COMPANIES AND SECURITIES LEGISLATION IN AUSTRALIA (INCLUDING THE TAKEOVERS CODE)

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1. Regulatory Framework in Australia

The companies and securities regulatory scheme in Australia is almost a unique example of Federal and State co-operation. New Zealand, of course, does not have the same problems inherent in a Federal system. In any event, what happened in Australia with corporate and securities laws in the late 1970's was that the Federal Government and the six States agreed on a scheme to pool their legislative powers in this area, thus removing constitutional doubts had there been solely Commonwealth legislation. This followed a long period of debate as to unification of corporate and securities laws in Australia which, although theoretically uniform in each State, had developed some disturbing differences for practitioners and companies alike.

The cornerstone of the new legislative package is the Act that deals with the establishment of a National Companies and Securities Commission. The substantive legislation is comprised of:-

(i) The National Companies and Securities Commission Act and complementary Codes in each State;

(ii) The National Companies and Securities (Interpretation and Miscellaneous Provisions) Act and corresponding Codes;

(iii) The Companies (Acquisition of Shares) Act and corresponding Codes;

(iv) The Securities Industry Act and Codes; and

(v) The Companies Act and Codes.

The last part of the above legislation came into operation on 1 July, 1982. The co-operative scheme operates on the basis of the Commonwealth Government enacting principal substantive laws in the Australian Capital Territory and the States adopting the Commonwealth law as their own. It should be noted that the Northern Territory is not involved in the co-operative scheme.

The National Companies and Securities Commission (NCSC) has very wide powers and functions. It has responisbility for formulation of policy and administration with respect to company law. The NCSC may hold bearings for the purpose of the performance of any of its functions or the exercise of any of its powers.

Supreme responsibility under the scheme is given to the Ministerial Council for Companies and Securities of which each State and the Australian Capital Territory is represented. A key role of the Council is to approve amendments to the scheme legislation which require approval of a majority of the members.

2. Companies Code

The object of the Companies Code is to achieve an Australian company as distinct from a State company. The position had been that companies incorporated in Australia were incorporated under a State Companies Act which meant that a company incorporated in, say, New South Wales was a foreign company in all the other States or Territories. To establish a place of business or to commence carrying on business in a State other than New South Wales the company was required to lodge registration documents with the various Corporate Affairs Commissions of the other States.

The current Co-operative Scheme provides simplified rules for the lodging of company documents. Companies incorporated in one participating jurisdiction, that is, one of the six States or the Australian Capital Territory, may lodge all their documents with the registering authority of that jurisdiction without the need to duplicate the process in another State. Companies now may lodge documents in only one jurisdiction to be entitled to carry on business in another participating jurisdiction where their name is available. Companies are then only required to provide their local registering authority with the details of their principal place of business in other participating States.

All companies, including those companies not incorporated in Australia seeking to carry on business or establish a place of business in Australia, must comply with the requirements of registration set out in the Code. The concepts of establishing a place of business and commencing to carry on business are distinct and the requirement for registration applies if a foreign company is caught by either of them.

Whether a company has established a place of business or commenced to carry on business is mainly a question of fact which can be difficult to answer in practice. For example, the appointment of a representative of a foreign company having limited consultancy or observation functions only is not regarded as establishing a place of business. Thus, a large number of foreign banks, in particular, have set up representative offices in Australia and these are not required to be registered as group companies. The Code does set out some statutory provisions defining the concept of carrying on business. Establishing or using a share transfer or share registration office or administering, managing or otherwise dealing with property situated in a State constitutes the carrying on of business in that State. The concept, however, obviously extends beyond these two limited activities and is largely a matter of fact. The Code is, however, again helpful because it stipulates that a company is <u>not</u> deemed to be carrying on business within a participating jurisdiction by reason only that it:

(i) is involved in legal proceedings;

(ii) holds shareholders or directors' meetings or carries on other activities concerning its internal affairs;

(iii) holds a bank account;

(iv) effects a sale through an independent contractor;

(v) solicits or procures orders binding only if accepted outside the jurisdiction;

(vi) creates evidence of a debt;

(vii) creates a charge on real or personal property;

(viii) secures or collects a debt (or enforces its rights in regard to the securities for its debts);

(viv) conducts certain isolated transaction; or

(x) invests any of its funds or holds any property.

3. Incorporation

In brief, incorporation in a participating State or Territory is accomplished by lodging the required documents with the relevant Corporate Affairs authority in that State or Territory and the appropriate documents in order to carry on business in any other of the participating States. The place in which the documents are lodged is classified as the company's home jurisdiction and the company will be recognised in all other participating States.

