REPORT OF THE COMPANIES AND

SECURITIES LAW REVIEW COMMITTEE

on

THE TAKEOVER THRESHOLD

To: The Ministerial Council for Companies and Securities

Introduction

[1] At its meeting held in Perth on 24th May 1984, the Ministerial Council for Companies and Securities resolved to:

"request the Companies and Securities Law Review Committee to examine the threshold level as the next most important matter requiring attention in the context of its general reference on the takeover code".

[2] Following receipt of that request, the Committee made direct enquiries of certain persons and bodies thought likely to have an interest in the question whether 20% represents the' appropriate level of voting shareholding beyond which acquisitions of shares should be regulated by the Companies (Acquisition of Shares) Act 1980.[1] The Committee also placed a notice in the press seeking views. Parties were asked to comment on the series of propositions set out in Appendix 1. Submissions and opinions were received from the persons and bodies mentioned in Appendix 2. In addition to submissions

1. References throughout this report to the Companies (Acquisition of Shares) Act 1980 and the Companies Act 1981 include references to the provisions of those Acts as they apply as laws of the States.

received and published materials, the Committee has had regard to the papers mentioned in Appendix 3.

[3] Having completed its consideration of the matter, the Committee now submits to the Ministerial Council its findings and recommendation.

The Committee's Approach to the Question

[4] The principle embodied in s.11 of the Companies (Acquisition of Shares) Act 1980 is that a single person or concerted group should not, by acquisition, achieve control over more than 20% of a class of a company's voting shares without:

(a) affording to all other shareholders of the class equal opportunities to dispose of their shares; and

(b) complying with disclosure and procedural requirements. That principle was foreshadowed by the Ministers' announcement following their meeting at Maroochydore in May 1978. The considerations that led Ministers at that time to choose 20% as the appropriate level have not, so far as the Committee can ascertain, been the subject of any public explanation.

[5] One State, namely Queensland, chose a threshold of 12.5% when enacting, before 1980, legislation giving advance effect to the Maroochydore proposals.[2] When introducing that legislation into the Queensland Parliament, the then Minister for Justice and Attorney-General said that 12.5% was "considered to be a more realistic figure".[3] When asked in committee to

2. Company Take-overs Act 1979 (Qld.).

3. Queensland Parliamentary Debates, Vol. 280, p.2363.

explain the variation from 20%, the Minister indicated that the lower percentage had been adopted to "test the functioning of the legislation in the interim period before the national legislation comes into force".[4] South Australia and Western Australia enacted similar laws in 1979 but chose a threshold of 20% consistently with the Maroochydore proposals. That threshold was also adopted in provisions of the Official Listing Requirements of the Australian Associated Stock Exchanges reflecting the Maroochydore principles.[5]

[6] The 20% threshold has now prevailed in statutory form throughout Australia (with the exception of the Northern Territory) for more than three years. The same threshold found a place in the stock exchanges' regulatory system for 18 months before the statutory controls came into effect. The Committee has therefore proceeded on the basis that any departure from the 20% level may be justified only if that level is shown to be productive of results inconsistent with the objects of the legislation.

The Objects of the Act

[7] The Committee believes that the objects of the Companies (Acquisition of Shares) Act 1980 may be found in s.59. That section supplements s.57 and s. 58 under which the National Companies and Securities Commission has power to exempt persons from requirements of the Act and to declare that the Act is to have a modified operation in particular circumstances. Section 59 makes it clear that, in exercising those powers, the Commission is to take account of "the desirability" of a particular principle and is to have regard for the "need" to ensure certain matters. It may be assumed, therefore, that the "desirability" and "need" with which s.59

4. ibid, p. 2471.

5. Section 3S(4)-(7) which came into force on 31st December 1979 and has since been repealed.

is concerned mark out the purpose that the Act is intended to serve, those matters being matters which according to the statute itself are to be the guiding principle in mitigating or otherwise modifying its direct effect.

[8] Whether the guiding principle laid down by s.59 is appropriate in any abstract sense is itself a matter for debate. That debate is beyond the scope of the present report. The question for immediate consideration is whether the 20% threshold is or is not compatible with that principle.

[9] The predominant matter to which s.59 directs attention is "the desirability of ensuring that the acquisition of shares in companies takes place in an efficient, competitive and informed market". That matter is paramount. Subsidiary to it is the need to ensure certain matters, namely:

(a) that the shareholders and directors of a company know the identity of any person who proposes to acquire a substantial interest in the company;

(b) that the shareholders and directors of a company have a reasonable time in which to consider any proposal under which a person would acquire a substantial interest in the company;

(c) that the shareholders and directors of a company are supplied with sufficient information to enable them to

assess the merits of any proposal under which a person would acquire a substantial interest in the company; and

(d) that, as far as practicable, all shareholders of a company have equal opportunities to participate in any benefits accruing to shareholders under any proposal under which a person would acquire a substantial interest in the company.

[10] The Committee sees itself as called upon primarily to say whether the existing level of 20% is compatible with the fundamental notion of acquisition of shares in an efficient, competitive and informed market. It is also required to decide whether, if that level is continued, adverse consequences might follow in terms of inadequacy of information in the possession of shareholders and directors of "target" companies, lack of reasonable time to consider any proposed acquisition of a substantial interest or lack of equal opportunities for all shareholders to participate in benefits accruing from acquisition of a substantial interest.

The Purpose of the Threshold

[11] The effect of s.11 is to allow unrestricted acquisition of shares in a company up to the point where a single person or concerted group is in a position to control a specified proportion of total voting rights or to control the disposal of a specified proportion of total voting shares.

[12] As a corollary, s.11 has the effect that an acquiring person or group is precluded from attaining a more powerful

6. See, however, paras. 99ff. below. The implications of differential and limited voting rights will be considered elsewhere in the course of the Committee's review of the takeover code.

position in relation to voting rights except by certain specified means. The two principal methods, takeover scheme under s.16 and takeover announcement under s.17, clearly involve mechanisms which give effect to the principles concerning general dissemination of information, timing controls and equality of opportunity for all shareholders to participate. Another method, which is available under s.12(g) and is perhaps not altogether compatible with s.315(21) of the Companies Act 1981 (or, in view of the ineffectiveness of unanimous consent, with other provisions), proceeds on the obvious assumption that the general body of shareholders, whose interests the legislation in large measure seeks to protect, may themselves "contract out" of the statutory protection. The final principal method, laid down by s.15, recognises the acceptability of gradual and open acquisition.

[13] Implicit in this statutory scheme is an assumption that the percentage upon which s.11 is based must represent a level of ownership and voting influence which falls short of actual control.[7] Regulation in the interests of shareholders as a whole, particularly when it is framed in terms of voting power, must be taken to be directed at acquisition of such voting power as will, through the ability to control the composition of the board of directors, carry with it the ability to determine policies and to influence the fortunes of the corporation. The s.11 percentage must therefore be set at a level which, as a practical matter, falls short of the power to control the business but which, at the same time, is not inconsistent with the efficient and competitive characteristics of the market.

