COMPULSORY ACQUISITION OF MINORITY SHAREHOLDINGS

PETA SPENDER
Faculty of Law, Australian National University

The House of Representatives Standing Committee on Legal and Constitutional Affairs, in its report of November 1991, recommended that the Companies and Securities Advisory Committee investigate ways in which protection against compulsory acquisition on unfair terms be made consistently available for minority shareholders. The Australian Securities Commission in its submission to the Committee, stated that ss 701 and 702 provided elaborate safeguards for minority interests.

In this article it is argued that the compulsory acquisition provisions in Ch. 6, Corporations Law, though elaborate, may not in fact provide an adequate safeguard for minority shareholders.

In Anglo-Australian jurisprudence the law of compulsory acquisition of minority shares following a takeover evolved from a premise which greatly favoured the majority shareholder. This favouritism has intensified as the law has evolved to the extent that it is now almost impossible for the minority to resist acquisition of its shares.

Since compulsory acquisition involves the forcible expropriation of a property right, the reasons for the expropriation must be justified.

Minority rights and the development of policy in this context have been swamped by an assumption that takeovers are desirable and that compulsory acquisition is necessary to facilitate them.

It is therefore important that this distortion be recognised and a critical evaluation of the efficacy of the rights of the minority be made.

Introduction

"Freezeouts, by definition, are coercive: minority stockholders are bound by majority rule to accept cash or debt in exchange for their common shares, even though the price they receive may be less than the value they assign to those shares. . . . [M]embers do not receive identical treatment: the controlling stockholders retain their equity but force the minority to accept cash or debt. . . . All freezeouts, then, involve the distinct possibility that a self-interested majority stockholder or control group has ruled unfairly, and all require special safeguards to ensure that minority stockholders receive equal though not identical treatment."¹

¹ V. Brudney and M. Chirelstein, "A Restatement of Corporate Freezeouts" (1978) 87 Yale L.J. 1,354 at 1,357-1,359.

This article will examine the present Australian law on the compulsory acquisition of minority shareholdings following a takeover bid to establish the inadequacy of the "special safeguards" adopted by this jurisdiction. The development of the letter of the law which is now encapsulated in ss 701-703, Corporations Law will be traced, together with the philosophical context which shaped this development. Reference will be made interstitially to the American law on this area which provides an interesting point of comparison.

The Nature of the Problem

The problem of dissenting shareholders is an entrenched theme of company law. In the situation where a bidder seeks full control of the company and a takeover bid has received
90 per cent acceptance, the difficulty arises where a small minority is unwilling to part with its holding. Arguably, the major objective of the law in this area should be to balance the interests of the majority and the minority; to ensure that the majority commits no fraud on the minority but also to empower the majority where its will is thwarted by a bloody-minded minority. The issue has been further highlighted by the recent activities of certain participants in Australia’s securities industry whose investment strategy involves taking a minority interest in target companies in the anticipation that the company will become the subject of a full bid.²

In a recent Note,³ Kent and Vary submitted that the compulsory acquisition provisions contained in ss 701-703, Corporations Law are not philosophically sound in terms of the objectives of the law of compulsory acquisition. They stated:

"It is at least arguable that over recent years courts have been more disposed in favour of offerors and majority shareholders to the exclusion of what some would consider to be inalienable property rights."⁴

"Recent developments . . . lead one to conclude that the legislature and the judiciary are paying greater credence to commercial efficiency and are imposing a lesser burden on the offeror."⁵

If the notion of commercial efficiency is a primary criterion in determining the legitimacy of a proposed forcible acquisition, then the party seeking total control of the company will almost certainly prevail. As a consequence, once 90 per cent of the shareholders have accepted the bid, prima facie activating the compulsory acquisition provisions of the Corporations Law, the burden on the dissenting shareholders to resist the acquisition of their shares will be almost insurmountable. Considering that the obligation of the judiciary and the legislature is to balance the rights of the minority shareholders and the bidder, it may be that the pendulum has swung too far in favour of the bidder.

The matter is not just of academic interest, since minority freezeouts were recently investigated by the House of Representatives Standing Committee on Legal and Constitutional Affairs (Lavarch Committee) who produced a report in November 1991. The Committee considered the following methods of compulsory acquisition and minority freezeout:

- acquisition pursuant to a court approved scheme of arrangement under s. 414, Corporations Law;
- acquisition following a takeover under the takeovers legislation, resulting in a compulsory acquisition under ss 701 and 702, Corporations Law;
- compulsory acquisition under s. 411, Corporations Law;
- reduction of capital to cancel minority holdings under s. 195, Corporations Law; and
- selective buy-back under s. 206JA, Corporations Law.⁶

The Committee made the following recommendations:

"Recommendation 10
The Committee recommends that, in relation to a court approved scheme under s. 414, the Law be amended to provide the rights of compulsory acquisition are not available unless the thresholds and their calculations are determined in the same manner as would apply to compulsory acquisition under s. 701.

Recommendation 11
The Committee recommends that, in relation to the compulsory acquisition of shares pursuant to schemes of arrangement, selective reduction of capital or pursuant to a power inserted in the articles, the Attorney-General ask the Companies and Securities Advisory Committee for it to report on ways in which protection against compulsory acquisition on unfair terms can be made

4. Ibid., at 267.
5. Ibid., at 262.
consistently available for minority shareholders.”

The Australian Securities Commission (ASC), in its submission to the Lavarch Committee, commented that ss 701 and 702 provide elaborate safeguards for minority interests. The Committee clearly adopted this assessment in making Recommendation 10 and it appears that the “safeguards” in s. 701 will be a focus for further reform of the other provisions of the Corporations Law referred to in Recommendation 11. But are the safeguards mandated by ss 701-702 as effective as the ASC would have us believe?

Historical Background

Perhaps the safest way to determine the objectives of ss 701-703 is to explore the source of the law, the main source being the recommendations of the Greene Committee in 1926. However, the common law also plays a significant rôle in this area and it will be examined first.

The Common Law

In the law of freezeouts, it appears that Anglo-Australian and American jurisprudence commenced from different bases as to the predominant right which it protected. Early cases in Anglo-Australian law tended to allow the majority free rein in the management of the company on the basis that shareholders were able to sell or transfer their shares if they were discontented with the way the company was being run. In early American common law, the courts viewed share ownership as a form of vested right that could not be taken without consent. Therefore, all shareholders not only had the right to retain their shares in a corporation, but also had the right to veto any fundamental change in the nature of the corporation’s business or the terms of its existence. Majority shareholders were powerless to overcome dissenters’ opinions, except by buying them off.

However, with the passage of time, the laws of both jurisdictions converged. American law recognised that the rule of unanimity

“created intolerable holdout problems and frustrated many efficient corporate transactions, [so] it was ultimately jettisoned in favour of a rule that allowed the majority to freeze out minority shareholders”.