Similarly a foreign company which has been incorporated outside Australia need only register as a foreign company in one of the participating jurisdictions to have recognised status in the other participating jurisdictions. Thus, a New Zealand company need only register as a foreign company in one of the participating jurisdictions to give it recognised status in the other participating jurisdictions. Accordingly, in the jurisdiction in which it became registered, the company will be a registered foreign company and, in all other jurisdictions, a recognised foreign company. As noted previously, a recognised company or foreign company need only lodge documents with the registering authority in its own jurisdiction.

The principal obligation of a recognised company or foreign company is to have a principal office within its home jurisdiction which must be open and accessible to the public. Apart from this, a recognised company or a foreign company is obliged to exhibit its name, the place of its home jurisdiction and the words "principal office" outside its place of business in the home State. The Code also requires that its name be included on negotiable instruments such as cheques, etc. issued, signed or published in the home State and to include its name and place of incorporation on every relevant document such as business letters, statements of account, invoices, etc.

The crucial thing to note about incorporation or registration as a foreign company is that a company is not entitled to carry on business or to establish a place of business in a participating jurisdiction unless its name is first registered or reserved in its home State and in each other jurisdiction in which it wishes to carry on business. One should not gloss over this apparent formality because the name may not nessarily be available in one or more States or Territories. The Commission will not register a name which is already reserved or registered or which, in the opinion of the Commission closely resembles a name already reserved or registered. Apart from that, certain names have been declared to be unacceptable (including names suggesting a connection with royalty, the Commonwealth or a foreign government when no such connection exists). Thus, one can have the frustrating experience of a name being available in several relevant jurisdictions, but not all.

An Australian company is required to have a Memorandum of Association and Articles of Association. There has been one relatively recent but important change in relation to the requirements for a company's Memorandum. Until the introduction of amendments to the Companies Code made in 1983, a company was obliged to state its objects in the Memorandum. This normally took the form of a laundry list of every conceivable activity that a company may carry on, sometimes 20 pages long. The 1983 amendments made this optional and, unless stated, a company has the rights, powers and privileges of a natural person. In addition, it has several rights which a company must have but a natural person cannot have, for example, to issue and allot shares, distribute property amongst members, grant a floating charge on the security of the property of the company, etc.

The reason for the extensive laundry list of often confusing, conflicting and duplicated powers was to overcome the doctrine of ultra vires but this was also abolished by amendments made to the Code in 1983.

The Articles of Association provide the rules for the internal organisation of the Company and I don't believe there are any particular Australian requirements which would render these materially different from the Articles of Association usually adopted by New Zealand except that a proprietary company may have unissued shares and must include certain restrictions in its Articles similar to those which applied under the New Zealand Companies Act, 1933.

Branch or Subsidiary

A New Zealand company contemplating carrying on business in Australia would have two choices; either registering an existing New Zealand company as a foreign company in Australia, or establishing, by acquisition or incorporation, a subsidiary.

The first step is to choose which of these is more appropriate and, to a large extent, the answer to this question is dictated by taxation considerations which will be considered separately and in detail by David Williams.

To incorporate a subsidiary, it is first necessary to decide which of the company structures available is the most appropriate. There are three major types of company structures in Australia, namely, public company, proprietary company and exempt proprietary company. The latter category can effectively be ignored as any company in which a foreign company is a shareholder will not be an exempt proprietary company except in very limited circumstances.

The principal distinctions between a public and a proprietary company are the restrictions that are imposed upon a proprietary company, namely, that a proprietary company cannot have more than 50 shareholders, cannot offer its shares to or borrow money from the public and the rights of its members to transfer their shares must be restricted. A proprietary company is required to have a minimum of two members although one of these may hold its share in trust for the other. A public company is required to have five shareholders and, similarly, four of these can be held in trust for the parent company. Also, a proprietary company is required to have two directors one of whom must be ordinarily resident in Australia. This does not necessarily require citizenship but simply that a person be residing here for the time being. A public company requires three directors, two of whom must be resident in Australia.

A point to note is that in some industries there is a requirement to operate through a subsidiary company. For instance, branches of life and general insurance companies are now being required by the Insurance Commissioner to incorporate locally. From a corporate (as distinct from taxation) viewpoint, the principal difference between "subsidiary" and "branch" relates to limited liability. A subsidiary company, however low its issued capital (and there is no specified minimum) is a separate entity from its parent. It is not liable for its subsidiaries' debts or obligations except in extraordinary circumstances. However, an Australian branch of a New Zealand company is not a separate legal entity with the result that the New Zealand company would be liable for all debts or obligations of its Australian branch.