7. Everyone who expressed an opinion to the Committee on this position agreed with it.

[14] The principle of equality of opportunity to participate in benefits underlines the view that the s.11 percentage must be set at a level falling short of control. It seems to be recognized that the benefits inherent in control belong, at it were, to the general body of shareholders and that no single person or group should reap those benefits unless that general body has been given an opportunity to participate in whatever concomitant benefits flow from the passing of control.

The Control Concept

[15] In simple and direct terms, a single person is not in a position to control a company unless he is able to exercise more than one-half of the total number of votes that may be cast at a general meeting of the company. This notion of control of a company has long been recognised.[8] Although those who thus control a company as such may not necessarily control its business and activities,[9] it is always the case with a public company that directors in whom control of those matters does reside may be replaced at the wishes of a shareholder who can exercise a majority of votes at a general meeting on that issue.[10]

[16] As a practical matter, however, voting power falling short of a clear majority will often carry control of the company and, accordingly, the power to control its business and activities. In its Second Interim Report of February 1969, the Company Law

8. Gramophone and Typewriter Ltd. v. Stanley [1908] 2 K.B. 89; British American Tobacco Co. Ltd. v. Inland Revenue Commissioners [1943] A.C. 35; Inland Revenue Commissioner v. J. Bibby & Sons Ltd. [1945] 1 All E.R. 667; Mendes v. Commissioner of Probate Duties (1967) 122 C.L.R. 152.

9. Commissioner of Taxation v. Commonwealth Aluminium Corporation Ltd. (1980) 30 A.L.R. 449.

Advisory Committee to the Standing Committee of Attorneys-General (Eggleston Committee) said:

"In the case of a company with large numbers of small shareholders it is unlikely that any one shareholder would need to control as much as one-third of the voting power to gain control of the company. Various lower figures have been suggested, and it is not easy to determine a figure which will be appropriate in all cases".[11]

[17] The difficulty of identifying any arbitrary percentage marking the point at which control arises has been described as follows:

"The attempts to define control in terms of a fifty percent interest lose sight of the particular distribution of the shareholdings of a company. A five percent interest in a widely held public company may be enough to control that company. On the other hand, the character of the shareholder enters into any appraisal of control. For example, a large institutional investor (superannuation fund) may hold forty percent or fifty percent of a company but not take a voting interest in the company's affairs. In such a case even a majority holding would not be an accurate barometer of control".[12]

[18] The same difficulty has been described elsewhere:

"As a practical matter a company or individual wishing to acquire control of another company does not need to acquire all the assets or all of the shares in the other

11. Report, para. 27.

12. D. Nochimson, "The M.L.C. Ordinance - A New Legal Approach to Foreign Investment", (1969) 43 A.L.J. 101.

company. Depending upon the dispersal of the existing shares, the acquisition of forty, twenty-five or even fifteen per cent of the shares may confer effective de facto control, and such acquisition will be very much cheaper than the purchase of 100 percent of the shares. In a public company, with widely dispersed shareholdings, the acquisition of fifteen percent of the shares from the existing controllers, coupled with an arrangement for appointment by the retiring controllers of the purchaser's nominees as directors, will enable the purchaser, assisted by the benefits of controlling the proxy machinery, to perpetuate its control".[13]

[19] It has been suggested that empirical research might disclose a percentage level which, in the majority of cases, can be said to represent control of a company. In the context of foreign investment laws, Nochimson[14] said:

"What is called for is a detailed and empirical study of Australian companies in order to gauge what is a realistic measure of control. Perhaps a sliding scale formula can be devised. Some well thought out criteria must be selected and the more informed the draftsmen are on shareholding structures and company behaviour, the better the chance that the ultimate legislative choice will coincide with reality".

[20] While such a proposition has theoretical merit, the Committee doubts that statistical analysis would yield any useful result for present purposes. It is difficult to identify

13. J.R. Peden, "Control of Company Take-Overs", (1970) 44 A.L.J. 208.

14. ?????????

instances of the manifestation and exercise of control. The Committee has considered but rejected the possibility of undertaking a detailed and statistical appraisal of cases in which matters of a significant and contentious kind have been placed before general meetings of listed public companies. Such cases might include proposals for resolutions under s.12(g) of the Companies (Acquisition of Shares) Act 1980, under Sections 3J(3), 3E(6) and 3E(8) of the Official Listing Requirements of the Australian Associated Stock Exchanges, for the removal of directors and for the approval of schemes of arrangement. The fact is that in all such cases many factors other than abstract power will have a bearing on the result. In short, the Committee has concluded that, even if accurate data on such matters could be assembled, that data would not necessarily provide any reliable guide as to the point of demarcation of the ability to control in any general and abstract sense.

[21] The Committee has, however, reviewed a number of statutory provisions in Australia which might provide guidance on the question of control.

Companies Act 1981 - Consolidation of Accounts

[22] The Companies Act 1981 regards one corporation as a subsidiary of another where share ownership or voting power exceeds 50% or power to "control" the composition of the board of directors exists. The holding company - subsidiary relationship, which thus proceeds according to the most conservative view of control, plays a part in many of the provisions of that Act. Principal among them are the provisions concerning group

accounts which recognise the need to regard a holding company and its subsidiaries as a single accounting entity.

[23] Accounting theory has progressed beyond these Companies Act provisions. According to that theory, it is appropriate for a company to account for its interest in another corporation over which it exerts "significant influence" by bringing to account its "equitable share" of the accumulated profits or losses of that other corporation. This "equity accounting" approach is seen by the International Accounting Standards Committee[15] as appropriate where the investor company participates in, but does not control, the financial and operating policy decisions of the other corporation (the "investee"). The relevant international accounting standard reads in part as follows:

"If the investor holds less than 20% of the voting power of the investee, it should be presumed that the investor does not have the power to exercise significant influence unless such power can be clearly demonstrated".

[24] The objects of these accounting principles are far removed from those of the Companies (Acquisition of Shares) Act.

Companies Act 1981 - Substantial Shareholdings

[25] Division 4 of Part IV of the Companies Act 1981 requires public disclosure of "substantial shareholdings" in companies the securities of which are traded on stock exchanges. A person has such a "substantial shareholding" if, alone or with associates, he is in a position to control 10% of voting rights or to control disposal of 10% of voting shares.

