation might render other parts of the legislative scheme, such as paragraphs (5) to (7), unworkable.³¹

One of the dangers of limiting the Act to only conventional tender offers is that it facilitates technical evasion of the requirements.³² On the other hand, it would seem unlikely that any form of share transaction should be included within the ambit of the Act. It has been argued that to interpret the legislation in this way would render section 13(d) meaningless.³³ Section 13(d) requires disclosure of acquisitions of greater than 5% of equity securities howsoever acquired. It is important to note, however, that section 13(d) refers to securities already acquired and that the requirements for disclosure do not have to be complied with until ten days after the date of the acquisition. By contrast, section 14(d) relates to share acquisitions which will result in greater than 5% control when completed and, imposes compliance with the disclosure requirements at the time the offer is made. Therefore, while it may not be desirable that any form of share acquisition be brought within section 14(d), there remains scope for a wider interpretation than one which only considers the conventional tender offer. The terms of section 14(d), unlike section 13(d), serve as a preventive measure and are able to provide protection for shareholders by supplying the opportunity and the means with which to consider acceptance of an offer. The question remains: what are to be the parameters of the term?

Two approaches have been taken to this problem. First, the courts have taken the view that where a particular transaction differs from the conventional tender offer the Williams Act will only apply where the pressure exerted upon the shareholders is equivalent to that of a tender offer.³⁴ Accordingly, the definition should be extended if the offer in question was "...likely to pressure shareholders into making uninformed, ill-considered decisions to sell, that is, offers with the same impact as the conventional tender offer".³⁵

28 356 F. Supp. 1066 (1973); affirmed 476 F. 2d 687 (1973).

29 Note, note 10 *supra*, 1268.

30 584 F. 2d 1195 (1978).

31 *Id.*, 1207.

32 Note, note 10 *supra*, 1271.

33 *Ibid.*

34 Humes, note 12 *supra*, 362.

35 *Nachman Corp. v. Halfred, Inc.* [1973-74 Transfer Binder] Fed. Sec. L. Rep. (CCH) 94,455, 95,590.

While this was accepted in *Nachman Corp. v. Halfred, Inc.*,³⁶ it was held on the facts that the programme of large purchases of stock was not a tender offer for a number of reasons: the offer extended over several months, it was one of several offers, and the offerees were substantial shareholders or directors who were not only able to resist pressure but were in a position to demand higher prices.³⁷ The decision mentions that it was not the legislative intention to include as tender offers negotiated purchases of large blocks of shares. However, it would appear that the Court considered that some negotiated purchases might be regarded as tender offers by applying the impact test.³⁸

Whether privately negotiated purchases and/or open market transactions are to be considered tender offers is an issue that has aroused differing judicial opinion. There would appear to be a consistent line of cases which, like *D-Z Investment Company v. Holloway*,³⁹ consider that open market purchases, with or without privately negotiated sales, will not constitute tender offers.⁴⁰ Whilst some of the decisions give tacit recognition to the need to consider impact upon the investor, it would appear that they are still operating very much within the framework of the conventional offer. There seems to be an implicit assumption that open market/privately negotiated transactions do not create situations in which investor protection is necessary. However as Hume indicates, citing the shareholders in *Hoover Company v. Fuqua Industries, Inc.* as an example, one should not assume that owners of large shareholders are invariably sophisticated and well-informed investors.⁴¹

The S.E.C. has not demonstrated the same confidence. In *Cargill, Inc. and Missouri Portland Cement Co.*⁴² it was argued that the transaction was a privately negotiated purchase, limited to a few sophisticated shareholders and therefore did not exert any undue pressure.⁴³ However, the S.E.C. refused to give a no-action ruling. While recognizing the problem of uncertainty, it stated that any variety of circumstances could exist such that it was impossible to decide definitely what would suffice to render a transaction an exempt private negotiation.⁴⁴ In *S-G Securities, Inc. v. Fuqua Investment Company*⁴⁵ there was a public announcement prior to rapid open market purchases of large blocks of shares, along with private negotiations. It was held that where there was a publicly announced intention, which created the risk of pressure that the Act was designed to prevent, to acquire stock for control and subsequent rapid private and on-market purchases, there would be a

36 *Ibid.*

37 *Id.*, 95,591 — 95,592.

38 *Id.*, 95, 593.

39 [1974-1975 Transfer Binder] Fed. Sec. L. Rep. 94,771, 96,559.