There are a number of practical operational problems encountered by branches which do not arise in the case of subsidiaries. Government agencies often have a misconception as to the legal nature of a branch and indeed some of the Acts which they administer do not contemplate branches of foreign corporations. Also, branches of foreign companies are given low priority in receiving Government incentives or assistance. The present order of priority is, first, Australian-owned subsidiaries, second, locally owned incorporated subsidiaries of foreign companies and, lastly, branches of foreign companies. Lenders and providers of credit would often also prefer to deal with a subsidiary rather than a branch, particularly as most require audited financial statements of the Australian operations of the borrower. As the branch has no separate legal identity, sometimes there are difficulties preparing audited statements of the affairs of the company's Australian operations. Suppliers may also be nervous in dealing with a branch and a similar situation exists in relation to leases of property and equipment. Where a lessor is unfamiliar with the operation of branches they may require that some form of bond or guarantee be given by the foreign company. Thus, there may be some perceived advantages of operating through a subsidiary rather than a branch.

Corporate Filing Requirements

Briefly, both a locally incorporated subsidiary and a branch are required to file an annual return incorporating their accounts. In the case of a subsidiary, the accounts that are to be filed are those of the subsidiary. In the case of a branch, the accounts are those of the company, including the branch. Disclosure, therefore, in the case of a branch is not limited to local operations and the annual return is a public document and, as such, is available for inspection by the public and competitors.

It is of course not possible in a paper of this nature to traverse all the key provisions of the Code, many of which are probably reasonably familiar to most of you as they are similar to those applicable to New Zealand companies. It may be worthwhile, however, alerting you to a number of significant matters. These include the duties of honesty and diligence imposed on directors which have been extended to officers of the company. Also, not only directors but also any person taking part in the management of a company will be personally liable for debts incurred by the company if there were reasonable grounds to expect that the company would not be able to pay all its debts as and when they became due.

The Companies Code clarifies the position concerning pre-incorporation contracts. At common law, the company could not ratify a contract after incorporation but the Code allows ratification within a reasonable time. Where the company is not formed or fails to ratify the contract within a reasonable time the promoter will be liable for damages.

The provisions relating to a company financing or dealing in its own shares are different. The Code expressly exempts certain transactions from being prohibited forms of financial assistance, for example, payment of dividends if made in good faith and in the ordinary course of commercial dealing - a curious concept when related to dividends. The discharge by a company of a liability incurred in good faith as the result of a transaction entered into on ordinary commercial terms is also exempted. Most importantly, however, the Code incorporates a procedure to permit transactions that would otherwise be prohibited by this provision. This procedure requires a special resolution and advertising but is most useful compared with the absolute prohibition which applies under section 62 of the New Zealand Act.

There are also two important disclosure requirements imposed by the Companies Code which are relevant to the Takeovers Code which will be considered below. Firstly, there is a requirement to disclose substantial shareholdings that is where one has a "relevant interest" in more than 10% of a class of shares. You should note that the concept of relevant interest is extraordinarily wide and makes it difficult for holdings in excess of 10% to be effectively warehoused. These provisions apply irrespective of the domicile of the substantial shareholders and under the legilsation there is power in the council to make such oreders as it thinks fit for dealing with the shares.

In addition, under Section 261 a corporation is entitled to trace beneficial and other interests in its shares by enquiry of registered holders. There is no minimum shareholding necessary to trigger this right. Not only does the company have this right but so does the NCSC and 5% of a company's shareholders may direct the company to exercise its powers to obtain the required information. The information received by the company is to be available for public inspection. It should be noted that there is a specific civil remedy imposed by the Code on a person who fails to comply with the section and in addition there is a liabily to pay damages to any person who suffers loss or damage as a result of that failure. Under these provisions beneficial holders can be traced to the final and true holder of the Shares.

6. The Securities Industry Code

I noted at the outset that we have a tri-furcated system of company and securities regulation with separate Codes for securities, companies and takeover regulation. The Companies Code, which we have dealt with above deals with basic company law matters such as the formation, management and direction of corporations, financial and other disclosure, external fund raising, schemes of arrangement, receivership of liquidation, that is, companies from birth to death. The Securities Industry Code, on the other hand, deals with the regulation of securities markets and the intermediaries who participate in them. It also covers the proper conduct of securities markets, including dealing by dealers as principal, the obligation to give priority to clients on executed orders, insider trading and market manipulation, enforcement by stock exchanges of their own listing rules and the NCSC's power to prohibit trading in particular securities on the Stock Exchange. I have attached as Appendix A some of the principal features of the Securities Industries Code because there is insufficient time in which to cover these provisions in any detail in a discussion of this nature.