15. International Accounting Standard IAS 3, published in 1976.

[26] Provisions of this kind were introduced following recommendations made by the Eggleston Committee in its Second Interim Report of February 1969 and drew upon United Kingdom and United States models. The Eggleston Committee saw such legislation as:

"justified by the consideration that in the case of companies whose shares are traded on stock exchanges, shareholders are entitled to know whether there are in existence substantial holdings of shares which might enable a single individual or corporation, or a small group, to control the destinies of the company, and if such a situation does exist, to know who are the persons on whose exercise of voting power the future of the company may depend."[16]

[27] These comments do not suggest that 10% marks a level at which control exists - rather, that it represents a level which may raise some presumption of a possible intention to move towards control. That such thinking lay behind the initial choice of 10% as the relevant proportion in corresponding united Kingdom legislation is demonstrated by the comments of the Company Law Committee (Jenkins Committee) in its Report of January 1962:

"[T]he directors, other shareholders, and indeed the employees of a company, all of whom may be materially affected, ought to be able to ascertain the identity of any substantial holder of the company's shares; this is of particular importance in cases where there is reason to suppose that someone may be in the process of buying for

16. H.M.S.O. Cmnd. 1749, para. 142.

control. Even where a holder of a substantial number of shares is not actually buying with this intention it may be of interest to the others concerned to know whether, for example, someone is in a position to veto a special resolution of the company, and who that person is".[17]

The Eggleston Committee was in general agreement with the Jenkins Committee on this issue.

[28] It is clear that the 10% level adopted by the "substantial shareholding" provisions is seen as falling short of control. Those provisions create an early warning system. They require that a person or group with 10% must, if proceeding further, proceed in the open. Beyond the requirement of publicity, they impose no constraints.

[29] Division 4 of Part IV is, in a sense, supplemented by s.261 of the Companies Act 1981. That section enables (and, in some circumstances, compels) a listed company to enquire into the identities of persons who may ultimately influence voting rights regardless of the size of shareholding involved. By this means too there exists machinery for identification of persons who may be thought to be working towards a position of control.

Australian Takeovers Legislation of 1961 and 1971

[30] Reference has already been made to comments of the Eggleston Committee in February 1969 concerning the difficulties of finding an arbitrary percentage appropriate for the regulation of takeovers.

17. H.M.S.O. Cmnd. 1749, para. 142.

[31] The legislation under consideration by that committee was s.184 of the Companies Acts and Ordinances of 1961 and 1962. That section regulated, in a way that is rudimentary by present-day standards, any scheme involving the making of offers for the acquisition of all shares in a company (or all shares in a particular class) or of any shares which, together with shares already held beneficially by the offeror or a related corporation of the offeror, carried the right to exercise, or control the exercise of, not less than one-third of the voting power at a general meeting. As a corollary, an acquisition scheme aimed at a level below one-third was not subject to regulation.

[32] The Eggleston Committee expressed agreement "with the general principle that if a natural person or corporation wishes to acquire control of a company by making a general offer to acquire all the shares, or a proportion sufficient to enable him to exercise voting control, limitations should be placed on his freedom of action". The limitations foreseen were those necessary to ensure, broadly speaking, the matters which s.59 of the Companies (Acquisition of Shares) Act 1980 prescribes as the general principles it seeks to serve.

[33] The Eggleston Committee had little to say about the appropriate percentage. It noted that there seemed to be general agreement that the figure of one-third was too high. It went on to say:

"Various lower figures have been suggested, and it is not easy to determine a figure which will be appropriate in all cases. However, we consider that any person who is seeking to gain control of 15% or more [emphasis added] of

the voting power is likely to be aiming at control of the company itself, and we do not see any disadvantage in fixing the figure at that level rather than at some other level between 15% and the present 33 1/3".[18]

[34] It will be apparent that the question of the appropriate percentage received no detailed consideration by the Eggleston Committee. When amending legislation was introduced in most States in 1971, the recommendation of 15% was accepted and implemented: s.180C(2)(a) and s.180D.

[35] It is important to note the purpose served by the 15% criterion in the 1971 takeover provisions. Those provisions regulated the making of offers to acquire shares. Section 180C(1) prohibited the making of such offers generally except in accordance with certain procedures. Later sub-sections of s.180C(2) created exceptions to the general rule. One of those exceptions related, in broad terms, to an offer or offers the success of which would not cause the offeror's level of ownership to exceed 15%. Of greater significance was s.180C(7). It excluded from the prohibition an offer to acquire shares in~ the ordinary course of stock market trading. The 15% limit was therefore by no means an absolute limit upon shareholding. In that respect, the 15% criterion adopted in 1971 differed significantly from the 20% figure found in s.11 of the Companies (Acquisition of Shares) Act 1980.

Foreign Takeovers Act 1975

[36] The Foreign Takeovers Act 1975 regulates acquisition of shares in certain companies by overseas interests. It does so by

18. Report, para. 27.

reference to two separate thresholds: a 15% threshold related to a single overseas party or associated group and a 40% threshold related to total foreign ownership.

[37] If any analogy can be drawn with the circumstances now under consideration, it is with the provisions of the Foreign Takeovers Act which regulate acquisition by a single overseas entity or group. Where such an acquisition occurs without prior official clearance, the Treasurer of the Commonwealth may take action of various kinds.

[38] The provisions of s.18 of the Foreign Takeovers Act are such that the Treasurer's power to act against an acquisition of shares arises, in a purely threshold sense, if one overseas party or group accounts for 15% or more of total shares or voting rights. It is clear, nevertheless, that a 15% shareholding is not automatically to be regarded as carrying control. Section 18 is based upon the statutory notion of "controlling interest". Section 9(2) raises a presumption of "controlling interest" at 15% but in fact goes on to say that a person in that position is not to be regarded as possessing such an interest if "the Treasurer is satisfied that, having regard to all the circumstances, that person together with the associate or associates (if any) of that person is not ... in a position to determine the policy of the corporation".

[39] It is thus clear that the operation of the Foreign Takeovers Act is based, in the final analysis, upon the Treasurer's view of the practical ability of a 15% shareholder actually to determine the corporation's policy.

[40] The Foreign Takoevers Act operates in an environment and for purposes which differ significantly from those with which the Companies (Acquisition of Shares) Act is concerned. Its purpose is related to the economic well-being of Australia and, in that context, to the concentration of economic power. It is not concerned with the rights of shareholders or with the maintenance of an efficient, competitive and informed market in securities. Its ultimate operation depends upon official assessment of the effects of an acquisition on the basis of, among other things, actual power to determine a corporation's policy.

[41] The 15% threshold therefore marks no more than an arbitrary level at which official scrutiny is put within statutory reach. At that point, each particular transaction may be examined separately and an official view may be taken as to the likelihood of control or influence inimical to the national interest.

Broadcasting and Television Act 1942

[42] The Broadcasting and Television Act is similar, in concept, to the Foreign Takeovers Act. Again there is no absolute prohibition and again 15% represents a level at which official scrutiny may be undertaken. In this case, also, an assessment against statutory criteria related to the "public interest" is to be made if ownership beyond that level is in contemplation.

[43] Fixing of the level of ownership at which official examination may be undertaken against some criterion of national or public well-being might be thought to entail more conservative

thinking than the fixing of a level which seeks to regulate market behaviour in the interests of those whose commodity is traded in that market.

Banks (Shareholdings) Act 1972

[44] The Banks (Shareholdings) Act 1972 limits individual or associated holdings in an Australian bank to less than 10% of the total voting shares unless the Governor-General fixes a higher percentage. The Commonwealth Government has recently announced proposals to vary this 10% level so that a holding of up to 15% may be permissible in some instances.