But in a concurrent development, the principle evolved that a fiduciary obligation is owed by the majority in handling the property of the minority.

Anglo-Australian common law evolved the principle of fraud on a minority. A provision in the articles of association of the company enabled the majority to acquire the shares of the minority against their wishes but it was prudent for the enabling provision to be in the articles from the time of the company’s formation because any attempt to amend by the majority often led to allegations of fraud on a minority.

Although the majority owes no fiduciary duty per se to the minority and the power to amend the articles is not fiduciary in character, the doctrine of fraud on a minority will invalidate any apparently regular exercise of the power to alter which is really a means of securing some personal gain. In other words, the power to remove the shareholding of the minority “must be exercised bona fide for the benefit of the company as a whole”.

The concept of the benefit of the company as a whole appears to be somewhat inappropriate here when the majority and the minority both have claims which are equally meritorious. Certainly the notion is not novel to cases of

15. Peters’ American Delicacy Co. Ltd v. Health and Ors (1939) 61 C.L.R. 457 at 511, per Dixon J.
17. This indeed was discussed by Dixon J. in the Peters’ American Delicacy case, supra, n. 15, when he stated at 512:

“To say that shareholders forming the majority must consider the advantage of the company as a whole . . . seems inappropriate, if not meaningless.”

10. Ibid.
expropriation, since it underpins the modern law of oppression of the minority. However, its lack of utility is illustrated by the cases which are often cited in this area: Brown v. British Abrasive Wheel Co. and Sidebottom v. Kershaw Leese and Co. Ltd.

In Sidebottom's case the proposed amendment to the articles would compel shareholders who were business competitors to transfer their shares. In such a case assessing the bona fide interests of the company as a whole was quite simple because the legitimate business interests of the company (as a separate entity to the shareholders) would be promoted by eliminating the power of competitors to obtain inside information. However, Brown's case is a more typical example of expropriation where each party has a legitimate claim. In that case the majority had capital which was needed by the company, but only wished to inject it if they could acquire a 100 per cent shareholding. The minority simply did not want to sell their shares. An attempt by the majority to amend the articles failed since it was not for the benefit of the company as a whole, merely for the majority's benefit. It is difficult to assess what is in the company's interest when it cannot be easily separated from its parts. As Kent and Vary have quite rightly pointed out, the decision is anomalous given that the only alternative to the injection of capital was to wind up the company.

The situation arose again in the recent case of Gambotto v. WCP Ltd, where the majority shareholders, who held 99.7 per cent of a company passed a resolution purporting to alter the company's articles to permit the expropriation of minority interests. It was held by McLelland J. that, since the immediate purpose and effect of the amendment was to permit expropriation of the minority's shares, it amounted to unjust oppression of the minority and therefore was invalid and ineffective. His Honour further commented that the test of "bona fide for the benefit of the company as a whole" was inappropriate, especially (citing the words of Dixon J. in Peters' American Delicacy) since "the very subject matter involves a conflict of interests and advantages".

Therefore it became increasingly obvious that the common law was, and still is, inadequate to solve the problem of a small minority of shareholders thwarting the will of the majority.

The Legislative Response

American jurisdictions enacted merger statutes which enabled majority shareholders to force minority shareholders to relinquish their shares in exchange for cash. Where the total holdings of insiders aggregate the amount necessary for a short-form merger (for example, 90 per cent in Delaware; 95 per cent in New York), the insiders form "Newco", which adopts a short-form merger with "Pubco". Under the merger agreement the stockholders of Newco remain the sole stockholders of the surviving enterprise in the merger. Minority stockholders in Pubco receive cash or securities in return for their stock. The merger itself is adopted by a simple resolution of the Board of Directors of Newco. If the initial holding of the insiders prior to the merger is less than 90-95 per cent, a long-form merger is necessary which requires adoption by a Pubco stockholders' meeting, involving proxy statement, essentially in prospectus form, which must be filed with the Securities Exchange Commission.

In relation to both forms of merger, minority shareholders are granted a right of appraisal which is similar to the right conferred on dissenting shareholders under s. 701(6), Corporations Law. The remedy requires the corporation to facilitate the shareholders' withdrawal by buying back their shares at fair value or its equivalent as determined by appraisal proceedings.
The cash merger statutes have been described as

"the ultimate expression of the enabling philosophy, dominant in twentieth century American corporate law, which promotes statutes that grant those who control corporations almost unlimited power and leaves to the courts the prevention of exploitation of the minority's interests".27

Although the tendency of Australian corporate legislation in the last decade has been to intricately define the rights and powers of participants in corporations, the practical effect of our compulsory acquisition provisions is the same.

The Australian legislative framework had its origins in 1928 with the recommendations of the Greene Committee, set up by the United Kingdom Board of Trade. The Greene Committee had a reference extending to the whole field of company law, but the issue of dissenting shareholders was examined in respect of simplifying the process of reconstruction and amalgamation between companies. As stated by the Committee:

"The acquiring company generally desires to obtain the whole of the share capital of the company which is being taken over and in some cases will not entertain the business except on that basis... It has been represented to us that holders of a small number of shares in the company which is being taken over (either from a desire to exact better terms than their fellow shareholders are content to accept or from a lack of real interest in the matter) frequently fail to come to an arrangement which commends itself to the vast majority of their fellow shareholders, with the result that the transaction fails to materialise. In our opinion this position—which is in effect an oppression of the majority by a minority—should be met."28

There are a number of elements to these comments which are of interest:

1. The characterisation of the dissenting shareholders as being either greedy or apathetic.
2. The overwhelming significance of the acceptance of the bid by the vast majority of the shareholders.
3. The legitimacy of the desire of the majority to require 100 per cent of the shareholding.

These themes recur constantly through the development of the law in this area and will be examined more closely later.

The Committee recommended that where a scheme of amalgamation involving the transfer of shares had been sanctioned by the holders of at least 90 per cent of the shares, the purchasing concern should be entitled as of right within a limited time to acquire the shares of the non-assenting shareholders, with a right of appeal to the court on any question of value or oppression. The procedure was only available where the purchasing concern was a company and did not apply where the company already held more than 10 per cent of the shares which it desired to acquire.29

The Cohen Committee in 1945 recommended that the legislation be extended to enable compulsory acquisition where a company initially holds more than 10 per cent of the shares, provided that the offer is made to all the holders concerned and is accepted by not less than 75 per cent in number of the holders, holding between them not less than 90 per cent of the value of the shares to be acquired.30 The Committee also recognised the value of giving reciprocal rights to the minority shareholder to

---

26. cond

right was also enacted in Canada in the Canada Business Corporations Act. Upon the happening of certain fundamental changes occurring within the company, the statute allowed shareholders to insist that the company buy their shares. The appraisal right was adapted from similar provisions in New York's Business Corporation Law and was intended to strike a balance between majority and minority shareholders. For an excellent coverage of the appraisal right in Canada, refer to J. G. Macintosh, "The Shareholders' Right of Appraisal in Canada: A Critical Reappraisal" (1987) 24 Osgoode Hall L.J. 201.

