LEGAL COMMITTEE OF THE

COMPANIES AND SECURITIES ADVISORY COMMITTEE

COMPULSORY ACQUISITIONS

CONSULTATION PAPER

NOVEMBER 1994

Reforming the law of compulsory acquisitions

Part 1: General principles

The Legal Committee is considering whether ss 701 and 414 of the Corporations Law should be replaced. It is concerned about the procedural complexities, lack of certainty, and possibility of greenmailing, under these provisions, as identified in its Issues Paper, and the consequent resort in some instances to alternative methods of compulsory acquisition. A simpler and more certain acquisition procedure may be warranted.

The Legal Committee took the position in its Issues Paper that compulsory acquisitions should be permitted, notwithstanding that they override the proprietary rights of individual shareholders. The regulatory task was to balance the interests of all shareholders, and avoid minority oppression or dictation, by requiring

- full disclosure of all material facts relevant to the proposed compulsory acquisition
- fair and equitable treatment of persons affected by the acquisition, and
- adequate external scrutiny by the court or the ASC

The proposed substitute compulsory acquisition procedure outlined in Part 2 of this Paper adopts these principles. It would ensure that a shareholder with a 90% or greater voting share entitlement (controlling shareholder), at its election, can acquire all minority shares, without the possibility of minority veto. However, this right would be subject to any express contrary provision in a company's constituent documents or any shareholder agreement. This will preserve any stipulated rights of minority shareholders to retain their shares.

Minority shareholders would be protected in a compulsory acquisition through minimum price rules and by receiving independent expert advice on the fairness of the controlling shareholder's buy-out price. They would also have the right by simple election to require the court to review that price. Not all those shareholders seeking court assessment need participate in the court proceedings. Also, the costs of any court proceedings could be equitably borne through discretionary court orders.

All minority shareholders in a compulsory acquisition would be entitled to receive any privately negotiated higher price. This would protect against greenmailing by, or selective discrimination against, minority shareholders.

The controlling shareholder may commence, but not withdraw from, the compulsory acquisition procedure. This restriction may raise the prospect of a controlling shareholder lacking the funds to acquire all the minority shares, if the court awards a higher price than the controlling shareholder's buy-out price. The Legal Committee questions whether a gross disparity in these prices would often occur, given that an independent expert's opinion on price must be obtained at the outset. Also, over time, the courts would adopt more standardised pricing criteria in assessment proceedings.

A greater concern, if withdrawal was permitted, would be the possibility of a controlling shareholder declining to acquire the outstanding shares in the face of an adverse court ruling and indefinitely leaving those shareholders who sought assessment as a locked-in minority. This prospect could unduly discourage shareholders from seeking court review in the first place.

The compulsory acquisition procedure does not provide for any higher price determined by the court to be passed on to all minority shareholders. To this extent, not all minority shareholders will necessarily receive the same price per share. However, minority shareholders who choose court assessment also run the risk of receiving a lower than buy-out price and being subject to adverse cost orders. It may also appear inconsistent, and unfair to the controlling shareholder, to pass on price increases to all minority shareholders, but not price decreases. The latter possibility would be unsatisfactory as those minority shareholders who accept the buy-out price should not be financially disadvantaged by those who choose court assessment.

The Legal Committee is also considering whether the proposed compulsory acquisition procedure should deal with non-voting shares and other securities convertible into shares. In principle, this should be permitted to allow the controlling shareholder to take advantage of taxation provisions that require 100% control or deal with the assets of the company without needing to consider minority interests.

Part 2: The proposed compulsory acquisition procedure

General principles

- The compulsory acquisition procedure shall be separate and distinct from the takeover procedure. It shall replace s 701 and s 414 of the Corporations Law.

- The controlling shareholder may acquire minority shares other than through the compulsory acquisition procedure. It may acquire them through private agreement or be obliged to acquire them under s 703. The price for any shares acquired outside the compulsory acquisition procedure shall not be increased to any higher price paid for compulsorily acquired shares. However, the price paid in these private acquisitions may affect the minimum price in any compulsory acquisition.