[45] The Committee of Enquiry into the Australian Financial System (Campbell Committee) noted[19] that various reasons have been put forward in support of ownership restrictions under this Act. An original justification, it is said, was foreign ownership which is now dealt with by the Foreign Takeovers Act.

It is also suggested that ownership restrictions are necessary to avoid undue concentration of ownership within the financial sector. A related argument put forward in favour of the Act is, as the Campbell Committee observed:

"that management is more likely to be 'unduly influenced' by a small number of shareholders than by a widely diversified group. It is argued that ownership restrictions are necessary to ensure reasonable independence and continuity of the management and thus confidence in the banks concerned."

19. Para. 19.48 of its Final Report of September 1981.

[46] If this rationale is accepted, 10% (or, more recently, 15%) is presumably seen as the level at which a shareholder might exert "undue influence". Clearly, therefore, neither 10% nor 15% is regarded in that context as entailing control as such.

State Trustee Companies Legislation

[47] Legislation in various States places restrictions on the size of individual shareholdings in trustee companies. The prescribed maximums vary between companies but fall within the range 0.5% to 5%. There are no provisions at present for shareholders to increase their holdings beyond prescribed maximums, though this may soon be altered in Victoria.

[48] The shareholding restrictions were originally introduced for reasons peculiar to the nature of trustee companies. They were apparently designed in part to avoid the possibility of influence over a trustee company becoming concentrated in the hands of a person whose motives might be inimical to the interests of beneficiaries, clients or the general public. Another apparent purpose arose from provisions in the legislation imposing reserve liability upon shareholders. A low maximum shareholding was designed in part to ensure that shareholders could meet these liabilities in the event of liquidation.

[49] The Campbell Committee in its Final Report regarded these restrictions as incompatible with the principle of efficiency:

"These restrictions provide a significant barrier to new entry and effectively protect less efficient management

from takeovers that might be to the advantage of both shareholders and beneficiaries".[20]

[50] In October 1984 the Victorian Attorney-General introduced a Trustee Companies Bill which sets initially the maximum percentage of shares in which a person may hold a relevant interest at 5%. It also provides that a trustee company may insert into its articles of association a provision setting a higher percentage. The Bill prohibits a person from acquiring, in any event, more than 20% of the share capital without the written approval of the Attorney-General. The 20% limit was chosen because it was consistent with the threshold under the Companies (Acquisition of Shares) Act 1980.

[51] The restrictions on shareholdings in this legislation were designed to meet special circumstances relating to trustee companies. They offer only limited guidance on questions of shareholder influence and control outside that context. However, the provisions suggest that 5% was perceived as well below the level of potential influence or control of such companies.

Overseas Precedent

[52] The Companies (Acquisition of Shares) Act 1980 approaches takeover regulation in a way that seems to be unique. While there are some parallels in other countries, the concept of complete freedom of acquisition up to a specified level and regulation beyond that level only if the acquirer himself chooses to go further has no direct equivalent in other countries.

20. Final Report, para. 21.06.

[53] Nevertheless, some guidance on the threshold question may be gained from an examination of the laws and practices prevailing in the United Kingdom, the United States, Canada and New Zealand. As the following discussion will show, there are currently proposals in the last three of those countries for further reform.

United Kingdom

[54] The City Code on Take-overs and Mergers administered by the Panel on Take-overs and Mergers proceeds upon a basis different from that which underlies the Companies (Acquisition of Shares) Act 1980. Its purpose is not to mark out the level of shareholding beyond which acquisition is prohibited unless in accordance with particular principles and rules. Rather, it says that if a particular level of ownership is achieved, an offer must be made to all remaining shareholders. The City Code readily recognises that its purpose is to compel to further action, rather than to restrain from further action, a party who has already achieved a position of "effective control".

[55] Until 1974, the City Code made no attempt to define "effective control". The Panel executive, however, "usually treated a purchase of about thirty per cent of the shares from the directors or holders of blocks of shares as conferring effective control".[21] Where purchases had been made otherwise than from directors or holders of "blocks" of shares, a criterion of 40% was employed. Experience showed, however, that some overall arbitrary level was necessary in the interests of

21. A. Johnston, "The City Take-over Code", 1980.

practicality and in 1974 30% was adopted as an arbitrary measure of "effective control"[22]

[56] To the extent that the City Code is relevant at all to the matter before the committee, it may be taken to show two things: first, that an arbitrary percentage is seen in London as an appropriate approach; and, secondly, that a level of 30% is regarded there as the level at which control is assumed to have passed.

United States

[57] In the United States, s.14(d) of the Securities Exchange Act of 1934 regulates "tender offers" by imposing disclosure requirements on both the offeror and management of the target corporation and regulating the timing of the bid and certain aspects of its mechanics. While the attributes of a "tender offer" are not defined by the legislation, a test based on eight factors has been adopted by the Securities and Exchange Commission and has received some judicial acceptance[23]:

(a) active and widespread solicitation of public shareholders for the shares of a company;

(b) solicitation made for a substantial percentage of the shares;

(c) offer to purchase made at a premium over the prevailing market price;

(d) terms of the offer are firm rather than negotiable;

22. ibid.

23. Wellman v. Dickinson 475 F.Supp. 783 (1979); Brascan Ltd. v. Edper Equities Ltd. 477 F. Supp. 773 (1979); Stromfeldt v. The Great Atlantic and Pacific Tea Co. 484 F. Supp. 1264 (1980).

(e) the offer is contingent on the tender of a fixed number of shares, often subject to a fixed maximum number to be purchased;

(f) the offer is open for only a limited period;

(g) the offeree is subjected to pressure to sell his stock; and

(h) publicity precedes or accompanies the rapid accumulation of stock.

[58] Section 14(d) applies where, after consummation of the offer, the bidder would be the beneficial owner of more than 5% of the class of securities to which the offer relates. In such circumstances the bidder is fixed with disclosure obligations similar in some respects to those which apply to an offeror under the Companies (Acquisition of Shares) Act 1980.

[59] It has been said that this 5% threshold was adopted "apparently on the grounds that acquisition of 5% of a company's stock involved a substantial step towards control of the company"[24].