27. Weiss, supra, n. 9 at 625.

29. Ibid., pp. 44-45.
By contrast, the Attorney-General’s Department believed that the change to the test in cl. 701 produced greater certainty. As stated in evidence by Mr Davies from the Department:

“It is a difficult area because you will always have shareholders saying ‘I want to hold on to my shares’. It is a balance that we have tried to strike between the interests of the company and the interests of the shareholders.”35

Thus, each submission had a different perception as to the point at which the line should be drawn. If the test was to be relaxed to increase market efficiency, an increased number of shareholders would be unhappy as a result of having their property compulsorily acquired. The NCSC warned that “you will be causing more anguish than is justified”.36

The Committee concluded that certainty is of prime importance and that there should be no confusion or difficulty of application of the legislature’s intention. With the stated aim of fulfilling the legislature’s intention, the Committee adopted a test which favours market efficiency over shareholder protection.

The Statutory Provisions

“Dissenting shareholders” in the context of ss 701-703 means shareholders who do not accept, or fail to respond to, a takeover offer.37 Where an offeror who owns less than 10 per cent of the shares of a target company makes a full takeover offer an entitlement to acquire full ownership arises where more than 90 per cent of the shareholders accept the offer.38 Where an offeror holds in excess of 10 per cent at the time the bid is made, it will also be necessary for 75 per cent of the offerees to have disposed of their shares to the offeror or that 75 per cent of the registered holders of the shares are not so registered at the expiration of one month after the end of the offer period.39 Thus where less than 10 per cent of the shareholders have not consented to the compulsory acquisition of their shares where they would be “boxed in” by a bidder obtaining 90 per cent of the shares.31

Australian jurisdictions copied the United Kingdom legislation, apparently without any independent debate or discussion as to its merits. Subsequently, further amendments were made by the Eggleston Committee which enabled individuals to take advantage of the compulsory acquisition procedure.32 The Jenkins Committee in the United Kingdom declined to do the same because it considered that the amendment was an impermissible departure from the original aim of the legislation which was to facilitate company mergers.33

Further amendments were made pursuant to the Joint Select Committee on Corporations Legislation (Edwards Committee) Report concerning the requirement that 75 per cent of the target shareholders must participate in the offer where the offeror holds greater than 10 per cent of the shares (the provisions of s. 42(2)(b) Companies (Acquisition of Shares) Code, the precursor to s. 701(2)(c), Corporations Law). The deliberations of the Committee tend to illustrate the comments made above by Kent and Vary.

The Committee took submissions on a proposed amendment that the 75 per cent figure should include all shareholders selling out regardless of whether to the offeror or to a rival bidder. The National Companies and Securities Commission (NCSC) in its submission considered that the benefit to acquirers under the clause was effected at the expense of rights of minority shareholders. It stated that it had received a lot of complaints since the 1987 crash and its concern was that acquirers of shares were taking advantage of low share prices to take full ownership of companies. Shareholders were being forced to sell at a loss or under value.34

31. Ibid.
35. Ibid., par. 13.45.
36. Ibid., par. 13.39.
38. Section 701(2), Corporations Law.
39. Ibid.
accepted or responded to the offer the offeror may compulsorily acquire all the shares of those shareholders.

Pursuant to s. 701(2) the offeror is obliged to give notice to dissenting offerees before the end of two months after the end of the offer period. One month after the notice has been served under subsection (2) the offeror is entitled to become registered as holder of the shares, unless dissenting shareholders have made applications to the court under s. 701(6) that their shares not be compulsorily acquired. In order to facilitate this right to approach the court, the dissenting shareholders may seek a written statement from the offeror of the names and addresses of all other dissenting offerees.

Following an acquisition of 90 per cent of the shareholding, s. 703 enables remaining shareholders and holders of non-voting shares, renounceable options or convertible notes to require the offeror to purchase their holding. The offeror is also obliged to give notice to these parties one month after the end of the offer period, and the notice to holders of notes and options must contain an expert's report stating whether in the expert's opinion the terms of the acquisition are fair and reasonable.

The Policy Basis for the Compulsory Acquisition of Shares

In this section the policy behind the compulsory acquisition provisions will be explored, in order to isolate the philosophical and social "objectives" referred to by Kent and Vary.

The Agony: The Concept of Compulsory Acquisition

(a) The Public Good

"What justifies compulsion is in Blackstone's phrase, 'the general good of the whole community', 'the public good' . . . . Adequate compensation balances the acquisition, but only 'the public good' can balance the compulsion."[43]

Compulsory acquisition of shares under ss 701-703 constitutes a rare example where a private person can acquire the property of another against the will of that other, purely because the acquirer wishes to have total control of a commodity. To use the language of Blackstone, "the public good" which justifies the compulsion is the facilitation of takeovers. In this sense the nature of the public good is one step removed from most situations where compulsory acquisition of property interests is utilised. Therefore, not only must it be clear that the power to compulsorily acquire encourages takeover activity, but that takeover activity is in itself good for the public at large. Although there has been significant research conducted as to the merits of takeover activity, the scope of the research is still narrow and the normative issue as to whether takeovers are beneficial remains unresolved.

Therefore, it could be suggested that the extent of the public good does not warrant the

40. Section 701(10), Corporations Law.
41. Section 701(9), Corporations Law.
42. Section 703(5), Corporations Law.

"[T]he effect of takeovers on issues such as productive capacity, competition, external balances, business investment, research and development and employment have not been explored by . . . anyone in Australia."

46. Compare the following comments:
(a) By McDougall, ibid., p. 121:

"A strategy of corporate acquisition resulted in a deterioration in the performance of the merging firms, both compared to their pretakeover experience and compared with the experience of the matching non-merging firms . . . . Further, the actual returns received by shareholders in the acquiring firms were little different from those earned by shareholders in the non-merging firms . . . ."


"Large increases in shareholder wealth are generally associated with takeovers. Th[e] evidence is consistent with the view that takeovers, on average, lead to more profitable uses of company assets, and as such they play a vital role in the capital allocation process."
expropriation. What about the other side of the equation; that is, should shareholders’ right to hold their property be given primacy?

(b) The Private Interest

“Small wonder, then, that attempts by governments to acquire or ‘resume’ land held by individuals should occasionally meet with resistance. In the Melbourne suburb of Camberwell, a house owned by a Mrs Campigli stands as a lonely island in a sea of car-parking, a monument to an elderly lady’s resistance.”