7. Companies (Acquisition of Shares) Code

For convenience, I will refer to this legislation as the Takeovers Code. I have attached as Appendix B a more specific and detailed resume dealing with the acquisition of companies listed on stock exchanges. There are however a number of more general matters I wish to raise about public company acquisitions. Firstly, you should note that in one important area namely that relating to schemes of arrangement the Takeovers Code overlaps the Companies Code. A court and shareholder approval scheme, involving in a typical case the cancellation of share capital of all but the new controlling shareholder was prior to the Companies Code frequently used as an alternative to a conventional takeover under the Takeover Code. There are certain advantages to utilizing the scheme of arrangement procedure in friendly takeovers including in relation to stamp duty, taxation and the Trade Practices Act and most importantly the approval level for implementation. A scheme of arrangement requires approval of 75% of shareholders as compared to 90% before compulsory acquisition can be instituted under the Takeovers Code. You should note however the Companies Code provides that the court shall not approve a scheme where it has been proposed for the purpose of enabling avoidance of the Takeover Code. This does not prevent schemes of arrangement in appropriate cases but it does limit the scope of this procedure.

Let me provide you with the following very brief summary of the applicable regime under the Takeovers Code. In effect what the Code provides is that a person may not alone or through associates acquire a relevant interest (both associates and relevant interests are widely defined) in more than 20% of the voting shares of any corporation without making takeover offers for the balance of the shares of the company. There are a number of specific exceptions to this prohibition including:

- acquisitions approved by the members of the target company in general meeting;

- an acquisition of no more than 3% of the voting shares of the target company in any six month period;

- an acquisition of shares in proprietary companies with consent or where a company has not more than fifteen members;

- an acquisition of shares in a case where the NCSC has approved.

The Takeovers Code does not apply to non-voting shares or to companies limited by guarantee and has no application to acquisitions of shares up to the 20% threshold.

If an offeror wishes to acquire more than 20% of the voting shares of the company he can only proceed in accordance with the formal procedures laid down in the Code. In effect there are two alternative courses. Firstly, offers may be made direct to all shareholders (those are referred to as Part A offers) or alternatively an offeror can proceed by making bids on the floor of the Stock Exchange (Part C offers). As noted above compulsory acquisition can be instituted where the offeror has acquired 90% of the shares the subject of the offers. In a situation where the offeror held 10% or more of the shares prior to the offers then he must also receive acceptances from 75% in number of the shareholders of the target company.

Some defensive steps previously available are authorised or regulated under the Code. Profit forecasts are prohibited without the NCSC's consent. Also, the Code empowers the Court to set aside employee service contracts which are "unfair or unconscionable having regard to the interests of the corporation", in effect in contemplation of a takeover offer.

The Code also empowers the NCSC to declare an acquisition of shares to be "unacceptable" in which event the Court can make such orders as it thinks fit including an order vesting shares in the Commission.

In passing it may be worthwhile to make a couple of comments about the takeover environment in Australia which I believe has changed quite dramatically over recent years and, notwithstanding black letter law provisions supposedly in place to protect widows and orphans, generally in favour of the offeror. I think part of this is a result of a general change in commercial philosophy and morality which is now much more short term and performance orientated. Takeovers have become highly topical and recently have been played very much harder than was the case previously. Every loophole, every device, every tactic has been used by takeover practitioners so that the game is played right up to the limit of the rules with the result that resort to the Courts by offerors Targets and the NCSC is much more commonplace.

The present chairman of the NCSC is avowedly anti-takeover and is likely to push for the introduction of several measures which will make takeovers more difficult. These include:-

- a ban on escalation clauses. These of course allow an offeror to accumulate large holdings up to the threshold limit because they guarantee to sellers that they will receive an increased price if one is subsequently paid;

- a rule that the same price be paid for all shares; this will affect on-market offers where the seller receives the ruling market price on the day and not the highest price as under a Part A offer;

- a lowering of the substantial shareholder threshold to 5%.

In addition charges are proposed to regulate partial takeover offers so these are required to be pro-rata rather than proportional. This charge is recommended by the Companies and Securities Law Committee.

APPENDIX A

Principal Features of the Securities Industry Code

A. Conduct of Securities Business

1. The obligations imposed by the legislation apply in certain circumstances to different categories or groups of persons (including companies). There are certain prohibitions imposed upon all persons involved in securities transactions. "Securities" include equities, debentures, notes and certain participatory interests which are not shares or debentures. In particular:

   (i) Dealers and investment advisers and certain of the employees of either must be licensed in order to carry on business (although certain exemptions exist).

   (ii) Once a licence is granted, it is permanent and there is no provision for annual renewal applications. All that is required is the payment of a prescribed annual licence fee and the lodgment of annual statement in the prescribed form at the time when the auditor's report is required to be lodged with the Commission - usually within three months of the end of a company's financial year.

   (iii) Licences can, however, be revoked or suspended and failure to pay the fee or lodge the statement as required may result in revocation of a licence, as will contravention of the licence conditions.

2. Dealers must issue contract notes in relation to securities traded detailing the particulars of the transaction.

3. When sending circulars or other similar written communications which include recommendations of securities, dealers, investment advisers and their licensed employees must disclose the nature of any interest they or persons associated with them have at the date of the sending of the circular. All such circulars must be signed by a prescribed officer of the corporation and a copy of the circular sent to the NCSC.