[60] In July, 1983 the Advisory Committee on Tender Offers released a report proposing that any acquisition resulting in total ownership of more than 20% of voting power of a corporation be required to be made by tender offer. The recommendation was founded on the premise that 20% represented a figure close to corporate control; that such control is a corporate asset; and that all shareholders should have an equal opportunity to share in the premium paid for that asset. This matter is still under consideration by the Securities and Exchange Commission which

24. M.M. Brown, "The Scope of the Williams Act and its 1970 Amendments", (1971) 26 Business Lawyer 1637.

appears at this stage more concerned with the question whether to introduce mandatory tender offer provisions than with any reservations about the threshold figure:-

"As its meeting on 13th March, 1984, the Commission expressed serious reservations about the Committee's proposal. Principal among the drawbacks with such a proposal is the regulatory burden that it would place on all forms of acquisition that result in more than 20% ownership, even those where control is not the ultimate objective.... The proposal, which would represent a fundamental change in the current system, could have significant impact on capital formation and corporation governance. The Advisory Committee itself acknowledge the difficult issues which the proposal would represent, noting its own 'extended debate' on the question".[25]

Canada

[61] Legislation regulating takeovers in Canada is found in the uniform provincial Securities Acts and the Canada Business Corporations Act. The provincial legislation applies where a takeover offer is made to an addressee within the province. The Federal Act operates where an offeree company is federally incorporated. A bid may attract both provincial and federal regulation.

[62] The uniform provincial legislation is based on the model 1966 Ontario Act which follows for the most part the

25. S.E.C. Paper on Two-Tier Tender Offers, June 1984.

recommendations made by the Kimber Committee in 1965. The Kimber Committee, in seeking to define the threshold for a mandatory takeover bid, fixed on the 20% figure, describing it as a reasonable balance between legal and effective control. This threshold was adopted in the Ontario Act. The Ontario Securities Commission subsequently reviewed the takeover legislation[26] and pointed out that the question of whether a block of shares materially affects control is not capable of arithmetical measurement. The Committee recommended that the 20% threshold be retained, commenting that "its examination of Canadian acquisitions suggests it to be realistic".

[63] The Securities Acts of the provinces have undergone substantial review and reform since 1970, but all have retained the 20% threshold. In January 1984 provincial administrators met to discuss a series of policy issues raised by the provincial takeover legislation and voted to retain the 20% threshold in their respective jurisdictions. [27]

[64] The federal legislation is based on the recommendations of the Dickerson Committee (1971). It adopts a 10% threshold. The Committee favoured this threshold as it constituted "a reasonable compromise between the Ontario law [20% mandatory bid threshold] and the U.S. law [5% disclosure threshold]".[28] The Committee conceded that the Ontario and U.S. thresholds had fundamentally different policy orientations, the former

26. Ontario Securities Commission Disclosure Report 1970.

27. CCH Canadian Securities Law Reporter, Vol. 3, p.54-891a, "Consensus on Amendments on Takeover Bid and Issuer Bid Legislation".

28. Report, para. 429.

regulating share acquisitions and the latter merely imposing disclosure obligations. The Committee nevertheless saw a sufficiently close association between the Canadian and U.S. jurisdictions to warrant this compromise. It therefore appears that adoption of the 10% threshold figure in the Canadian Federal Act was heavily influenced by United States law and practice.

New Zealand

[65] Special legislation to regulate takeover activity was introduced in New Zealand by the Companies Amendment Act 1963. This Act applies to takeover schemes which are defined under the Act as schemes:

"involving the making of offers for the acquisition of any shares in the company which, together with shares, if any, to which the offerer is already beneficially entitled, carry the right to exercise or to control the exercise of more than one fifth of the voting power at any general meeting of the company."

[66] The New Zealand Securities Commission, in 1983, put forward proposals for the introduction of new takeover legislation to replace the 1963 Act.[29] The proposed legislation follows the broad patterns of the Companies (Acquisitions of Shares) Act and retains the 20% threshold. There has been no published dissent from this figure.

29. Company Takeovers: A Review of Law and Practice, October 1983.

Assessment of Australian and Overseas Precedent

[67] The matters surveyed in paras. [15] to [66] of this report may be summarised as follows:

(1) In a purely abstract sense, control of a company exists where a single shareholder or group accounts for more than one-half of total voting power.

(2) In a practical sense, however, voting power falling short of an absolute majority will in many cases carry control.

(3) The Eggleston Committee in Australia and the City Code in London recognised ownership of 30% or 33.33% as likely, in the generality of cases, to entail actual control.

(4) In the United States, acquisition of 5% may in 1971 have been regarded as "a significant step towards" control while, more recently, 20% has been seen as a figure "close to" corporate control.

(5) The Eggleston Committee in Australia and the Jenkins Committee in the United Kingdom saw 10% as the level at which disclosure was appropriate in the interests of general awareness of possible moves towards control.

(6) In two cases where official controls over company ownership have been thought appropriate at Federal level in Australia, 15% has been regarded as the point beyond which such controls may be applied. Another case recognises that a level of 10% may involve "undue influence" or, at least, the potential for such influence. The State trustee companies legislation suggests 5% or less as a level not productive of undue influence

(7) A level of 15% was seen as appropriate by the Eggleston Committee and was incorporated into the Australian take-

over legislation of 1971. It did not, however, represent a level beyond which acquisition was in all circumstances prohibited.

(8) In an accounting context, ownership of less than 20% is in general regarded as too small to warrant the conclusion that a shareholder has an "equitable share" in the profits or losses of the company concerned.

(9) In New Zealand and at provincial level in Canada, 20% is seen as an appropriate threshold.

Submissions on the Control Question

[68] Many of those who addressed submissions to the Committee expressed opinions on the level of shareholding which, in Australia, carries control.

[69] Only one of them thought that a shareholding approaching 20% could ensure effective control. Another expressed the view that an offeror with 20% is "in a commanding position upon announcing a takeover offer".

[70] The predominant view was clearly that a shareholding of 20% falls short of effective control in the generality of cases. Those who identified particular percentages as likely to entail control referred to percentages in the range 30% to 45%.

Particular Arguments in Australia

[71] The considerations summarised in paras. [67] and [70] have led the Committee to conclude that, unless particular abuses or market factors otherwise indicate, the current level of 20% is an appropriate measure of a level of ownership which is likely to

fall short of actual control and is consistent with the objectives which the Companies (Acquisition of Shares) Act 1980 is intended to promote.

[72] Submissions received by the Committee, as well as other materials available to it, identify several matters requiring comment. These relate to perceived abuses and shortcomings which, it is said, might be overcome by changing the threshold.

The Warehousing Argument

[73] The view is taken in some quarters that reduction of the threshold would discourage the practice known as "warehousing". That term is used to describe a situation where one person, because he has reached or is about to reach the maximum permissible level of share ownership, arranges in some way for others to take up buying where he is forced to desist. Those others will often be "associates" of the party concerned by operation of s.7(4) of the Companies (Acquisition of Shares) Act 1980 and, if they are, the warehousing operation will entail contravention of s.11.

[74] There are mechanisms available to unveil "associateship". The National Companies and Securities Commission's power to conduct hearings has been used in this context.[30] In at least one other case, the Commission has moved informally but successfully to cause associates to reduce their combined holding below 20%: the case of McDonnell and East Ltd. The Commission also has at its disposal under s.261 of the Companies Act 1981

(30) See, for example, Hearing into Acquisition of Shares in Grace Bros. Holdings Limited; Hearing into Acquisition of Shares in Murphyores Holdings Limited.

procedures enabling it to enquire into ultimate ownership and control of shares in listed companies regardless of the level reached by any one party. Section 45(2) of the Companies (Acquisition of Shares) Act 1980 will, in some circumstances, cast the burden of disproving association upon the alleged associates.