It seems that the issue of compulsory acquisition of shares would never conjure up figures such as Mrs Campigli. The image of Mrs Campigli and her struggle to keep her property is likely to invoke public sympathy and the suffering caused by the disturbance of a property right to land is compensable in many jurisdictions. The Victorian legislation provides for a “solatium” for the compulsory nature of the acquisition which is paid in addition to the market value of the land. In Canada a citizen may claim damages for injurious affection even when no land is ultimately taken. In contrast, it has been held that conditions cannot be attached to the compulsory acquisition of shares so as to afford solace to the individual.

This differential treatment of land and shares raises important questions as to the nature of the property that is sought to be compulsorily acquired. Certainly the nature of the property being defended in each case is qualitatively different. Mrs Campigli’s resistance appears to be a manifestation of the human urge to acquire and defend territory, whereas it is difficult to argue that the ownership of shares satisfies such a deeply ingrained need.

The nature of the property in a share varies with the nature of the company from which it is issued. On one hand, the purchase of shares in a company clearly connotes participation in an association with a number of persons for a common object, that object normally being the economic gain of its members. As stated by Bryson J. in Nicron Resources Ltd v. Catto, “an event like that [the expulsion of the minority] could be interpreted as according less than appropriate value to the standing of shares as property which should be respected and not subjected to expropriation, even with compensation unless there is lawful authority; and also less than appropriate value to continuing membership and freedom from expulsion”.

On the other hand, a shareholder in a public company is quintessentially a “mere purchaser of income” and, in this context, a share is merely a capitalised dividend stream.

This notion of the share as a source of income means that fair compensation to dissenting shareholders will always be assessed by reference to the price of the shares. There is no right per se to the form of the investment rather than its value. Again as succinctly stated by Bryson J. in the Nicron case, “[t]he courts appear to me to have equated the payment of the fair equivalent in money of the value of the shares with fair and equitable treatment”.

Shareholders who desire to retain ownership of the shares in specie will receive little sympathy because the assumption is that they are merely holding out for a higher price. For example, in Re Shoppers City Ltd and M Loeb Ltd a shareholder testified that the 13 shares he held were a Christmas present from his wife and he planned to give them to his three year old son on his 21st birthday. The court held that personal or sentimental attachment was not a sufficient reason for blocking a compulsory acquisition.

51. Supra, n. 2.
52. Ibid., at 228-229.
55. Supra, n. 2 at 229.
The difficulty with the assumption that price is at the core of the conflict is that there will be a blunted perception of oppression of minority shareholders. In particular, there is a risk of an unfair appropriation of hidden values in the enterprise by majority shareholders.57 As stated by Brudney and Chirelstein:58

"[The] likelihood that public investors will be treated unfairly is greater when they receive cash or debt, with the insiders in effect receiving or retaining the equity . . . [E]xperience suggests that payouts to the public in cash or securities often reflect a temptation to undercompensate the public investors."

The Ecstasy: The Advantages of Full Ownership

"In some instances a collective use may be more valuable than any private undertaking; and in other instances different parties may be able to make more productive use of an asset than is possible by the current owner. . . . Conflicts or disputes frequently arise and are commonly about the extent to which a right is protected or accorded preference over another entitlement."59

Full ownership of companies simply means that the shareholder has total control of the use to which the company can be put. Thus, the company's assets or cash flow may be freely used, and the agency costs of management are reduced. The purchaser may also recoup the costs of the acquisition by appropriating the gains from the transfer of control. The value of the combined entity may be greater than the sum of the separate values of the parent and subsidiary due to economies of scale, centralised management and corporate planning or economies of information.60

There are also advantages in firms going private, such as the elimination of costs due to public ownership; for example, legal and auditing fees, shareholder relations and the disclosure obligations mandated by the Corporations Law and the Australian Stock Exchange. The avoidance of disclosure obligations can benefit the company if it has to sacrifice prospective business opportunities where disclosure is required.61

It is generally accepted that the advantages available under the grouping provisions of the Income Tax Assessment Act 1936 (ITAA) constitute one of the main attractions associated with a successful bid for all the outstanding shares in the target company. Section 80G, ITAA, enables losses to be transferred from one company to another within the group so that the transferee can claim a deduction for the losses.62 In ANZ Executors & Trustees Ltd v. Humes Ltd63 evidence was adduced that the target company would save between $6 m and $28 m a year if the group could take advantage of s. 80G.64

Ultimately, the desire to attain full ownership of companies reflects the increasing dominance of the group context of corporate life. The capacity to have full access to a company's cash flow means that funds may be lent to other companies in the group on unsecured terms or sometimes even without a promise to repay. The presence of minority shareholders means that directors have to be more careful about fulfilment of their fiduciary duties and majority shareholders must be aware of potential oppression.65

"Despite the established legal theory which says that each corporate entity is to be regarded

57. MacIntosh, supra, n. 26, states at 229:

"The risks if opportunistic redistribution are heightened due to asymmetric possession of information regarding company value. The majority shareholders or managers may possess inside information disclosing hidden values that are not reflected in the market price of the company's securities and may wish to capture these values for themselves by excluding the minority."

58. Supra, n. 1.
59. Ibid., at 1,359.
as legally distinct from other corporations, the economic reality is quite different. A Perth based corporate lawyer noted that 'there is a tendency to have regard to the interests of the group qua group, rather than the company as such'. . . . As one Adelaide based chief executive noted: 'groups are being treated as if they are an individual entity. This does not matter so much when the going is good but in bad times this is a problem as money is moved around as if there were no difference between the companies in the group.'" 67

The Law of Compulsory Acquisition of Shares: Developments Since the Greene Committee

Adopting the themes derived from the Greene Committee and elaborated above, the manner in which the law has developed to embrace these themes may be traced.

The Significance of Ninety Per Cent Acceptance

The rule that the bidder is required to obtain acceptances from 90 per cent of the shareholders has meant that an assumption has arisen that the acquisition is fair. The rights of individual minority shareholders are therefore viewed in the context of the decision of an overwhelming number of shareholders to sell their shares. It is not clear from the deliberations of the Greene Committee how the figure of 90 per cent was arrived at and, as stated above, this threshold figure varies in different jurisdictions. 68 Clearly acceptance by 90 per cent of the offerees is evidence the bid is fair, but 10 per cent still remains a significant minority and the 90 per cent acceptance should not override an independent assessment as to whether compulsory acquisition on the terms of the bid is in fact fair.