40 *Kennecott Copper Corp. v. Curtiss-Wright Corp.* note 30 *supra*; *Brascan Ltd v. Edper Equities Ltd* 477 F. Supp. 773 (1979); *Financial General Bankshares Inc. v. Lance* [1978 Transfer Binder] Fed. Sec. L. Rep. 96,403, 93,418; *Stromfeld v. Great Atlantic and Pacific Tea Company, Inc.* 484 F. Supp. 1264 (1980).

41 Note 34 *supra*, 378.

42 [1974-1975 Transfer Binder] Fed. Sec. L. Rep. 80,050, 84,892.

43 *Id.*, 84,896.

44 *Id.*, 84,893.

45 466 F. Supp. 1114 (1978).

tender offer.⁴⁶ The Court referred to the legislative and judicial history which indicated that open market and privately negotiated transactions did not come within the ambit of section 14(d). However, it was persuaded to the view that circumstances might be such that methods of stock acquisition other than conventional tender offers should come within the terms of section 14(d).⁴⁷

The second approach concerns the judicial consideration of the S.E.C. guidelines in which eight characteristics are proposed to aid identification of a tender offer.⁴⁸ The eight factors, accepted by the Court in *Hoover Company v. Fuqua Industries, Inc.*⁴⁹ were: active and widespread solicitation of public shareholders; substantial percentage of stock sought; offer at a premium price; firm terms of the offer; the offer was contingent upon a fixed number of shares being purchased; limited period of time; pressure to sell; and whether there were any public announcements. In this instance there were offers by letter to over 100 shareholding members of the Hoover family combined with numerous press releases. The Court considered that there was a tender offer. There was widespread solicitation which would not have been necessary in a genuine private negotiation.⁵⁰ There were also time pressures with regard to acceptance. Further, there was no indication that the shareholders were sophisticated or that their family ties offered any particular advantage.⁵¹

In *Brascan Ltd v. Edper Equities Ltd*⁵² the Court rejected the S.E.C. guidelines as being an invitation to "crippling uncertainty".⁵³ The facts involved the solicitation of large blocks of shares held by experienced professional investors by means of privately negotiated purchases. While on the facts the case was not within the guidelines, the Court also considered the S.E.C. guidelines in general terms asserting that they expanded the scope of the statute beyond the original intention of Congress.⁵⁴ The Court, following *Kennecott*, held that this was not a tender offer and expressed the view that the decisions of *S-G Securities, Inc. v. Fuqua Investment Co.* and *Cattlemen's* would push the boundaries too far, making it impossible for any share acquisition to exist other than by means of the legislative scheme.⁵⁵ It is clear, thus far, that one is left in a state of uncertainty as to what attitude will be taken to a given set of facts and what tests and guidelines will be applied to determine the question.

Nevertheless, there does seem to be developing a more consistent approach which embraces the *Cattlemen's* decision while utilising the need for investor protection and also the S.E.C. guidelines tests. In *Wellman v. Dickinson*⁵⁶ the transaction in question concerned a rapid and secret acquisition of 34% of the stock of the company. The solicitations were made either face to face or by telephone and the shareholders were both institutional and individual investors. The Court held that

46 *Id.*, 1126-1127.

47 *Id.*, 1124-1125.

48 Note 2 *supra*, 465.

49 [1979-1980 Transfer Binder] Fed. Sec. L. Rep. 97,107, 96,145.

50 *Id.*, 96,150.

51 *Id.*, 96,149.

52 Note 40 *supra*.

53 *Id.*, 791.

54 *Ibid.*

55 *Id.*, 790.

56 475 F. Supp. 783 (1979).

the presence of sophisticated shareholders could not be relied upon as a defence and that lack of access to information meant that the transaction could not be regarded as a private negotiation exemption.⁵⁷ Sophistication and experience were only relevant if there was an opportunity to use them.⁵⁸ The Court also considered and approved of the S.E.C. guidelines.⁵⁹ It stated that it was not necessary that all the factors be present.⁶⁰ In this instance all the factors were present except for publicity. To hold otherwise would have been to undermine the operation of the Act, particularly as in this case the offerors had deliberately avoided publicity.⁶¹ The Court held that there was a tender offer. The view as to publicity is in contrast to the *Kennecott* line of decisions which has tended to regard large open market purchases as being outside the tender offer because they lacked publicity. *Wellman* points out, however, that the Act was designed to avoid secret corporate takeovers where some offerees might be acting blindly, for example, not knowing who the purchaser was, and therefore, incapable of making rational and independent decisions.⁶² Clearly lack of publicity might be for the very purpose of aiding avoidance of the Act. Recent decisions, apart from *Stromfeld v. Great Atlantic and Pacific Tea Company*,⁶³ would appear to be consistent with the *Wellman* approach. *Wellman v. Dickinson* is valuable in that it distinguishes between what are truly private negotiations, which are outside section 14(d), and those transactions which must be regarded as public, and therefore within the definition of tender offer, because in one way or another they present a situation in which shareholders require protection or are likely to be treated unfairly or unequally. Transactions in which an offeree lacks necessary information, is at a disadvantage compared with other shareholders, is unable to negotiate the terms of the offer or, is in any way subjected to pressure, cannot hope to be characterised as private negotiations.