[75] There is little evidence to suggest that reduction of the 20% threshold would reduce the temptation to resort to ware-housing. In a paper dated 26th March 1980, the National Companies and Securities Commission expressed the opinion that "if the existing threshold [i.e., the 15% threshold embodied in the 1971 legislation] is raised to 20% it will inevitably encourage clandestine acquisitions that will also on occasions be illegal". In a subsequent paper (1st July 1983), the Commission said that "although there is no direct evidence on the point, it is the N.C.S.C. 's view that a reduction of the threshold [from 20%] to 10 per cent is likely to increase the extent of warehousing". A majority of the submissions to the Committee which expressed an opinion on this issue supported the latter view.

[76] Once a person achieves 10% ownership of a listed company, that person must declare his interest under Division 4 of Part IV of the Companies Act 1981. The spotlight is then upon him. Somebody intent upon by-passing the 20% level by covert means is therefore probably more likely to resort to those means before reaching 10%. Once he shows his hand at 10%, continues acquiring and, at 20% decides to rest, not only the Commission but also the target company itself is likely to have taken an interest in

other share movements as well. In short, the existence of the 10% substantial shareholding disclosure provisions already achieve to some extent whatever protection against warehousing might follow from lowering of the takeover threshold itself. It is perhaps significant that the only reported court decision on the general subject of warehousing involved the substantial shareholding provisions rather than the takeover threshold.[31]

[77] It may be argued against this view that the 10% substantial shareholding provision is of limited effectiveness in cases where a large holding is amassed on the market in a very short time - perhaps even in a single day. Disclosure of a substantial shareholding may not in fact be made until the second business day after it is achieved. If that is perceived as a problem, a shorter time might be prescribed for disclosure. It might be provided, for example, that a brief announcement specifying the party's name and the percentage level reached must be made to stock exchanges on the day on which the 10% level is actually achieved. That could be followed, within two business days, by the more comprehensive disclosure called for by the present provisions. Consideration might also be given to reducing the level at which substantial shareholding notification is required from the present 10% to, say, 5%.

The Slowing of Acquisition Argument

[78] It might also be argued that reduction of the threshold would ensure that directors and shareholders of a target company

31. National Companies and Securities Commission v. Orlit Holdings Ltd. (1983) 8 A.C.L.R. 164.

will be assured of more time in which to assess the intentions of a potential bidder and to make rational and unpressured decisions. According to this argument, a bidder who launches a takeover scheme from a position of 20% may, particularly if he has access to the stock market under s.13(3), proceed with relative ease to a position of control because shareholders feel that his success is almost a foregone conclusion.

[79] This argument has some merit although an initial 20% stake does not assure success of a bid. The real problem, however, may lie not in the takeover threshold itself but in the bidder's ability to purchase shares on the stock market. A possible solution to that problem has already been foreshadowed by clause 9 of the Companies and Securities Legislation (Miscellaneous Amendments) Bill (No. 2) 1984. That clause proposes alterations to s.13 of the Companies (Acquisition of Shares) Act 1980 the effect of which will be that a bidder has no access to the stock market after reaching the 20% level unless his bid is an entirely unconditional cash bid for all shares to which he is not already entitled.

[80] While it may be so that, in many instances where a bidder launches a takeover scheme from a position of 20%, the bid is ultimately successful, this is by no means invariably the case.[32]

32. For example, offer by ADC Buildings for Enacon Ltd.; offer by O'Connor Investments for Abbott Holdings Ltd.; offer by Belstone Investments for Dickenson & Johnson Holdings Ltd.; offer by Hartogen Energy for Oil Company of Australia N.L.

The Informed Market Argument

[81] It is sometimes said that a reduced takeover threshold would cause the market generally to be better informed. The Committee strongly doubts that this is so and a large majority of the submissions received said that the proposition cannot be supported.

[82] The takeover threshold itself clearly has little, if anything, to do with the processes by which the market is put into possession of facts relevant to its efficient and informed operation. To the extent that knowledge of the pattern or concentration of ownership of a company's shares is relevant to those matters, that knowledge should be produced by provisions such as s.261 and Division 4 of Part IV of the Companies Act 1981. Those provisions are concerned in a real and direct way with eliciting information. The takeover threshold, on the other hand, serves a different purpose.

The Entrenched Inefficiency Argument

[83] It may be argued that if the 20% threshold were reduced takeover activity generally might be discouraged. According to this argument, prospective bidders might be less willing to pursue their plans because of the added uncertainty that absence of a significant initial stake (or the availability of such a stake) would entail. A perceived by-product of discouragement of takeover activity is a tendency for existing and perhaps inefficient management to become entrenched to the possible detriment of shareholders.

[84] The Committee is of the view that arguments such as these are of marginal relevance only to the present debate. The function of the Companies (Acquisition of Shares) Act 1980 is neither to encourage nor to discourage takeover and merger activity. The objects stated by the Act itself are to promote an efficient, competitive and informed market and to protect, in the manner indicated by paras. (a) to (d) of s.59, the position of company shareholders. The Committee therefore regards as only incidentally relevant to the question of an appropriate threshold matters such as tendencies to entrench inefficient management, the desirability or undesirability of vertical and horizontal integration, the extent to which concentration of ownership of particular industries should be promoted or inhibited and the question whether corporate diversification and "empire building" ought or ought not to be controlled. These matters, if they warrant legislative attention at all, should be dealt with outside a statute which is concerned with share market efficiency and protection of shareholders against surreptitious and discriminatory appropriation of the corporate control that belongs to them collectively. If it were otherwise, the Companies (Acquisition of Shares) Act would become some kind of amalgam of its present provisions, s.50 of the Trade Practices Act 1975, the provisions of the Banks (Shareholdings) Act 1972 and the Foreign Takeovers Act 1975 and whatever other statutory measures are at present concerned with the wider commercial, economic and nationalistic aspects of merger activity.

[85] A comment might nevertheless be ventured on the inefficiency entrenchment argument which does have some bearing

upon the interests of shareholders. In the United Kingdom, the Committee to Review the Functioning of Financial Institutions (Wilson Committee) said in its report of June 1980:

"In the final analysis, the takeover mechanism, the market for corporate control, may threaten to put the management of inefficient companies into more competent hands, and this threat may help to keep management on their toes."[33]

[86] This observation no doubt has some validity in Australia too. The Campbell Committee, speaking of the Banks (Shareholdings) Act 1972, said:

"The Committee is of the view, however, that a dispersion of shareholdings may give unwarranted security of tenure to management, which could inhibit efficiency and innovation."[34]

[87] The potential for larger shareholdings may serve to increase the accountability of management to shareholders. Institutional shareholders in particular may have a role to play.[35]

[88] The Committee therefore thinks that, to the extent that these matters are relevant at all to the takeover threshold issue, they provide indications against any reduction.