An example of the persuasiveness of the 90 per cent acceptance is the comment of the NCSC in its Release No. 139:

"Section 42 permits certain property rights of shareholders to be removed in the interests of commercial efficiency. . . . The underlying assumptions are that the very high success of the offer implies that the terms of the offer (and consequently of the compulsory acquisition) are very favourable and that, having achieved such a favourable response from accepting shareholders, a bidder should be allowed to achieve the benefits of total ownership of the company . . . ." 69

The case law on ss 701-703, Corporations Law and their equivalents in other jurisdictions abounds with judicial warnings to minority shareholders as to the overwhelming odds they face in attempting to bypass the will of the majority. It seems to be almost mandatory for judges hearing applications under s. 701(6) to refer to the very high evidentiary burden suffered by the dissenting shareholder. 70 For example, Maugham J. in In Re Hoare & Co. 71 stated:

". . . it seems to me impossible to suppose that the court, in the absence of very strong grounds, is to be entitled to set up its own view of the fairness of the scheme in opposition to so very large a majority of shareholders" 72

Vaisey J. in In Re Evertite Locknuts 73 also made the following comments:

"[i]t cannot be right that one shareholder, owning one-seven-hundredth part of the shares affected, should be entitled to stand out against the decision of 699/700ths of the share capital, merely because he has, as he thinks, been left somewhat in the dark in regard to the material facts." 74


68. For instance, it is 95% in New York State.


72. Ibid., at 107.

73. [1945] Ch. 220.

74. Ibid., at 224-225.
The extent of the dissenting shareholding will always be a relevant consideration, but it submitted only within the context of balancing the interests of the minority and the majority. An example is *TNT Ltd v. NCSC* where TNT acquired greater than 99 per cent of the shares through its holdings and that of an associated company. Unaware that it was entitled to compulsorily acquire the remaining shares, TNT made a subsequent bid for them, only yielding 66 per cent of acceptances. TNT appealed to the Supreme Court after the NCSC refused to modify the *Companies Code* under the predecessor to s. 730. In dealing with the application, Gobbo J. took the following matters into consideration:

- the history of the dealings in the outstanding shares, including the many attempts made by TNT to communicate with the shareholders in question and the absence of any real interest in the affairs of the company; for example, none of the relevant shareholders had attended the company's recent general meetings;
- the significant burden and cost of servicing the remaining shareholders;
- the uncertainty inherent in the situation and the inhibitions this had created in the commercial planning of TNT;
- the unchallenged expert evidence that the price offered for the shares was very generous;
- the considerable inconvenience, long-term uncertainties and impracticability of the only alternative seriously proposed (that is, amendment of the articles); and
- the fact that there were only nine dissenting shareholders with 2652 shares out of 77 million.

Hence, his Honour considered that the circumstances of the case were "exceptional" and did not erode any principle as to the preservation of property rights.

Although the facts of the *TNT* case may be exceptional, its outcome is not. In fact, it is not surprising that judges issue stern warnings to dissenting shareholders who bring proceedings for relief, since the trends seem to indicate that, in the absence of fraud or other impropriety, it is almost certain that dissenting shareholders will not succeed in defending the acquisition of their property. Since there are other, more efficacious remedies available where fraud or impropriety can be established, one might ask whether by the process of further amendment and judicial interpretation, the legislative provisions are now useless to protect the dissenting shareholder.

**The Characterisation of the Dissenting Shareholders: Apathetic v. Dissenting**

As discussed above, Anglo-Australian law in this area developed from a premise that the majority should be allowed free rein in the management of the company and, unlike United States law, there was no heritage of vested rights in the minority shareholder. In the context of ss 701-703, by focussing on the will of the majority (as manifested by the 90 per cent acceptance), the issue of the property rights of dissenting shareholders or, generally, of their oppression, becomes subsidiary. The oppression issue becomes subsumed into the issue of price. Therefore, the issue becomes not whether minority shareholders should retain their shares, but at what price is it fair to compulsorily acquire them. By corollary, the shareholder tends to be characterised as either uninterested in the acquisition or attempting to coerce the majority into paying a higher price. This was the premise adopted by the Greene Committee, as discussed above.

A number of issues are raised by this characterisation of the rights of the minority shareholder. Firstly, the question arises as to whether shareholders should be entitled to the form of their investments as well as their value. Secondly, should there be a differentiation between shareholders who are lost/dead/uninterested and those who genuinely do not want to sell their shares? The case of *TNT Ltd v. NCSC* demonstrates that there can be little complaint if the acquisition is just a mopping up exercise, especially where the shareholding is fragmented and the share-

---


76. For example, s. 260 in cases of oppression or injustice by members or officers, s. 232 in relation to the officers of the company or at general law if fraud on a minority or breach of directors duties can be established.
holders have no involvement with the company. But should there be different rules for shareholders in this category and those who genuinely do not want to sell?

An interesting point of comparison to the TNT case is the case of ANZ Executors and Trustees Ltd v Humes Ltd\(^\text{77}\) where there were identifiable holders of convertible notes who were threatening to convert them to shares so as to ruin the owner’s tax benefits under s. 80G, ITAA. Therefore, the noteholders were not only in a very strategic position, but were clearly aware of their bargaining power.

In that case the defendants represented the interests of the Smorgon family who succeeded in 1988 in obtaining all 223 million shares in Humes Ltd. There were also a large number of convertible notes on issue, created by a trust deed made 29 April 1987 between Humes and ANZ. When the Smorgons made the takeover bid in March 1988, they made a corresponding offer to acquire all the convertible notes. The vehicle for the acquisition was a company called SCI Acquisitions Pty Ltd and it acquired 98.8 per cent of the notes. A company called PS (Enterprises) Nominees Pty Ltd held 50,000 of the notes but refused to sell.

SCI was concerned that if the convertible notes were converted into shares Humes would cease to be a subsidiary of SCI. Hence, s. 80G would no longer apply because the grouping provisions apply only to companies whose beneficial ownership is identical throughout the relevant year of income. SCI asked the NCSC to exercise its discretion under s. 58 (s. 730, Corporations Law) to modify the Companies Code to enable it to compulsorily acquire the notes but, after representations by PS, the NCSC refused.

Upon an application to the Supreme Court, Brooking J. awarded specific performance of the contract to allot the shares to PS, rejecting SCI’s argument that damages would be an adequate remedy. The issue of the assessment of damages was “replete with difficulties” since it would focus on what price SCI would be prepared to pay to rid itself of the problems occasioned by an outside shareholder and no one would be better able to quantify that loss than SCI itself.

SCI was unable to avail itself of the compulsory acquisition provisions because s. 703 only gives the right to the minority holder to have those securities purchased by the bidder. There is no corresponding power in the bidder to acquire them compulsorily even when the 90 per cent threshold is passed.\(^\text{78}\) The NCSC did not have the power under s. 58 to modify s. 42 in the way suggested by SCI. Any attempt would have been a “highly questionable exercise of the discretion”.