- A controlling shareholder may choose to compulsorily acquire all remaining shares at any time, whether or not the controlling shareholder has previously conducted a takeover bid. This right is subject to any contrary provision in a company's constituent documents or in any other agreement or arrangement binding the controlling shareholder.

- A controlling shareholder may not withdraw from the compulsory acquisition procedure, once commenced.

- A compulsory acquisition cannot be selective. It must be for all minority shares.

- A minority shareholder cannot challenge the right of compulsory acquisition. Each minority shareholder can only either accept the compulsory acquisition price or elect for court assessment of that price.

- Subject to any court assessment, all remaining minority shareholders shall receive the same price per share.

- From the commencement of the compulsory acquisition procedure, all minority shares shall have no voting or dividend rights, except for dividend rights accruing before that date.

- Minority shares shall be transferred to the controlling shareholder, upon the controlling shareholder paying the requisite price.

Summary of procedural steps

1. A controlling shareholder who elects to undertake compulsory acquisition must serve on the company and lodge with the ASC on the same day (the commencement date) a notice of compulsory acquisition and an independent expert's report.

2. The company must within [7 days] of the commencement date send minority shareholders the prescribed notice and expert's report, together with prescribed particulars, including the buy-out price, and a court assessment request form.

3. Shareholders wishing to have their share price determined by the court must complete and return the form to the company within [28 days] of its being sent by the company.

4. The controlling shareholder must pay shareholders who do not seek assessment within [14 days] of the expiration of the [28 day] period for return of the court assessment forms.

5. There are notification and payment procedures where a controlling shareholder pays a higher price for any minority shares.[1] All minority shareholders in the compulsory acquisition are entitled to that higher price.

6. There are procedures to permit a shareholder seeking assessment to withdraw and receive the price paid to the other minority shareholders in the compulsory acquisition.[2]

7. Any application for court assessment must be initiated within [4 months] of the commencement date.

8. If an application is made, assessment proceedings take place.

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[1] This step is not taken in all cases.
[2] This step is not taken in all cases.

9. The controlling shareholder must pay the shareholders who sought assessment within [14 days] of the expiration of the appeal period unless the court otherwise directs. Any shareholders who appeal shall be paid within [14 days] of the appeal court determination.

Details of procedural steps

- *Commencing the procedure.* The controlling shareholder may commence the compulsory acquisition procedure for all remaining minority shares by serving on the company and lodging with the ASC on the same day (the commencement date) a prescribed notice of compulsory acquisition (the prescribed notice), setting out the buy-out price determined by the controlling shareholder, and an independent expert's report stating whether, in the expert's opinion, the buy-out price is fair and reasonable for shares in the company. The fact that the particular shares represent a minority interest which may attract a premium or a discount is to be disregarded.

- *Minimum buy-out price.* If the controlling shareholder, or any associate, has acquired, or has agreed to acquire, any shares in the company (whether under a formal bid or otherwise) in the [4 months] prior to the commencement date, the compulsory acquisition price must be no less than the highest price paid for those shares (cf s 641).

- *Notice to minority shareholders.* Upon being served with the prescribed notice from the controlling shareholder, the company must send a notice to remaining minority shareholders within [7 days]. That notice must include a copy of the prescribed notice and the independent expert's report and prescribed particulars informing these shareholders of their option to accept the compulsory acquisition price or exercise assessment rights. The notice must also explain the assessment procedure, including the court's general discretion regarding costs, and must be accompanied by a form to be completed and returned by any shareholder seeking assessment.

- *Election by minority shareholders.* Minority shareholders who wish to exercise assessment rights (shareholders seeking assessment) must complete and return the form to the company within [28 days] of its being sent by the company. The shares of minority shareholders who do not return that form to the company within that period (shareholders not seeking assessment) shall be compulsorily acquired for the price in the prescribed notice (subject to one exception - see next point). The controlling shareholder must pay that price to shareholders not seeking assessment within [14 days] of the expiration of the period for return of the assessment form.