In *Chromalloy American Corp. v. Sun Chemical Corp.* a series of open market purchases and one private block purchase was held not to be a tender offer. The Court came to this decision because no pressure was placed upon the shareholders. It was clear that the presence or absence of pressure was the touchstone of the decision. The Court in *Macke Company v. Allegheny Beverage Corporation*⁶⁵ approved the *Cattlemen's*, *S-G Securities* and *Wellman* decisions and stated that it was necessary to look to the purpose of the Act and consider whether the investor was given sufficient time and information.⁶⁶ In *S.E.C. v. Texas International Company*⁶⁷ an offer to purchase the claims of creditors of a defunct company was held to be a tender offer because the two week time limit for tenders was likely to expose claim holders to the risk of making hasty investment decisions.⁶⁸

57 *Id.*, 823.

58 *Ibid.*

59 *Id.*, 824.

60 *Ibid.*

61 *Id.*, 823-824.

62 *Id.*, 823, 825.

63 Note 40 *supra*.

64 [1979-1980 Transfer Binder] Fed. Sec. L. Rep. 97,126, 96,219.

65 [1980 Transfer Binder] Fed. Sec. L. Rep. 97,576, 98,045.

66 *Id.*, 98,047.

67 [1981 Transfer Binder] Fed. Sec. L. Rep. 97,883, 90,456.

68 *Id.*, 90,462. See also case note on *Esmark, Inc. v. Strobe* in (1981) 600 S.R.L.R. F-Z; *Kaufman & Broad, Inc. v. Belzberg* [1981 Transfer Binder] Fed. Sec. L. Rep. 97,893, 90,500; *Luptak v. Central Cartage Co.* [1981 Transfer Binder] Fed. Sec. L. Rep. 98,034, 91,349.

Despite the somewhat haphazard application of section 14(d) by the Courts, judicial statements and the comments of the S.E.C. have consistently recognised the protective nature of the Williams Act. Implicit in the Act is an intention to provide opportunities for both fair and equal treatment of shareholders.⁶⁹ Examples of these considerations can be seen in the provision for pro-rata acceptance of offers, escalation of prices, withdrawal of offers, a ban on buying on the market during a bid and primarily in the approach towards the meaning of tender offer. It would appear that the S.E.C. has consistently attempted to administer the Act mindful of the objective of investor protection and its overriding importance.⁷⁰ It is, however, the decisions of the courts which have particularly highlighted the concern for equality and fairness. The courts have moved away from a tendency to consider only the traditional models as tender offers. Instead, transactions which at first glance would appear to be outside the definition of tender offer have been held to be tender offers where there were circumstances which could result in unreasonable pressure or some form of unequal treatment of shareholders. Accordingly, recent decisions have shown the courts to be more willing to closely scrutinize the transactions even though they may seem to involve private negotiations, large and sophisticated shareholders and open market purchases. The presence of these characteristics is no longer sufficient to exempt certain transactions from the operation of the Williams Act. That the courts have moved in this direction can be seen to be consistent with the original purpose of Congress in not defining the term tender offer, for it

preferred to leave to the Commission and the courts the ability to deal effectively with transactions, not envisioned or imagined in 1968, which required the application of the statutory provisions of the Williams Act for the protection of investors.⁷²

There has been, however, a move towards a statutory definition of tender offers. In 1979 the S.E.C. reaffirmed its position that a statutory definition of tender offer was neither necessary nor appropriate.⁷³ It considered that its application should be flexible looking to the particular facts and circumstances of the transaction.⁷⁴ A year later the S.E.C. admitted that the non-definitional approach might no longer be adequate to deal with changing techniques designed to circumvent the Act.⁷⁵ It is clear that the adoption of a definition will still be consistent with the objective of the Williams Act of providing investor protection rather than seeking to regulate the tender offer as an economic phenomenon.⁷⁶ The proposed amendment provides a

69 D. Binder, "The Securities Law of Contested Tender Offers" (1973) 18 *New York L. Forum* 569, 610.

70 "Proposed Tender Offer Rules and Schedule" [1979 Transfer Binder] Fed. Sec. L. Rep. 81,935, 81,209.