4. When acting as a principal, a dealer has an obligation to disclose the fact.

5. Dealers must maintain a trust account and deposit such account all moneys held in trust for a client. Where dealers are members of a stock exchange they must maintain and lodge deposits with the Stock Exchange out of trust funds representing two-thirds of the lowest balance held in trust over a three month period. The Stock Exchange invests the funds and the interest goes towards a fidelity fund out of which claims against defaulting brokers are paid.

6. A dealer under Section 131 of the Securities Code must give priority to the unexecuted instructions for purchase or sale of clients who are not associated with him in preference to transactions of his own as principal or on behalf of a person associated with him.

This obligation does not apply where the client's instructions are conditional and the dealer has not been able to deal for the client in the relvant securities by reason of the conditions.

7. Dealers, investment advisers or their employees are not to act jointly as principals in purchasing or subscribing for securities or give credit to the employees for dealings in securities.

8. A dealer must maintain a register of interests in securities (as must an investment adviser and all licensed employees).

B. <u>Influencing the market, fraud and other deceptive or unfair practices</u>

1. All persons generally involved in securities transactions are prohibited from doing or causing certain things with respect to stock markets for securities. Further, such persons must not (subject to some exemptions):-

(i) engage in short selling;

(ii) create a false or misleading appearance of active trading; this can catch the ordinary market support that an underwriter might give in the after market; <u>Marra Developments</u> v. <u>North</u> 56 A.L.J.R. 106 (1981);

(iii) inflate, depress or cause fluctuations of market prices of securities by fictitious transactions;

(iv) make any statements or disseminate any information that is false or misleading in a material particular and is likely to induce the sale or purchase of securities by others or affect the market price of securities if, when the person makes a statement or disseminates the information, he either does not care whether the statement or information is true or false or knows or ought to have know that the statement or information is false or misleading in a material particular;

[The decision in April, 1984 in a case of fraud concerning a listed group Magnet Minerals saw the Victorian Supreme Court set aside stock exchange share transactions after the NCSC promptly intervened following a forged company announcement. Action was brought under Section 14 of the Securities Code which gives the Court a wide discretion. However the Court declined to make an order which applied outside Victoria. So the problem of interstate fraud still remains one of practical difficulty as the jurisdiction does not reside in a Federal Court and orders may need to be sought in each State affected.]

(v) Engage in insider trading: generally, deal in securities, or cause others to do so on the basis of price sensitive information (i.e. information that is not generally available but if it were, would be likely materially to affect the price of securities) when the information is obtained either by virtue of certain types of "connections" with the relevant companies or, by other associations or arrangements. In other jurisdictions especially the U.S., legislative prohibitions of insider trading have been widely drawn and vigorously enforced by the Courts. It has been said that the equivalent Australian laws are even more extreme because they apply to all companies, not just listed companies, as does the U.S. law. Heavy penalties are imposed. However, there have been few successful prosecutions in Australia.

There are exceptions for Chinese walls but only within a corporation. Also for new issues of shares (since the subscriber has no more information than the company). This exemption will not apply to an unincorporated broker. But relatively new Stock Exchange by-laws for stock brokers permit incorporation and new rules encourage Chinese walls.

(vi) Finally, there are provisions requiring added disclosure in "issuing house" or "underwriting" situations.

APPENDIX B

ACQUISITIONS OF COMPANIES LISTED ON THE STOCK EXCHANGE IN AUSTRALIA

1. INTRODUCTION

1.1 The acquisition of a controlling interest, that is either 100% or a lesser percentage of the shares of a company listed on a Stock Exchange in Australia is normally effected by the making of takeover offers. Procedures which involve an agreed merger with the corporation in question are only very rarely encountered and indeed the laws regulating securities markets in Australia discourage acquisitions in that form.

The Companies (Acquisition of Shares) Code ("the Code") provides the legal framework for the regulation of takeover offers. The Code is a uniform Statute having the force of law in each Australian State and the Australian Capital Territory. The Code is administered by the National Companies and Securities Commission and the Corporate Affairs Commission of each State and of the Australian Capital Territory.

The general scheme of regulation under the Code is that shares in a company may not be acquired, except as is otherwise permitted by the Code, by any person, either alone or together with another person, where as a result of that acquisition:

(a) any person would immediately thereafter become entitled to more than 20% of the voting shares in that company; or

(b) any person entitled to more than 20% but less than 90% would immediately thereafter become entitled to a greater percentage of voting shares in that company.

In essence a person is taken to acquire or to have become entitled to shares under the Code if he or his "associate" (as defined in the Code) acquires a "relevant interest" in those shares. A person has a "relevant interest" if he has the ability to control the right to vote attached to that share or to exercise control over the disposal of that share.