- *Flow-on of privately negotiated higher price.* If the controlling shareholder, at any time after the commencement date, pays, or agrees to pay, for any minority shares, a price higher than the compulsory acquisition price stated in the prescribed notice (excluding any court assessment price) or any earlier deemed higher price, that higher price (the deemed higher price) shall be the compulsory acquisition price for all minority shareholders. The controlling shareholder must serve on the company and lodge with the ASC a notice of the deemed higher price within [2 business days]. If the period for lodging the court assessment forms has not expired, the company must notify all minority shareholders of the deemed higher price within [7 days] of its being notified. If that period has expired:

- the company must notify all shareholders seeking assessment of the deemed higher price within [7 days] of its being notified and
- the controlling shareholder must pay the difference between any amount already paid and the deemed higher price to all shareholders not seeking assessment within [14 days] of its serving the notice of deemed higher price on the company.

- *List of shareholders seeking assessment.* A shareholder seeking assessment shall, upon written request to the company, be entitled to receive as soon as practicable a written statement of the names and addresses of all other shareholders seeking assessment (cf s 701(9)).

- *Withdrawal of court assessment notice.* A shareholder seeking assessment may unilaterally withdraw the assessment notice (and thereby have the shares acquired on the same terms as for shareholders not seeking assessment) at any time prior to the commencement of the judicial proceedings. A shareholder seeking assessment may also unilaterally withdraw after that time by accepting any deemed higher price, within [7 days] of being notified of the higher price by the company. Otherwise, the shareholder may only withdraw after the commencement of judicial assessment proceedings with the consent of the court. The controlling shareholder must pay for the shares within [14 days] after the minority shareholder lodges with the company a notice of withdrawal.

- *Application to court.* The controlling shareholder or any shareholder seeking assessment who has not withdrawn the assessment notice may at any time within [4 months] of the commencement date apply to the court for an assessment of all shares of shareholders seeking assessment. A copy of that application must be served on the company and the controlling shareholder if that shareholder is not the applicant. If no application is made within that period, the assessment rights shall expire and the shares shall be acquired on the same terms as for shareholders who did not seek assessment.

- *Notifying an application.* Upon being served with an assessment application, the company must give the court a list of all shareholders still seeking assessment. The court may order that all persons on that list be notified of the application, and the application be otherwise advertised.

- *Standing.* The controlling shareholder and each shareholder still seeking assessment shall have full standing in the assessment proceedings. These shareholders, other than any applicant, are not required to participate in the assessment proceeding. The ASC has standing to intervene (s 1330).

- *Court assessment of price.* The court shall determine a fair price for the shares of all shareholders still seeking assessment, excluding any premium or discount for the shares being minority shares. At its discretion, the court may include a fair rate of interest for the period since the commencement date. The court shall have broad discovery powers to obtain information relevant to determining a fair price.

- *Discretion over costs.* The court may apportion the costs of the proceedings as it deems equitable. For instance, the court may order that the costs of any shareholder seeking assessment who participated in the court proceedings be paid by the controlling shareholder or be pro-rated against the price to be paid for all assessed shares, or that the controlling shareholder's costs be met pro-rata by all remaining shareholders who sought assessment.

- *Appeal.* Any shareholder who sought assessment may appeal from the court decision within 21 days. The same standing rights, appeal withdrawal rights and cost discretion principles shall apply to appeals. Only appellants shall receive any higher price assessed by the appeal court. However, all minority shareholders shall receive any privately negotiated higher price.

- *Paying shareholders who sought assessment.* The shares of all shareholders who still sought assessment must be acquired by the controlling shareholder for the price determined by the court, adjusted between the parties for any costs order. Unless the court otherwise directs, that price must be paid within [14 days] of the expiration of the appeal period to any shareholder who does not appeal. Shareholders who appeal shall be paid within [14 days] of the appeal court determination.

The Legal Committee reiterates that this is a Consultation Paper only. The Committee has not yet settled its position. It will review all responses to this Consultation Paper before settling its Final Report.