71 It is interesting to note the comment in *Kennecott* note 30 *supra*, that in considering whether other forms of stock acquisition would be considered as tender offers, "[t]he Second Circuit has not yet moved this far", note 30 *supra* 1207. However it was out of the Second Circuit that the *Wellman* decision came.

72 Letter from S.E.C. Chairman Williams dated February 15 1980, quoting from a letter of Senator Proxmire [1979-1980 Transfer Binder] Fed. Sec. L. Rep. 82,453, 82,910.

73 Note 70 *supra*, 81,213.

74 *Ibid.*

75 Note 72 *supra*, 82,910.

76 Note 70 *supra*.

two tiered definition. The first tier defines a tender offer as

offers to purchase securities which during any forty five day period are directed to more than ten persons and seek the acquisition of more than five per cent of a class of equity securities.

The second tier covers offers which are

disseminated in a widespread manner, provide for a price in excess of the five per cent over or two dollars above the current market price, and do not provide for a meaningful opportunity to negotiate the price and terms.⁷⁷

The first tier represents a more traditional approach to the subject matter. It provides a greater measure of certainty in that participants will know what activity is caught. On the other hand, it is also likely to provide a greater opportunity for technical evasion of the Act, but this must be considered in the context of the second tier. This is a broader approach consistent with the concern to give effect to the objectives of the legislation. It is submitted that it implies an approval of the *Cattlemen's/Wellman* approach. Like the non-definitional approach it will foster a case by case development, and although the decisions considered in this discussion should be of some guidance, offerors will again be faced with the dilemma of not knowing whether their activity will be caught by the second tier even though it may be outside the first tier. The elements in the second tier will provide some guidance for the courts and should result in the lessening of the notion that tender offers are always tied to the conventional model. The focus will be not so much upon attempting to classify what the characteristics of a tender offer are, but rather whether the activity in question is one which is widespread, within the defined price and limits negotiation. The uncertainty from the point of view of the remedial purposes of the legislation will be how freely the courts are prepared to interpret this.

II. THE AUSTRALIAN EXPERIENCE

The Companies (Acquisition of Shares) Act 1980 (Cth) provides the new Australian takeover code. As with the American regulation of takeovers it is essentially concerned with providing protection for shareholders. These aims were expressed by the Eggleston Committee.⁷⁸ To ensure fair treatment of all shareholders the Committee believed it was essential that: the identity of the offeror be known; the directors and shareholders be given a reasonable time in which to consider the offer; there is sufficient information in order to be able to evaluate the merits of the proposal and; for each shareholder to have an equal opportunity to participate in the benefits offered.⁷⁹

77 J. H. Fogelson, J. R. Wenig and B. P. Friedman, "Changing the Takeover Game: The Securities and Exchange Commission's Proposed Amendments to the Williams Act" (1980) 17 *Harv. J. Legis.* 409, 432.

78 Standing Committee of Attorneys-General, *Second Interim Report: Disclosure of Substantial Shareholdings and Takeover Bids* (1970) 8.

79 *Ibid.*

The touchstone of the new Code is section 11 which prohibits the acquisition of voting shares which would entitle the person, after the acquisition, to more than twenty per cent of the company's voting shares. It should be noted that the emphasis is upon acquisition *per se*. There is no distinction to be made with regard to the methods of acquisition. Technical avoidance of the prohibition will turn upon the application of the terms "acquire shares", "relevant interest", "associate" and "entitled" which are defined in the Act.⁸⁰ The Code provides a number of exceptions to the prohibition which are to be found in sections 12 to 17; of which sections 13 (discussed *infra*), 15, 16 and 17 are particularly important. Section 15 excepts the acquisition of shares where it is not greater than three per cent in any six month period and where the acquirer has already reached nineteen per cent. The section gives a degree of freedom of movement for the bidder who is approaching a position of control and is likely to make a takeover offer, while at the same time according some protection to the other shareholders by controlling the rate of acquisition.⁸¹ The section also eliminates evasion possibilities that were a problem with section 180C(2)(b) of the 1971 Code.⁸²

Section 16 provides an exception to the section 11 prohibition by way of a formal takeover offer. The takeover scheme is initiated by the registration with the Commission of a Part A statement and a copy of the proposed offer: section 18. The requirement of registration, although criticised as imposing unnecessary impediments to the takeover process,⁸³ is obviously in keeping with the legislative objectives, for it ensures that the statements will receive close scrutiny, and in turn, be more valuable. Paragraph (a) of section 18(2) requires the Commission to refuse registration unless it is satisfied that there are no misleading or false statements either in form or context.