SCI argued that PS had not come to equity with clean hands and therefore should be denied a remedy. Brooking J.’s comments on this submission are very instructive:

“... it is said there has been sharp practice, which my Concise Oxford Dictionary tells me means ‘barely honest dealings’. I do not think anything done by the plaintiff here fairly answers that description ... . While no doubt the plaintiff hoped that the Smorgons would find themselves under pressure ... that group was not in necessitous circumstances or engaged in good works ... but the owner of a multimillion dollar commercial enterprise which was used to ... having available to it the best of legal and other expert advice.”\(^\text{79}\)

Therefore, in TNT the bidder was allowed to tidy up after the acquisition by use of expropriation, whereas in ANZ the judicial response was to let the market decide. Although the decision in ANZ was predicated on a perceived inadequacy of the law, the comments of Brooking J. indicate generally that the perception of the minority shareholders coercing the majority may be far-fetched.

**Valuation of Shares and Securities**

(a) Shares

If price is indeed the fulcrum of the rights of the minority shareholder, then the calculation of that price will clearly be crucial. Pursuant

\(^77\) Supra, n. 64.


\(^79\) Supra, n. 64 at 409.
to s. 701(5), once the bidder has given notice of its intention to acquire the shares, an obligation arises to acquire the shares on the terms applying under the takeover scheme or pursuant to the takeover announcement immediately before the end of the offer period. There may be some issue as to whether this test is sufficient, since a dissenting (as opposed to apathetic) shareholder would presumably have accepted the bid in the first place.

In comparable legislation in Canada, the statutes allow shareholders who initially failed to tender into the bid to elect to take either the same consideration offered in the bid or a court determination of “fair value”. It has been argued that allowing shareholders to make this election may render successful takeover bids more difficult by offering the hope to minority shareholders of realising a better price by declining to tender into the bid and claiming the appraisal right on a second-step cashout. Hence, paying dissenters the same price offered in the initial takeover offer is quite adequate.

The United States authority of Weinberger v. UOP Inc. construed the Delaware statute and found that the price offered must be fair, which is not based on a formula but instead based on a consideration of a myriad of factors, including market value, asset value, dividends, earning prospects, the nature of the enterprise and any other facts which were known or which could be ascertained as of the date of the merger and which throw any light on the future of the merged corporation. Weinberger is significant in that it recognised that a shareholder’s equity interest in a corporation cannot be valued solely by the current trading value. This is because minority shareholders, when bought out, immediately lose all future rights and benefits they may receive from participation in the corporation’s business.

The question of the appropriate valuation of shares held by minority shareholders upon a takeover bid arose in the recent case of Hawker De Havilland Ltd v. ASC. In that case, BTR Plc (BTR) proposed to make a bid for all the shares in Hawker Siddeley Group (HSG) in the United Kingdom. This would result in a downstream acquisition of 73 per cent and 85 per cent respectively in two Australian companies. The two companies sought an exemption under s. 728, Corporations Law and one of the conditions that the ASC put upon granting the exemption was that BTR make a bid for the minority shareholdings.

The Administrative Appeals Tribunal considered that the companies and the ASC should both appoint a valuer. The valuers should rely upon NCSC Release No. 102 as to the method of valuation to be adopted. Although this Release pertained to reports prepared by target companies for the preparation of Pt B statements, the principles were just as useful in this context. If a range of values was given by the appointed valuers, the top of the range should prevail.

(b) Securities

In Australia, a court which is called upon to make a determination under s. 703(3) with respect to the acquisition of securities has very little to guide the exercise of its discretion. Although an expert’s report must accompany the notice given by the bidder under s. 703(5) indicating whether the terms of the acquisition are fair and reasonable, Bryson J. of the Supreme Court of New South Wales has expressly rejected this approach as not being appropriate to a judicial determination.

In Kingston v. Keprose Pty Ltd Bryson J. found that:

1. The words used in the provision confer a very wide discretion on the court and the court may have regard to any consideration which is not extraneous to the purposes of the Companies Code.

80. Canada Business Corporations Act, s. 199; Ontario Business Corporations Act, ss 187-188.
82. Ibid., at 239.
83. 457 A. 2d 701 (Del. 1983).
84. Ibid., at 713.
87. Ibid., at 591-592.
89. Ibid.
(2) The notion of equal opportunity does not mean that the terms of acquisition from the holders of options should be tested by reference to the terms of the takeover offer.

(3) The price fixed should be the value of the options if there had not been a takeover, therefore the depressing effects of the takeover on the price should be ignored.

Jacobs J., in *Mercantile Mutual Life Insurance Co. Ltd and Ors v. A ctraint No. 85 Pty Ltd (No. 2)*, agreed with Bryson J. that the decision calls for an exercise of intuitive judgment and judicial discretion which is not possible to expound as a reasoned process. However, his Honour did distinguish between:

(1) non-accepting offerees, who are given the right to require acquisition of their shares on the terms of the takeover offer; and

(2) non-target shareholders, where the law recognises that there may be special rights or privileges attached to these interests which distinguishes them from the shares which were the subject of the takeover offer. Their "exit right" does not invoke the terms of the offer, but is on terms to be agreed or to be determined by the court.

The Australian authority on valuation of minority shares and securities in this context is sparse. However, where a minority shareholder is dissenting rather than merely apathetic, it may be that valuation similar to that adopted in *Weinberger's case* is more equitable since it recognises the shareholder’s loss of future value. Although the distinction discussed by Jacobs J. in the *Mercantile Mutual* case is important, there may be some merit in allowing the court to independently assess the exit right of non-accepting offerees to recognise this loss of future value.

**Alternative Techniques of Eliminating Minority Shareholdings**

Although this article is primarily concerned with the compulsory acquisition provisions under Ch. 6, Corporations Law, a majority shareholder is by no means confined to these provisions in seeking to freezeout the minority. In his article "Eliminating Minority Shareholdings", Quentin Digby considered eight alternative techniques of eliminating minority holdings. They are:

(1) s. 414 following a scheme or contract approved by 90 per cent of the majority;

(2) a s. 411 scheme of arrangement;

(3) s. 413, by a merger in connection with a s. 414 scheme;

(4) s. 501, by voluntary liquidation and selective distribution in specie;

(5) s. 507, by voluntary liquidation and amalgamation;

(6) ss 197 and 198 to eliminate or vary rights attaching to shares or a class of shares;

(7) sale of assets and liquidation; and

(8) s. 206CA, by a permitted share buy-back.

There have been a number of recent cases in which it has been necessary for the courts to analyse the interaction between these provisions and those contained in Ch. 6. In most instances the application to the court has been for a reduction of capital under s. 195. Although a similar purpose may be effected by the use of s. 411, shareholders tend to shy away from the connotation of insolvency which is raised by a scheme of arrangement.

It was held in the case of *Catto v. Ampol Ltd* that in deciding whether a reduction of capital is fair and equitable as between shareholders, the court may be guided by the legislative indications of fairness such as those contained in s. 701. As stated by Kirby P.:

"... in construing [s. 195], I regard it as legitimate and appropriate for a court to keep in mind the provisions of the

---


91. Supra, n. 2.

92. Ibid., at 112-119.

Compulsory Acquisition of Minority Shareholdings

... it would be a distorted and inadequate description of the events to say only that Nicron... reduced its capital... The fact that at the end of the process Nicron will have less paid up capital than at the beginning is of small interest or concern to anyone who is involved; the perception of all involved will be that Aztec has brought it about that all minority shareholders have had to leave Nicron and give up their investment in it for the present and for the future." 

