
Companies and Securities Advisory Committee

Report to the Minister for Financial
Services and Regulation

on

Compulsory Acquisitions

March 2000

Compulsory Acquisitions

Request from the Minister

The Minister for Financial Services and Regulation, The Hon Joe Hockey MP, by letter of 7 December 1999, requested the Advisory Committee to consider and report on whether it is appropriate to amend the compulsory acquisition provisions of the Corporations Law as proposed by one Senator during debate on the CLERP Bill. The amendments put forward by that Senator are as follows (as indicated by revision marks and italics):

Subsection 661E(2) be rewritten as follows:

“The Court may order that the securities not be compulsorily acquired under subsection 661A(1) only if the Court is satisfied that *the terms of the proposed acquisition are not fair and reasonable.*”

Subsection 664F(3) be rewritten as follows:

“If the 90% holder establishes that the terms set out in the compulsory acquisition notice *are fair and reasonable*, the Court must approve the acquisition of the securities on those terms. Otherwise, it must confirm that the acquisition will not take place.”

Paragraph 667A(1)(b) be rewritten as follows:

“state whether, in the expert’s opinion, the terms proposed in the notice *are fair and reasonable.*”

Section 667C - Valuation of securities - *to be repealed.*

Judicial criteria for approving a compulsory acquisition

The Advisory Committee recommends that no amendment be made to ss 661E(2), 664F(3) and 667A(1)(b).

The Advisory Committee confirms the recommendation in its *Compulsory Acquisitions Report* (1996) and in its *Commentary on the CLERP Bill* (March 1999) that the only appropriate consideration for the court to take into account in a disputed compulsory acquisition, either following or independently of a takeover bid, should be fair value. The reference to “fair value” in the existing provisions achieves this result and should not be changed.

The Committee also confirms the recommendation in its *Compulsory Acquisitions Report* (1996) and in its *Commentary on the CLERP Bill* (March 1999) that there should be no “proper purpose” requirement for the exercise of a compulsory acquisition power, nor should the court have any power to set aside a compulsory acquisition on any non-procedural grounds other than fair value. Either provision could give rise to protracted litigation and legal uncertainties, particularly if the High Court’s approach in *Gambotto v WCP Ltd* (1995) 182 CLR 432 were to be applied to

those provisions. Also, inclusion of criteria other than fair value may result in bidders being unable to compulsorily acquire remaining shares even where they have satisfied the compulsory acquisition threshold. This may discourage some persons from conducting takeover bids, to the detriment of shareholders generally. Various respondents to the compulsory acquisitions review, including the Law Council of Australia, were concerned to ensure that the *Gambotto* principles or other non-financial factors do not apply to compulsory acquisitions.

Valuation of securities

Section 667C sets out the steps for determining fair value in any compulsory acquisition, namely:

- assess the value of the company as a whole
- allocate that value among the classes of issued securities in the company (taking into account the relative financial risk, and voting and distribution rights, of the classes), and
- allocate the value of each class pro rata among the securities in that class (without allowing a premium or applying a discount for particular securities in that class).

The Advisory Committee recommends that s 667C be retained.

The criteria in s 667C reflect the recommendation in the *Compulsory Acquisitions Report* (1996). They ensure that the same method of valuation applies to all compulsory acquisitions, whether following or independently of a takeover bid. They also achieve the appropriate balance between the interests of all the parties in a compulsory acquisition. They ensure that remaining shareholders are not forced to accept a discount on the value of their shares, merely because of their minority position. Likewise, they protect offerors from greenmailing by minority shareholders.