The 1981 Code also introduces some other interesting provisions designed to provide meaningful information for shareholders. The target company is required to prepare a Part B statement: section 22(1). Where the target company and the bidding company have a common director or, where the offeror has a thirty per cent holding in the target company, section 23 requires that the Part B statement be accompanied by the report of an independent expert. The report should also consider whether the offer is fair and reasonable: section 23(1). The target company is also required to inform the stock exchange daily of share dealings: section 39, and this ensures disclosure of any defensive buying. Other provisions enable the offeror

80 D. Gonski and K. Santow, "Schemes of Arrangement and Takeovers", paper presented to a seminar on *The Securities Market and the National Companies Scheme* (Sydney, 25 September 1981) 19.

81 H. Storey, "The Aims and Purposes of the New Take-Over Code" in *The New Deal on Company Take-Overs* (1980) 1, 4-5.

82 Section 180C(2)(b) provided an exception to the formal procedures required for offers (s.180C(1)) and invitations (s.180C(3)). An offer was exempted if the offeror had not made offers to more than three members within the preceding four months. The offer could not be dispatched at the same time as another offer, which pursuant to s.180C(8)(b) meant that the making of offers or invitations had to be separated by a period of three days. However, circumvention of the provisions was easily achieved by the dispatch of an offer followed by an invitation or, an invitation followed by an offer. Note the comments of Mr Justice Kaye in *Cuming Smith* note 20 *supra*, 145, 162.

83 Note 80 *supra*, 20.

to obtain certain information from the target company: section 36; restrict both offerors and targets making statements concerning the revaluation of assets: section 38 and; prohibit both the offeror and the target making statements about future profits of the company, except with the consent of the Commission: section 37. While the rationale for this is understandable it has been suggested that this information is vitally important and is used frequently by the offeror in the planning of his bid.⁸⁴ Further, it is possible that the recommendations of a Part B statement may have been influenced by profit forecasts, yet these would not be available to the offeree.⁸⁵ Sections 36-39 are also applicable to on-market announcements.

Time limits are imposed upon the formal offers. The offer must state the length of time it will remain open, which may be less than one month and not more than six months: section 16(2)(f)(ii). Consideration for the offer must be paid within thirty days from acceptance or, where the offer is subject to a condition, thirty days after the offer becomes unconditional: sub-paragraph (vii). This avoids the problem found in the 1971 Code of offerees possibly not receiving payment for long periods of time. The time limits in both these sub-paragraphs may be extended pursuant to section 27.

Equality of treatment, an important objective of the legislation, is particularly relevant to the matter of partial bids. This arises when the offeror is seeking only to acquire a certain percentage of shares. Some shareholders are thereby discriminated against by having differing percentages of their shares, or none at all, accepted.⁸⁶ The 1981 Code allows bidding for a proportion of a class of shares but compels each offer to be of the same proportion: section 16(2)(a)(ii). Alternatively, where the accepted number of shares is greater than the offeror desires, each acceptance shall be deemed to be a pro-rata acceptance: section 26. This method is similar to that adopted in the United States.⁸⁷ While it could be argued that on the one hand, the offeror is placed in an uncertain position (as to how many shares he will obtain) and, on the other hand the position of the shareholder is made uncertain (because he will not know how many shares have actually been accepted)⁸⁸ the desire to prevent discrimination amongst shareholders forces some regulation of partial bids. It is suggested that these provisions afford no greater uncertainty than was likely in a situation where shareholders could be arbitrarily discriminated against.