33. H.M.S.O., Cmnd. 7937, para. 658.

34. Final Report, para. 19.52. See also Second Interim Report of the Eggleston Committee, para. 14. Such an opinion appears to be shared by a majority of those who mentioned the matter in submissions to the Committee.

35. See generally, Wilson Committee Report, Chapter 19.

The Partial Bid Problem

[89] If 20% is accepted as a level of ownership falling short of effective control and 45% or even 30% is seen as likely to represent such control, it is a relatively short step from a 20% threshold to the control position. That step may, as the law now stands, be taken by partial takeover bid. A prospective bidder may assemble an initial stake of 20% without restriction and, from that base, institute a takeover scheme by which he seeks to obtain from remaining shareholders proportionately a further 10% or 25%.

[90] Experience suggests that a move such as this will often meet with success. Most remaining shareholders will wish to be sure of obtaining the benefits of the partial offer realizing that, if a full bid does not materialize immediately, the possibility of such a bid at a later stage will be remote. There is thus a strong incentive to grasp the benefits of the partial bid - perhaps less attractive than those that a bidder for 100% would be inclined to offer. There is something of a stampede effect.[36]

[91] There may be a case for reducing the 20% threshold in the case of a partial bid. It might be provided that a party may not institute a partial bid if he already accounts for more than a specified percentage (less than 20%) of total shares. The Committee prefers, however, to defer consideration of any such proposal. The whole subject of partial takeovers is currently under review by the Committee and a discussion paper raising

36. See generally, D. Gross, "Partial Takeovers - A Critique of the Provisions in the Companies (Acquisition of Shares) Act and Codes", (1983), 1 Company and Securities Law Journal 251.

numerous issues is about to be published. The possibility of a separate and lower threshold for partial bids will be canvassed in that discussion paper.

The Forestalling of Competition Argument

[92] The 20% threshold is seen by some as likely to discourage the emergence of counter-bidders and, therefore, as likely to deny to shareholders generally the benefits said by some to be inherent in competitive bidding.

[93] It is true that some takeover bids are currently launched from a base of 20%. Others are launched from a smaller base. In some cases, the bidder begins with no shares at all. It is not possible to say with any certainty whether the prospects of success are higher in one case than in another, although some initial stake is no doubt useful from a bidder's viewpoint. And the larger it is, the greater may be the chances of its forestalling a competing bid. Again, however, this will not necessarily be the case. There have been instances in which several independent parties have built up sizeable stakes before take-over.[37] Experience tends to show that, at least in the case of a full bid, success or failure is influenced by the recommendations and advice of the target company's board which, in turn, depend upon the fairness of the offeror's price.

Impact of Threshold Change on Sellers

[94] If the threshold were reduced from 20% to, say, 10% or 15%, some adverse effect may be felt by those who, during the

37. For example, in Cascade Brewery and in Ateco Holdings.

operation of the present legislation, have assembled parcels above any such new level but below the existing threshold. Expectations of selling such a parcel as an intact whole would be destroyed.

[95] This argument carries little weight. The fact is that s.11 has always carried within it the clear possibility of threshold reduction. Section 11(7) declares that a reference to the "prescribed percentage" is a reference to 20% "or, where a lesser percentage is prescribed by regulations in force for the time being for the purposes of this section, a reference to that lesser percentage." In addition, a holder of a larger stake is always free to put it up for sale on the stock market where competitive forces prevail.

The Position of Institutional Investors

[96] Concern is sometimes expressed that a reduced threshold might hamper investment generally because of inhibitions upon the freedom of significant institutional investors.

[97] For reasons discussed at para. [84] of this report, the Committee sees this matter as only marginally relevant to the present enquiry. It might be observed, in any event, that an institutional investor rarely accounts for more than 10% or perhaps 15% of the shares of a particular company. Funds are not commonly exposed unduly to any single situation and the increasing scope of available investments following removal of exchange controls tends to ensure a greater diversification of investments.

[98] The Committee is inclined to think that neither maintenance of the threshold at 20% nor its reduction to 15%

would produce adverse effects in this area. Nor, of course, would an increase in the threshold.

The Importance of ss. 58 and 60

[99] It has been assumed to this point that 20% of voting shares is a level which may be achieved in an entirely unregulated atmosphere. That is not really so. The National Companies and Securities Commission possesses certain statutory powers which enable it to control in appropriate cases acquisitions below that level.

[100] The principal powers of this kind are those conferred by s.60. That section empowers the Commission to take action against an acquisition or conduct in relation to which it is satisfied that one or more of four specified circumstances exists. In such circumstances the Commission may make a particular kind of declaration. The circumstances as to the existence of which (or, at least, one or more of which) the Commission must be satisfied are defined in almost exactly the same terms as the second set of matters described in s.59 and taken by the Committee to define in large part the objects of the Act.

[101] Section 60 thus puts at the disposal of the Commission a power to act against a particular acquisition or particular conduct

which, while consistent with the "black letter" of the Act (including its 20% threshold), is nevertheless judged by the Commission to be inconsistent with the objects of the Act.

[102] The nature of the s.60 power should be briefly mentioned. It is, in essence, a power to subject an acquisition or conduct to the susceptibility of an adverse order. Those orders are the same orders to which an illegal acquisition beyond the 20% threshold is susceptible. By means of s.60, therefore, the Commission may, in cases where it is satisfied that the purposes of the Act are not served, produce (or seek the assistance of the Court in producing) consequences essentially the same as those that would have applied had some lower threshold applied under s.11 itself.

[103] The capacity for threshold regulation under s.60 is negative. It entails cure rather than prevention. The same cannot be said of the Commission's power under s.58.

[104] Section 58 empowers the Commission to modify the operation of the Act. Specifically, the Commission may declare that the Act is to have effect "in its application to or in relation to a particular person or persons in a particular case" as if a particular provision of the Act were omitted or varied. Again - and by direct operation of s.59 itself - the principles identified by the Committee as basic to the objects of the Act are to be taken into account. Subject to one possible limitation of s.58 about to be mentioned, that section in its present form will permit modification of the 20% threshold where such modification is demanded by the objects of the Act.

[105] The efficacy of s.58 as an instrument of threshold variation may need to be supplemented. As the section stands, the Commission may vary a provision of the Act only as it has effect "in its application to a particular person or persons in a particular case". The reference to "a particular person or persons" may mean that a threshold other than 20% could not be

imposed generally in relation to shares in a particular company or a particular class of companies. Because s.11 imposes a prohibition upon acquisitions of shares beyond a particular level, the person to whom the prohibition applies is a person who proposes to exceed that level. In many cases, the Commission will not know the identity of a prospective acquirer of shares. It will therefore not be able to frame a declaration that s.11 is to have effect "in relation to a particular person or persons" on the basis of a varied percentage.