Where a person has entered into an agreement, such as an option, and on fulfilment or performance of that agreement that person would acquire a relevant interest in the shares concerned, that person is treated as having acquired the relevant interest from the time the agreement is entered into.

Where a company has a relevant interest in shares, any person who alone or with his associates owns or controls more than 20% of the shares of that company is also deemed to have that relevant interest.

1.2 Any person therefore may acquire shares or enter into agreements giving eventual rights to control the disposal of or the rights to vote attaching to up to 20% of the voting capital of a target company. Any further interest may be obtained only if one of the exemptions provided for under the Code is applicable to that acquisition.

The major exemptions provided for in the Code that are likely to be relevant to a proposed acquisition are:-

(a) a provision whereby 3% of the voting shares in the target company may be acquired in any 6 month period. See paragraph 1.3 below;

(b) the making of a tender offer pursuant to a takeover scheme. See paragraph 2 below;

(c) the making of an on-market announcement to acquire all outstanding shares in the target company. See paragraph 3 below;

(d) the acquisition of shares with the approval of shareholders in general meeting - the approval required is that of a majority of the shareholders present and voting at the meeting personally or by proxy; and

(e) the acquisition of shares by an underwriter or sub-underwriter where those shares are offered in the first place to existing shareholders pro rata to their existing shareholdings.

(The National Companies and Securities Commission has issued certain practice notes with respect to the procedures outlined in paragraphs (d) and (e) to ensure that these exemptions are not abused.)

1.3 The restrictions discussed in paragraph 1.1 above do not preclude a person who has been entitled to not less than 19% of voting shares of the target company for a continuous period of not less than six (6) months, from acquiring a further 3% of the issued shares in the target company in a six (6) month period. If this exemption applies such shares may be acquired either on or off the market.

2. TAKEOVER SCHEME - TENDER OFFER

2.1 This involves making a formal takeover offer to all of the members of the company to acquire their shares. The offer must be made to each member who holds shares of the class that is sought to be acquired whether the offeror proposes to acquire all the shares in that class or only a proportion of the shares in that class. The offer must relate to all the shares that the offeree holds or a proportion of those shares that is the same in respect of each offer.

Each offer must be uniform and on the same terms and conditions except that there may be minor differences in the consideration to take into account that the shares may be differing accrued dividend entitlements or amounts paid up.

2.2 In effect the period for which such an offer is to remain open may be a period being not less than one (1) month or more than twelve (12) months.

The offer document is to state the date upon which the offer period is to end and such period cannot be less than one month or more than six months after the date of offer. However provision is made for the variation of a takeover offer by the extension of the offer period so long as the total offer period would not exceed twelve (12) months.

(Shareholders who have accepted must be given the right to recover their shares if the offer is extended beyond six (6) months).

2.3 The offer may provide for the consideration to be either in whole or in part securities of the offeror or some other company as well as cash or a combination of cash and securities. Alternative consideration may be offered to shareholders.

There are no provisions directly regulating the price payable for the shares subject to the offer. However where an offeror acquires shares in a target company in the period after the Part A Statement is served, (see paragraph 2.8 beow) at a price which is higher than that specified in the offer, the higher price is to be taken as the consideration payable for each share to which the offer relates.

2.4 The Part A Statement which must be served whenever a tender offer is made, this document is described in paragraph 2.8, is to give particulars of the intended method and sources of funding the acquisition wherever cash is offered as part of the consideration. Particulars need to be given of all funds held by the offeror for that purpose or any arrangement by which funds are to be made available to the offeror.

2.5 One of the advantages of the takeover offer alternative is that a takeover offer may be made subject to conditions, the most significant of which is a condition relating to minimum acceptance of that offer. The Code provides that a minimum acceptance condition is void if the offer does not specify the minimum number of acceptances and if there is a provision in the offer allowing for variation of this condition.

Other conditions that may be attached to an offer include conditions relating to obtaining the approval of the Foreign Investment Review Board.

An offeror may declare a conditional offer to be unconditional or free of a particular condition not less than seven days before the end of the offer, and may do so only if the offeror declares all other offers under the takeover scheme and all contracts formed by the acceptance of offers nder the takeover scheme to be free from that condition.

Offers with a minimum acceptance condition of a percentage which is greater than 50% may not be declared free from that condition unless the offeror has become entitled to more than 50% of the subject shares.

Where an offeror acquires 20% or more of the outstanding shares after the Part A Statement has been served, in a manner other than by receipt of acceptances of the offer, for example, by purchasing on the market as explained later, then the offer is deemed to be free from the minimum acceptance condition.

2.6 The Code provides that the takeover offer cannot be withdrawn without the consent of the Commission during a period of 14 days after the offer is dispatched. After that period offers can be withdrawn but not selectively and any offers that have been accepted are voidable at the option of the accepting shareholder but not at the option of the offeror.