The regulation of tender offers in the United States makes no distinction as to whether the offer takes place on the market or not. It has already been observed in this discussion that one of the major problem areas was the acceptance of open market purchases as tender offers. The 1981 Code attempts to ensure that there will be no opportunity for this type of takeover to escape regulation, while at the same time endeavouring to provide the opportunity for all shareholders to participate. Hence, another exception to section 11 is the takeover announcement pursuant to section 17. Provided that the offeror does not already hold thirty per cent or more of the voting shares it may announce that for one month, commencing fourteen days

84 R. Baxt, *The Rae Report — Quo Vadis?* (1974), 178-179.

85 Note 80 *supra*, 34.

86 Note 81 *supra*, 5.

87 H. S. Bloomenthal, *Securities Law in Perspective* (1977) 110.

88 Note 80 *supra*, 33.

after the announcement, it will acquire all shares offered at the specified price. The offeror is required to prepare a Part C statement which is similar to a Part A statement. However, the statement only has to be lodged with the Commission: section 17(10). It may be queried why there should be this difference given that the takeover announcement can result in the same fundamental changes to the company as the formal bid. The target has to issue a Part D statement similar to the Part B statement except, that it does not have to be given to shareholders: section 32. Again it is difficult to see the justification for this. Offers cannot be accepted until fourteen days after the announcement which is presumably designed to allow time to consider the offers without pressure. Unlike the formal bid which includes provision for price escalation, the takeover announcement does not appear to provide earlier offerees the advantage of any increase in the price. This could discriminate between shareholders, and in particular, favour the institutional or sophisticated investor whose stronger bargaining position and market awareness will allow the investor to defer acceptance.

The Act endeavours to give effect to the principles of equal treatment of shareholders. It is questionable whether the provision for buying on the market during a bid (section 13(3)) can be justified in the light of these objectives. Where a takeover announcement has been made the offeror may immediately commence buying on the market outside of the announcement (even during the fourteen day cooling period). In the case of a takeover offer buying may commence when the Part A statement has been served on the target subject to sub-sections (4) and (5) of section 13. It should be noted that if the price paid in the ordinary trading is greater than the takeover announcement price, the latter automatically increases except for those who have already accepted: section 17(8). One of the problems of allowing on-market buying during a bid is that large shareholders can take advantage of their bargaining position by negotiating or holding out for a higher price. A ban on market buying ensures that shareholders have a greater opportunity to be treated equally regardless of the size of their holdings.⁸⁹ Without the ban large and powerful shareholders are able to receive benefits denied to them by section 40, by utilising their bargaining position and the exception to section 40 concerning buying at an official meeting of a stock exchange: sub-section (3). Buying on the market during a bid was originally forbidden in the legislative proposals for the new Code. This would have been to adopt a similar attitude to that of Britain and the United States. However, this was an area of some concern to the stockbrokers and solicitors, who believed that the ordinary market should not be interfered with, as evidenced by the submissions to the Georges Committee.⁹⁰ Prohibiting this type of activity was felt to impose undue hardship upon the bidder who would be weaponless against defensive trading.⁹¹ Notwithstanding this the other considerations discussed would appear to be of sufficient weight to warrant a ban on trading receiving serious attention.

Two other provisions which illustrate the legislative intention of fair and equal treatment are sections 40 and 52. Section 40 prohibits the giving of any benefits to

89 Note 69 *supra*, 673.

90. *Senate Select Committee on the Corporations and Securities Industry Bill (1975)* (1975) 4 vols.

91 Law Society of N.S.W., "Submissions", *Id.*, ii, 1402, 1421.

offerees except in accordance with the takeover scheme or announcement. This ensures that no one offeree (for example large institutional investors)⁹² might receive incentive to the exclusion of other shareholders. Section 52 regulates bluffing offers, which arise where statements concerning a takeover offer are made in order to stimulate and create a false market although there is no intention to proceed. Sub-section (2) deems the person involved in the activity to have contravened the provision unless the person can establish that there were changes of circumstances which made it reasonable to withdraw. This avoids the problem of section 180Q of the 1971 Code in which it was necessary to prove the subjective intention.

The new Code continues the practice of regulating takeovers by means of highly complex and detailed legislation. This is in contrast to the approaches taken by the United States and the mode of self-regulation in Britain. Yet the 1981 Code does present some fundamental changes which seek to overcome the problems experienced by the earlier codes. One of the inherent problems of regulating by way of a detailed code means that where it fails to properly cover a given situation and practice, the deficiency can be taken advantage of and the code is left powerless. Also, a code is unable to meet all situations and schemes which might arise. Almost invariably, attempts to regulate by "black letter" codes are left limping behind. As David Block, in reference to the 1971 Code has pointed out

where precise legal rules are imposed there is a tendency to regard anything not expressly prohibited as permitted.⁹³