[106] This difficulty might be overcome by a fairly simple amendment to s.58. This would entail insertion, immediately after the word "case" in sub-section (1), of the words "or in its application to or in relation to the acquisition of shares in a particular company or in a company included in a particular class of companies". An amendment such as this would enhance the efficacy of s.58 as a general instrument of threshold modification. If it were also thought necessary to make it clear that the Commission's power under s.58 could be exercised to vary the threshold notwithstanding the co-existing possibility of threshold reduction under s.11(7), that could also be taken care of by a minor amendment to the Act.

[107] The Committee is of the view that ss.58 and 60 will, particularly if s.58 is amended as outlined above, provide ample scope for regulation by the Commission in any particular case where it is able to judge that the 20% threshold is incompatible with the objects of the Act.

A Note on State Issues

[108] There have been occasions on which State Parliaments have legislated with respect to particular takeover issues. Reference has already been made to the Company Takeovers Act 1979 (Qld.) which gave advance effect to the principles of the Companies (Acquisition of Shares) Act but upon the basis of a threshold of 12.5% instead of 20%. Reference may also be made to the Select Committee (Ansett Transport Industries) Act 1972 (Vic.) and the Santos (Regulation of Shareholdings) Act 1979 (S.A.). [109] Legislation of this kind has proceeded from special circumstances relevant to a particular State. The Committee does not see its function, as prescribed by the Agreement of 22nd December 1978 scheduled to the National Companies and Securities Commission Act 1979, as extending to purely intra-State matters of this kind. It follows that the Committee does not consider itself justified in offering comment on the question whether the takeover threshold might differ according to the State or Territory in which the target company is incorporated.

Conclusions and Recommendation

[110] The Committee is not persuaded that the existing 20% threshold is inappropriate. Other statutory provisions in Australia, as well as overseas precedent and opinions expressed to the Committee, suggest that 20% may fairly be regarded as a suitable arbitrary level falling short of the likelihood of actual control.

[111] It cannot be said that Australian experience indicates the desirability of threshold modification in the interests of the

overall objectives of the Act, although the possibility of threshold reduction cannot forever be dismissed. The efficiency of the market and the legitimate expectations of shareholders seem, for the time being, to be sufficiently and properly protected. The market has become accustomed to the 20% threshold and some who initially opposed it say that they have now come to accept it.

[112] The Committee's view of the matter is influenced to some extent by the existence of powers on the part of the National Companies and Securities Commission which (particularly if supplemented in the manner suggested in para. [106] of this report) should enable it to deal effectively with particular anomalous cases that may arise.

[113] The Committee recommends that:

(a) s.58 of the Companies (Acquisition of Shares) Act 1980 be amended as outlined in para. [106] of this report; and

(b) the "prescribed percentage" mentioned in s.11 of that Act be maintained for the time being at 20%.

H.A.J. Ford (Chairman)
R.I. Barrett
D.A. Crawford
A.B. Greenwood
K.W. Halkerston

26th November 1984.

APPENDIX 1

Relationship of Threshold to Control

1. The threshold should represent a level of ownership falling somewhat short of effective control since such control should not be achieved without opportunities to sell being afforded to the general body of shareholders.

2. Because the level of ownership carrying effective control is not capable of any precise calculation, the threshold should be fixed conservatively - that is, at a level sufficiently low that it is likely to fall short of effective control in virtually all cases.

Informing the Market

3. A threshold lower than 20% would cause the market to be better informed.

4. The philosophy behind the substantial shareholding provisions and the 10% criterion they embody is to identify publicly a party who may be on the way towards effective control and that 10% level is therefore the appropriate threshold for takeover purposes.

Warehousing

5. A threshold lower than 20% would reduce the temptation to resort to clandestine warehousing since the goal of effective control would be sufficiently remote to mean that such measures were not worthwhile.

6. A threshold lower than 20% would increase the temptation to resort to clandestine warehousing in an attempt to exceed a limitation falling unacceptably short of both effective control and a "springboard" to such control.

7. A threshold higher than 20% would reduce the temptation to resort to clandestine warehousing.

Impact of Threshold on Existing Corporate Control

8. The lower the threshold, the greater the potential for several parties to achieve that level of ownership, with a resultant counter-balancing effect in terms of effective control.

9. If the threshold were reduced to, say, 10% so that the maximum base from which takeovers could be launched became smaller, the

likelihood of entrenchment of inefficient management in target companies would be increased.

Impact of Threshold on Sellers

10. A single holding of more than 20% is sufficiently rare that the 20% threshold does not unduly interfere with the legitimate expectations of sellers.

11. Reduction of the threshold to, say, 10% or 15% would unduly interfere with the expectations mentioned in 10.

Equality of opportunity for Sellers

12. A party holding more than 20% should not sell unless his fellow shareholders also have an opportunity to participate in the opportunity to sell.

13. A party holding 10% or 15% should not sell unless his fellow shareholders also have an opportunity to participate in the opportunity to sell.

Institutional Investors

14. Because financial institutions and the like are responsible for such a significant proportion of Australian share market investment, reduction of the threshold below 20% would have an adverse effect on investment generally.

15. Because financial institutions and the like are responsible for such a significant proportion of Australian share market investment, increase of the threshold above 20% would provide a desirable stimulus to investment generally.

Competing Bids

16. If the threshold were reduced to, say, 10% so that the maximum base from which takeovers could be launched became smaller, the likelihood of competing bids (with consequent advantages to shareholders generally) would be increased.

Dawn Raids

17. The present threshold is too close to effective control and this encourages share acquisition dashes.

18. The possible problem of 'dawn raids' may be more appropriately dealt with by amendment of those provisions allowing for immediate on-market acquisitions after formal commencement of the bid (CASA s13(3)), rather than by alteration of the threshold level.

Partial Bids

19. The threshold level should be reduced to, say, 15% or 10% in the case of partial bids.

APPENDIX 2

The Adelaide Steamship Company Limited
Australian Associated Stock Exchanges
Australian Mutual Provident Society
Barclays Australia Limited
R.A. Brierley (Industrial Equity Limited)
B.T. Australia Limited
Commercial Law Association, Victorian Committee
G.G. Hill (Morgan Grenfell Australia Limited)
The Institute of Chartered Secretaries and Administrators
The Institute of Directors in Australia
Kleinwort Benson Australia Limited
Law Council of Australia, Business Law Section
Life Insurance Federation of Australia
Lloyds International Limited
Mathers Enterprises Limited
W.E. Paterson, Q.C.
Potter Partners
Schroder, Darling and Company Limited
A.E. Vrisakis (Dawson Waldron)
R.K. Warren (Parker & Parker)
P. Wood (Trans City Holdings Limited)

APPENDIX 3

"Takeovers Bill - Threshold for Acquisition Regulation", N.C.S.C. Paper dated 26th March, 1980 submitted to Ministerial Council.

"Reduction of Takeover Threshold Level", Queensland Paper dated 26th April, 1983 submitted to Ministerial Council.

"Reduction of Takeover Threshold Level", N.C.S.C. Paper dated 1st July, 1983 submitted to Ministerial Council.