Nevertheless, his Honour went on to say that it was literally true that Nicron had reduced its capital and he was satisfied that that was the true legal characterisation of the events. Although the application of s. 195 to the facts involved a high degree of contrivance and artificiality, he considered that the case fell within that section. 

The reason put forward in evidence by Mr Johnson (a director of both Nicron and Aztec) for not following the Ch. 6 procedure was that it was felt that it would be impossible for the company to meet the requirement of obtaining the approval of 75 per cent of the shareholders in number and hence proceeding to compulsory acquisition because the share register was untidy and a large number of the shareholders were uncontactable.

Of course, underlying the discussion of Ch. 6 remedies in the context of a s. 195 application presupposed that there was some established order of suitability of the available machinery by which events affecting shareholding and control in companies should occur. As succinctly stated by Bryson J.: 

97. Supra, n. 2 at 224. 
98. This approach is consistent with earlier decisions such as Singer v. Robinow 1971 S.C. 11, where minority shareholders opposed a scheme of arrangement on the ground that the proposed scheme was in essence an arrangement between two groups of members and not between the company and any class of its members. The court held that the company had a direct interest in the arrangement because it would need to amend its share register upon the majority shareholder obtaining 100% of the shareholding. It was necessary to take a broad construction of the equivalent of s. 411 to enable different types of arrangements to be put forward. 

99. Nicron, supra, n. 2 at 234.

94. Ibid., at 345. 
96. For example, Ramsay Health Care Ltd v. Elkington (1992) 7 A.C.S.R. 73.
“Chapter 6 procedure is not to be followed merely because it is there; it is not Mount Everest.”

The crucial consideration was that it was unlikely in his Honour’s opinion that the minority shareholders would not have had any significantly better result if Aztec had been forced to proceed under Ch. 6.

However, this might ultimately be an exercise in merry-go-rounds and swings, since it has been long established that the court may confirm the reduction under s. 195(5) if it considers the reduction to be fair. This is almost exactly the text used by the courts under s. 701 which will be discussed below.

Remedies of the Dissenting Shareholder

The cornerstone of the Ch. 6 procedure is that all shareholders of a company should, as far as practicable, have equal opportunities to participate in any benefits accruing to shareholders under any proposal where a person would acquire a substantial interest in a company.

Under s. 701(6) a dissenting shareholder may apply to the Supreme Court for an order that s. 701(5) (regarding the obligation to acquire the shares after a notice under s. 701(2) has been given) is not to apply to the shares of the dissenting offeree. The basic test applied by the courts in determining applications brought by dissenting offerees is whether the offer is unfair to offerees as a body.

Dissenting offerees may exercise their rights under s. 701(9) to obtain a written statement from the offeror of the names and addresses of all the dissenting offerees. The power to obtain the details of all other dissenting offerees is valuable in enabling all dissenting shareholders to join in the action, hence share costs. However, the law works in an unusual way in that the issue of exempting a particular shareholder from acquisition is determined by the test of fairness to the shareholders as a whole. This has some interesting consequences:

(1) The court does not take into account the circumstances of a particular shareholder in assessing fairness to the shareholders as a body. Therefore, damage suffered which is personal to a shareholder such as loss of a tax deferral or brokerage fees will not be taken into account.

(2) If a court makes a determination that a particular shareholder’s interest be exempted from s. 701(5) on the basis of unfairness to shareholders as a whole, this would probably create an issue estoppel to exempt other shareholders, even if they were not parties to the original action.

(3) If a shareholder joined a common law cause of action the court would have to decide whether there were any anomalies between the test of fairness to shareholders and the test of whether the proposed action was bona fide for the benefit of the company as a whole.

An alternative course available to the dissenting offeree is to issue a summons seeking a declaration that s. 701 is inapplicable; where the dissenting offeree believes that one or more of the preconditions for the use of compulsory acquisition notices has not been fulfilled.

The onus upon the dissenting offeree to establish that the offer is unfair where 90 per cent of offerees have accepted that offer is, to say the least, very heavy. As discussed above,

100. Ibid., at 235.
101. Ibid.
102. Sometimes referred to as the Eggleston principle. See, also, In re Fras Hinde & Sons Ltd, The Times, 23 April 1966.
103. Eddy v. W. R. Carpenter Holdings Ltd, supra, n. 70.
104. Manning v. Harris Steel Group Inc., supra, n. 50. Note that the court has no power to alter the consideration payable to the dissenting offeree. It must either allow compulsory acquisition to proceed or not to proceed. (Kinross v. Heritable Securities and Mortgage Investment Co. [1935] S.N. 25.)
105. As stated by I. Renard and J. G. Santamaria, Takeovers and Reconstructions in Australia (1991) Butterworths, p. 12,027:

“It is not uncommon in takeover litigation for a plaintiff to issue proceedings pursuant to a specific provision of CASA conferring that right, and at the same time issue proceedings at common law (e.g., BHP Co. Ltd v. NCSC [1986] 10 A.C.L.R. 470; NCSC v. Alexanders Laing and Cruickshank Ltd (No. 1) [1987] V.R. 940 at 944-945).”

the courts tend to start with a presumption that the bid is fair in view of the very large majority of offerees who have accepted and the court will often be loathe to substitute its own view as to the fairness of the offer.

However, special circumstances may lead the court to conclude that unfairness has been established. For instance, the following factors have been cited in past decisions:

- any element of cheating, deception or impropriety;
- any attempt by the majority shareholder to operate the company prior to the takeover bid in a way which substantially reduced the value of the minority shareholders' holding;
- materially misleading statements in the offer documents which may have influenced the majority to accept contrary to their best interests;
- evidence that independent advice on which the target board based a recommendation to accept the bid was fundamentally flawed; and
- evidence that the consideration offered was unfairly low.

Previously, the most efficacious way of showing unfairness was by establishing that the majority of the accepting shareholders were connected in some way with the offeror. Using this argument, the dissenting offeree was successful in the famous case of Re Bugle Press. In that case, two shareholders held 90 per cent of the shares but were unsuccessful in persuading the majority shareholder to sell. They incorporated a transferee company which made a bid to buy all the shares. The two majority shareholders accepted the bid and the offeror company issued a compulsory acquisition notice to acquire the 10 per cent held by the remaining shareholder. The minority shareholder sought a declaration that the transferee company was not entitled to acquire his shares on the terms. It was held by the Court of Appeal that the minority shareholder had shown that there were special circumstances why the court should exercise its discretion not to sanction the expropriation of the minority holding. The "special circumstances" were that although the transferee company was in law distinct from its only two shareholders, in substance it was the same as the majority shareholding in the transferor company.