The 1961 Code provides illustrations of this problem. In *Blue Metal Industries Ltd v. Dilley*⁹⁴ it was held that the Code did not apply to bids by natural persons. In *Colonial Sugar Refining Company Limited v. Dilley*⁹⁵ it was held that the Code did not apply to joint bids. The possibilities for evasion of the 1961 Code were manifest. One of the most serious defects, which typifies the difficulty that a code has in meeting every type of transaction which may arise, occurred in relation to the use of the word 'offer' in the Code. The regulatory provisions were activated by the making of an offer for the acquisition of shares which would give control of a certain proportion of the total voting shares. "Offer" was defined strictly with the result that an invitation to shareholders to make offers was not within the ambit of the Act.⁹⁶ This encouraged the development of a takeover scheme on a 'first-come first-served' basis. Shareholders were invited to make offers which were accepted in the order received.⁹⁷ This was inimical to the legislative objectives of regulating takeovers. Shareholders were likely to be pressured into making offers without reasonable or adequate information to consider the offer.

The 1971 Code sought to bridge some of these gaps. Essentially it prohibited the making of off-market offers subject to certain exceptions.⁹⁸ Along with the general problem of loopholes, the 1971 Code faced a fundamental difficulty in that it

92 Note the comments *supra*.

93. D. Block, "Submissions", *Id.*, iii, 1924, 1938.

94 [1970] A.C. 827, cited in H. A. J. Ford, *Principles of Company Law* (2nd ed. 1978) 458.

95. (1967) 116 C.L.R. 445.

96. H. A. J. Ford, note 93 *supra*, 459.

97 *Ibid*.

98 Note 81 *supra*, 7.

became uncertain as to what was in fact caught by the Code. By a combination of private acquisition and purchase of shares in the stock market, it became possible to effect a takeover without falling within the ambit of the Code.⁹⁹ In *Cuming Smith & Co. Ltd v. Westralian Farmers Co-operative Ltd*,¹⁰⁰ the parties effected a takeover by the utilisation of the 'creeping acquisitions' provision, coupled with a fine combed reading of the term 'offer' and the stock exchange trading exceptions. They were no doubt finally assisted by Mr Justice Kaye's legalistic application of the relevant provisions to the transactions in question. Thus, in considering the application of the 'four offer' rule it was held that there was no offer to Seldon's clients, Kaye J. commented:

[i]t is not possible therefore to infer that, because the object of the offers was to acquire the whole of the Cuming Smith shares, C. S. Holdings conveyed its offers to all shareholders of the company.¹⁰¹

Despite all the surrounding events, it was held that the bid on the stock exchange floor was within the ordinary course of trading: section 180C(7). In spite of its size, it displayed the characteristics of "anonymous competitive bargaining".¹⁰² Thus, a large and intended 'takeover' was able to proceed without any Code regulation. This must be of considerable concern to those who believe that regulation is necessary for the protection of shareholders. It is not surprising that the 1971 Code has been described as "to a large extent ineffective, a trap for the unwary, and a temptation for the ingenious".¹⁰³

This sorry history must present some misgivings to the likely success of the 1981 Code. While the 1961 and 1971 Codes highlight the sort of problems which an exhaustive "black letter" code presents, the 1981 Code differs in fundamental respects. Unlike the previous codes it has complete prohibition upon acquisitions. Thus, it is necessary for an offeror to come within one of the exceptions to avoid being in breach of the Act. This is an important development for in the past an offeror could proceed with impunity if that activity was not of a type actually described and regulated by the Code. As mentioned above the scope, if any, for avoidance of the Act will revolve around the definitions of words such as "acquisition", and doubtless, loopholes will arise even though the definitions are very broad. A number of possible defects in the new Code have been illustrated by Gonski and Santow.¹⁰⁴

Predictions as to the success of the Code must be considered with reference to the new discretionary provisions to be exercised by the National Companies and Securities Commission. These represent a significant development and a recognition that "...conduct in relation to takeover bids cannot be adequately regulated by precise statutory forms".¹⁰⁵ Section 57 gives the Commission the power to exempt a

99. R. Baxt, "The Takeover Code — An Example of Frustration in the National Scheme" (1980) 50 (No. 7) *The Chartered Accountant in Australia* 42.

100. [1979] V.R. 129.

101. *Id.*, 140.

102. *Id.*, 151.

103. D. Block, "Does the New Take-Over Legislation Achieve its Objective?" (1973) 1 *A. Bus. L. Rev.* 236.

104. Note 80 *supra*.

105. N.C.S.C. Policy Statement, *Discretions Vested in Commissioner* (1981) Release No. 105 para. 5.

person from complying with the Act, while section 58 allows the Commission to declare an application of the Act modified. These discretions are to be exercised having regard to the matters described in section 59. It is interesting to note the express legislative recognition given to the aims of the Eggleston Committee as well as a recognition of the need to ensure an efficient, competitive and informed market.