2.7 An offeror may not vary a takeover offer without the consent of the National Companies and Securities Commission except by increasing the amount of consideration which is specified in the offer or by offering cash as an alternative to the consideration specified in an offer that does not include or consist of cash or by extending the period during which the offer may remain open.

2.8 Not earlier than twenty-eight (28) days or later than fourteen (14) days before offers are dispatched the offeror is required to serve a Part A Statement and a copy of one of the proposed offers on the target company. Further, on the day that these documents are served on the target company, the same documents are to be lodged with the target company's home Stock Exchange. Not earlier than twenty-one (21) days before such serving the Part A Statement is required to have been registered by the Commission.

The Part A Statement is required to include information with respect to the offeror, its business, directors, etc. The offeror is also required to state whether within its knowledge the financial position of the target company has changed since the date of the last balance sheet laid before the target company's shareholders and whether the offeror has any other information which would be material to the target company's shareholders which has not been previously disclosed. The offeror is also required to state in general terms its intentions with respect to the target company's business and the future employment of present employees.

On receipt of the Part A Statement, the target company is required to furnish a Part B Statement which contains a recommendation from the directors of the target company to shareholders as to whether or not the offer should be accepted. The Part B Statement may be lodged with fourteen (14) days of the Part A Statement in which case it must be sent to shareholders with the offer or alternatively may be lodged within fourteen (14) days after the offers are dispatched in which case it is distributed to shareholders by the target company. The Part B Statement must also be lodged with the Commission and the Stock Exchange.

2.9 An offeror who has served a Part A Statement on a target company or for that matter dispatched offers, may acquire shares outside that offer either off-market or on the Stock Exchange until the 20% threshold is reached.

Once the initial threshold of 20% has been reached then during the period commencing on the serving of the Part A Statement on the target company and the date upon which the offer expires, shares may be acquired over and above the shares that are acquired pursuant to acceptance of the offer if such acquisition take place at the official meeting of the Stock Exchange and in the ordinary course of trading on the Exchange. Shares may not then be acquired off-market.

However, the right to acquire these shares on the Stock Exchange in this manner applies only where that tender offer relates to all outstanding shares in the target company and is free of all conditions other than a minimum acceptance condition which is not greater than 90% of the issued shares in the company, a condition that a "prescribed occurrence" in relation to the target company does not take place (i.e. in effect that there have been no changes in the constituent documents or share capital and no payment of dividends, reduction of capital or disposal of substantial assets, etc. of the target company), or any other condition which has been approved by the National Companies and Securities Commission.

An offeror who does not seek to acquire 100% of the target company cannot acquire further shares on the Stock Exchange once the 20% threshold is reached.

Where the consideration stipulated in the offer consists solely of securities and shares are subsequently purchased in the market for cash, the offeror is required to extend the equivalent cash offer to all shareholders.

As indicated earlier, if a higher cash sum is paid than that specified in the offer the higher price must be extended to all shareholders.

You will note that once the 20% threshold has been reached and before the Part A Statement is served on the target company an offeror under any offer is in effect "locked out" from on-market and off-market purchasing. Even after the Part A Statement is served no off-market purchase other than pursuant to the offer is permitted and on-market purchasing is allowed only if the offer meets the requirements described above.

3. TAKEOVER ANNOUNCEMENT - ON-MARKET BUYING

3.1 A person may make an announcement at an official meeting of the Stock Exchange through his stockbroker that he offers to acquire at the cash price per share specified in the announcement all of the outstanding shares in the relevant class of shares in that company. Unlike the situation under a tender offer the takeover announcement must relate to all of the outstanding shares in the relevant class and may not, for example, specify a proportion of shares.

The takeover announcement is regarded as a standing offer and upon acceptance by a broker on behalf of a shareholder of the target company the offeror is contractually bound to acquire and pay for such shares and the shareholder to sell.

A takeover announcement may not be made by a person who is already entitled to more than 30% of the shares of the target company.

3.2 The offer period under an announcement is for one (1) month commencing fourteen (14) days after the date of the announcement. However, the offeror may, prior to the expiration of the sixth trading day before the end of the original offer period, extend the offer period for a further month and may continue to do so provided that the total period for which the offer remains open does not exceed six (6) months.

A person who has made a takeover announcement is free to buy on the Stock Exchange during the ordinary course of trading after the expiry of a three (3) days "cooling off" period after the offer has been announced to the market notwithstanding that the 20% threshold has been reached.

3.3 The consideration under an on-market announcement must be cash - if it is intended that the consideration be made up in whole or part of securities the on-market announcement procedure is not available.

The price per share specified in an on-market announcementmust be not less than the highest price paid to or agreed to be paid by the offeror in respect of those shares in the four months immediately preceding the date of that announcement.