There is a fusion in the decision between the minority shareholder’s cause of action where the prerequisites for the notice under s. 701(2) have not been satisfied and the cause of action arising because the acquisition is unfair. It is submitted that the decision now has little utility unless a dissenting offeree is seeking a declaration that the preconditions for the acquisition are not made out. Due to the expanded definitions of “entitled” under s. 615 and “associate” and “relevant interest” in Pt I.2, Ch. 6 the legality of the acquisition will be tested at a much earlier point than at the point at which the s. 701 notices are issued.

Perhaps the most fundamental question about the fairness test is whether it is appropriate to use the circumstances of shareholders as a whole in assessing fairness. Arguably, the high level of acceptances will always militate against an offer being unfair to shareholders as a group, even if an individual might suffer extensive loss. Assuming that an objective of the compulsory acquisition provisions is to weigh up the interests of the minority and the majority, the test in its present form gives too much latitude to the majority.

Again, it is instructive to look at the United States law on this point, where minority shareholders may seek a judicial appraisal of the acquisition of their shares. Under United States law, a fiduciary obligation is owed by the majority in handling the property of the minority. In some jurisdictions, that

109. Ibid.
110. Renard and Santamaria, op. cit., n. 105, p. 12,029.
118. For example, New York State.
Does the Law Unduly Favour the Offeror? The Hurdles to be Overcome by the Dissenting Shareholder

Even if minority shareholders are keen to challenge the compulsory acquisition of their shares, pragmatic problems such as the expense and delays of litigation will be a deterrent. This is a common problem but it is made more acute by the restrictive attitude which the courts have taken in allowing minority shareholders access to company records. Often removed from the day-to-day operation of the business, minority shareholders may be unable to protect their interest because they are insufficiently sensitised to questionable business practices of the majority shareholders.

In addition, she may be denied discovery and inspection of the company records. Although the right to discovery turns on the relevant Supreme Court Rules there have been judicial statements which warn that there may be serious consequences if the holder of a small number of shares could obtain what Roxburgh J., in Re Press Caps,121 called an “extensive investigation of the company’s affairs”.122 Preparation of an action by the minority shareholder will be severely hampered by an inability to get hard evidence of unfairness.123

Yet another obstacle for the minority shareholder is the discretion of the ASC to modify the Corporations Law under s. 730. This power is discussed in the NCSC Release No. 139 in which the Commission records its policy regarding the discretion. The section has also been judicially interpreted in Brierley v. Dextran Pty Ltd124 and McGirr v. Dextran.125

In the Brierley case the NCSC purported to grant an extension of time to the offeror to fulfil the 75 per cent requirement under s. 701(2). Brierley, as a dissenting offeror, had argued that once the offers made by the offeror had expired without its meeting the requirements of s. 701(2)(a) and (b) the dissenting shareholders had acquired a right not to have their shares compulsorily acquired. As counsel put it,

“the game was over when the offers expired, and the dissenting shareholders had won, having acquired an immunity from compulsory acquisition of their shares; and it was not open for the NCSC thereafter to change the rules so that the dissenting shareholders were again put in jeopardy”.126

But Tadgell J. found:

(1) There is no time limit stipulated in s. 701(2) with respect to the 75 per cent requirement, hence it was unnecessary for the NCSC to exercise its discretion under s. 730. This finding contradicts the NCSC’s conclusion that the relevant time period was the end of the offer period.127

(2) There is no indication in s. 701 that it confers an immunity from the exercise by the NCSC under s. 730 of its power after the close of the offer period.

In the related proceedings of McGirr v. Dextran128 the dissenting offerees argued that they were entitled to be heard before the NCSC exercised its discretion, but this was rejected on the grounds that there is a right of appeal under the old s. 537 of the Companies Code (now Pt 9.4A, Corporations Law) by way of a hearing de novo.

Clearly, if the decision of Tadgell J. in the Brierley case is correct, then the minority shareholder is disadvantaged in three ways:

(1) Given that s. 701(2) does not stipulate a time limit, it is very difficult for the minority to assess at any point in time whether or not its shares will be acquired.

120. TheModelW>U*RMBCAl3.02(b)(1984),NYBus.Corp. whether or not its shares will be minority to assess at any point in time
121. [1948] 2 All E.R. 638.
122. Ibid., at 639.
123. For example, see Eddy v. W.R. Carpenter Holdings Ltd, supra, n. 70.
126. Supra, n. 124 at 464.
128. Supra, n. 125.
(2) It limits the efficacy of an action by the shareholder for a declaration that there has not been compliance with the requirements of ss 701-703.

(3) Even if the minority assumes that it would acquire an immunity from acquisition within a reasonable time after the close of the bid, this assumption could be displaced by the ASC exercising its discretion under s. 730 of the Corporations Law to grant an extension of time.

Conclusion

The recommendations of the Lavarch Committee demonstrate the faith that is vested by the regulatory authorities, the judiciary and now the legislature in the "safeguards" forming part of the law of compulsory acquisition of shares following a takeover bid. However, one must question whether this faith is misguided.

First, the law operates in a climate which clearly favours the majority and has done so since the recommendations of the Greene Committee. The Greene Committee itself adopted the view that the minority shareholder was either apathetic or extortionate. The Committee did not debate the justification for the compulsory nature of the acquisition, even though the result was that the minority shareholder was thereafter forced to resort to litigation to defend her property rights. The subsequent development of the law has persistently facilitated the majority's strategy.

Secondly, dissenting shareholders face overwhelming odds in attempting to retain their shareholding by use of the right to approach the court in s. 701 of the Corporations Law. Not only must they overcome the presumptions created by the 90 per cent acceptance rule, but they must also prove on the balance of probabilities that the offer is unfair to shareholders as a whole. Practical difficulties such as poor access to information are also faced and there is no flexibility in assessing the value of the contested shares should the minority be ultimately unsuccessful.

Therefore, if the Companies and Securities Advisory Committee is to examine ways in which protection against compulsory acquisition on unfair terms can be made consistently available for minority shareholders, then the "safeguards" in s. 701 may be a good place to start. For instance, it may be feasible for the onus of proof to be reversed, so that the majority must prove that the acquisition is fair or that unfairness is assessed in relation to the circumstances of the individual shareholder.

Ultimately, it is not sufficient to grant minority shareholders a right to defend their property if in fact that right is essentially illusory.

"Some shareholders are prepared to sell their shares without much consideration, particularly if they can do so at a profit. Other shareholders may prefer to hold. They may have a better grasp of the true value of the shares or may have a more rosy view as to the future of the company. Apart from the statute one of the rights of the shareholders is to hold."\(^{129}\)

\(^{129}\) Re John Labbatt, supra, n. 113 at 163.