Of particular relevance is section 60 which enables the Commission to declare an acquisition of shares or, conduct during a takeover offer or announcement, unacceptable. A declaration of unacceptable conduct or acquisition will enable the Commission to seek an appropriate order from the court, pursuant to section 45. In making its declaration the Commission must be satisfied that the acquisition was such that it occurred in one of the circumstances outlined in sub-section (7) or, in the case of unacceptable conduct, that the result of that conduct was one of the circumstances outlined in sub-section (7A). The circumstances are equivalent to the Eggleston Committee's aims. Section 60 represents an important move towards ensuring that takeover regulation will be able to be effectively utilised. It represents a move towards the flexibility of the American approach while still maintaining the greater certainty of the detailed code approach. Some points should be noted about the operation of section 60. It does not entitle the Commission simply to declare an acquisition or certain conduct unacceptable. It must be satisfied having regard to the particular elements outlined in sub-sections (7) and (7A). This raises the question of whether the relevant circumstances outlined in the sub-sections will be interpreted widely or will be given a narrow and rigid interpretation. In an application for orders the court can reverse the Commission's declaration: sub-sections (2) and (5). Thus, the effectiveness of the Code's discretions will also depend upon how widely the court is prepared to read them, and what weight will be given to them when the court reaches its own decision as to the acceptability of the acquisition or conduct.

III. CONCLUSION

It could be stated that the Australian and American models are moving closer together. The American scheme is coming to rely upon a more precisely delineated form while the national Code, although still retaining its attention to close detail, is recognizing the need for greater flexibility by the use of discretions. If an efficient, competitive and informed market is to be the guiding goal, then takeover regulation will need to combine both certainty and flexibility. Notwithstanding some serious shortcomings, the 1981 Code offers scope for a potentially more effective system of regulation. With its focus upon acquisition, regulation of on-market takeovers and the role to be played by the Commission it would appear to have progressed from its predecessors. Similarly it may also avoid some of the problems experienced in the United States where concern for flexibility has left the scheme very much at the mercy of the courts. It is only recently that a line has been adopted consistent with the legislative aims.

It is not ultimately the means chosen to define the regulated activity, nor the actual construction of the regulatory scheme which is crucial. Instead, what is more important is how the scheme is to be utilised and interpreted. This depends very much upon the persons and authorities involved in the regulatory process. Much of the success or otherwise of the 1981 Code will depend upon the role to be played by the courts. Australian courts in this area could be characterised more by their pedantic and legalistic approach than by a flexible and realistic attitude which might seek to enforce the protective spirit of the legislation.¹⁰⁶ It is for this reason that any discussion of the applicability of the American model must be seen in the context of our attitude towards judicial interpretation of legislation. Unlike the American courts, Australia does not have a history of decisions which are prompted by the particular legislative objectives. The success of the 1981 Code will depend upon the willingness of the courts to look to the substance of transactions, and to give effective meaning to the Code's discretions. It could be asked whether the Courts are even the appropriate bodies. The cumbersome formality and delays in time do not sit well with the concentrated activity of a takeover. A form of tribunal which was able to respond quickly and with flexible powers to the needs of the parties and the requirements of the Code might be more effective. Much will also depend upon the ability of the Commission to be informed about the state of the market and to be able to react quickly. Their willingness to exercise their discretionary powers when appropriate, and with flexibility, will also be important for the success of the 1981 Code. The attitudes taken by the appropriate bodies towards the potential scope that exists within the Code will be one of the important factors determining its effectiveness.

106 Some indication of the judicial attitude may be gleaned from the following comments of Needham J. in *National Companies and Securities Commission v. Industrial Equity Ltd* (1981) 6 A.C.L.R. 1, 18; a decision which related to the provisions of the Takeover Code concerning the withdrawal of bids;

The plaintiff [*N.C.S.C.*] submitted that . . . the court should give a liberal interpretation to the provisions of the Acquisition of Shares Code and the Securities Industry Code so as to ensure that the general purposes of the scheme should be forwarded. I was invited to be a brave spirit rather than a timorous soul — *Candler v. Crane Christmas & Co.* [1951] 2 K.B. 164 at 178. I would prefer not to enter either category but to apply to the provisions of the scheme relevant to this case the ordinary principles of interpretation of legislation, taking into account, of course, that those provisions are part of a larger whole brought into operation in the commendable hope that company law throughout the Commonwealth will be and remain uniform and effective.