More importantly where an on-market offeror acquires shares in the target company in the ordinary course of trading on the Stock Exchange at a price that is higher (but not lower) than the price that is specified in the announcement then for all <u>subsequent</u> (and not prior) acceptances the higher price is deemed to be the price specified in that announcement. (In the case of a tender offer the purchase of shares at a higher price than than specified in the tender offer, increases the price in respect of all shares purchased under the tender offer.

During the period commencing on the sixth trading day before the expiration of the offer period and ending at the expiration of the offer period the on-market offeror may not acquire shares at a price that is higher than the price that is specified in the announcement.

The on-market offeror may lower the price per share specified in the announcement only with the consent of the Commission and only if the target company takes action which may affect the value of the shares, for example allots or grants an option to subscribe for its shares, issues, convertible notes or declares dividends during the offer period.

You should also note that as in a Part A Statement particulars of funds available to the offeror for the acquisition must be disclosed in the Part C Statement.

3.4 No conditions such as the approval of the Foreign Investment Review Board being obtained, or a minimum acceptance condition may be attached to an on-market announcement.

3.5 An on-market offeror may before the end of the period and without the consent of the Commission withdraw offers that have not been accepted whereas "prescribed occurrence" takes place (see paragraph 2.9 above). However, any such withdrawal requires the Commission's consent where the offeror was entitled to more than 50% of the voting shares in the target company at the date that he purports to withdraw the offer unless a receiver has been appointed to the target company or an order for winding up has been made.

Subject to the above, the consent of the Commission is required to withdraw an on-market announcement.

3.6 On the date on which the on-market announcement is made the offeror is required to serve on the target company a Part C Statement and lodge the same with the target company's home Stock Exchange and with the National Companies and Securities Commission. Within fourteen (14) days after the announcement is made the offeror must dispatch a copy of the Statement to each of the shareholders of the target company. There is no requirement that the Part C Statement be registered with the Commission prior to serving as there is in the case of Part A Statements.

Where a target company receives a Part C Statement the target company must within fourteen (14) days after the announcement is made serve on the Exchange a Part D Statement, which is roughly equivalent to the Part B Statement referred to in paragraph 2.8 above.

3.7 Brokerage will be payable with respect to shares acquired under a takeover announcement. The brokerage rates payable should be negotiated in advance.

4. MAJOR STRUCTURAL ADVANTAGES AND DISADVANTAGES OF THE TWO METHODS

(Needless to say, there will always be many tactical considerations to take into account.)

4.1 The advantages of adopting a takeover scheme (takeover offer) approach include:-

(i) conditions may be attached to the offer including conditions relating to minimum acceptance and foreign investment approvals;

(ii) it is possible to prescribe that the offer extends only to a specified proportion of the outstanding shares;

(iii) the consideration for such an offer may be or include an element other than cash.

4.2 The disadvantages of a takeover scheme (takeover offer) include:-

(i) the provisions allowing acquisition of shares in excess of the 20% threshold in the ordinary course of trading on the market in addition to shares acquired under the offer applies only to a limited type of offer (as to which see paragraph 2.9 above). Further that provision applies only from the time that the Part A Statement is served on the target company, so that from the date that the decision to make a tender offer is made (if the 20% threshold has already been reached) to the date the Part A Statement is served on the target company, the offeror will effectively be locked out of the market.

4.3 The advantages of adopting the on-market announcement method include:-

(i) the provisions allowing acquisition of shares in the ordinary course of trading on the market by an on-market offeror over and above the acquisition of shares pursuant to the announcement apply irrespective of the terms of the offeror under the announcement;

(ii) there is no period other than the three (3) day "cooling off" period for which the on-market offeror is locked out of the market as is the case under a takeover offer.

4.4 The disadvantages of the on-market announcement include:-

(i) the offer may not be made conditional in any respect;

(ii) the offer must relate to all outstanding shares and not supply a portion of such shares;

(iii) the consideration under the announcement can only be cash;

(iv) brokerage is payable in respect of the shares so acquired. No such brokerage fee is payable with respect to shares acquired under a takeover offer.

5. <u>GENERAL</u>

5.1 There are reporting provisions in the company law which require disclosure of shareholdings held by any person and his associates where those holdings exceed 10% of the voting shares. Where a takeover offer or announcement is current this level is reduced to 5%.

An offeror who has made a takeover offer or announcement must during the currency of the offer report all acquisitions of shares to the Stock Exchange by 9.30 a.m. on the following day.

5.2 The Code permits compulsory acquisition of minority shareholdings where the offeror in either a takeover offer or on-market announcement becomes entitled to more than 90% of the shares of the company and in certain circumstances where shares have been acquired from more than 75% in number of the outstanding shareholders. These provisions are subject to certain procedures which are designed to protect minority shareholders.