

1997

# Corporate Takeovers: Law Reform and Theory - Is the Minority Shareholder Being Disadvantaged?

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### **Abstract**

Peter Little is Professor in the Business Law Faculty at the Queensland University of Technology. He has extensive experience in the legal aspects of corporate takeovers. He has lectured in this area for the last twenty years (including on occasions at Bond University) and has contributed to the CASAC and the Simplification Task Force proposals for corporate takeover law reform. He has also acted as a consultant to parties involved in takeovers on a number of occasions. *Law of Company Takeovers* is the culmination of this extensive experience. It provides the most thorough coverage of the corporate law aspects of takeover regulation in an Australian textbook to date.

**REVIEW ARTICLE**

**CORPORATE TAKEOVERS: LAW REFORM AND THEORY - IS  
THE MINORITY SHAREHOLDER BEING DISADVANTAGED?**

by

**John Lessing**

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Peter Little *Law of Company Takeovers* LBC Information Services 1997,  
xlv + 569 pages. Price: \$100.00.

Peter Little is Professor in the Business Law Faculty at the Queensland University of Technology. He has extensive experience in the legal aspects of corporate takeovers. He has lectured in this area for the last twenty years (including on occasions at Bond University) and has contributed to the CASAC and the Simplification Task Force proposals for corporate takeover law reform. He has also acted as a consultant to parties involved in takeovers on a number of occasions. *Law of Company Takeovers* is the culmination of this extensive experience. It provides the most thorough coverage of the corporate law aspects of takeover regulation in an Australian textbook to date.

The text is divided into 14 chapters which cover: an introduction to the regulation of takeovers; substantial shareholder obligations and the tracing of beneficial ownership of shares; a chapter each on takeover schemes and takeover announcements and a separate chapter on the provisions relating to both of these permitted methods of acquisition; the disclosure requirements of these two methods; other permitted acquisitions; false or misleading statements; experts' reports; powers of the Australian Securities Commission with respect to takeovers; remedies; the Corporations and Securities Panel; target directors and takeovers.

The back cover states, without excessive overstatement, that: 'Legal practitioners and students, company executives and investment bankers will find *Law of Company Takeovers* an indispensable reference.' With its detailed 'black letter' approach, the text will probably be of most use to legal practitioners. There cannot, however, be many (if any) universities offering an undergraduate course purely on the corporate law aspects of takeovers. The topic will usually be offered as part of a broader subject and this makes it difficult to prescribe this particular text (particularly at \$100.00) for undergraduate courses. It will certainly be useful for postgraduate courses and for research purposes. It is a pity that the text does not include more references to further publications that the interested reader might pursue.

There are relatively few typographical errors in the text. Only one or two distract the reader, such as 'publicly reported' which should be 'publicly supported' on page vi. The commas sometimes come adrift and then pop up where they should not be, for example 'disclosure, requirements' on page 12. Generally, however, the editing has been competently done.

Some of the references do not give much information. For example, footnote 1 states that the relevant information is based on 'data supplied by the Corporate Adviser 1996' and this source is referred to in subsequent footnotes as well. Researches might like to know where and by whom this source was published.

The purpose of the remainder of this essay is to evaluate the important recent proposals to corporate takeover law contained in the draft legislation forming part of the Corporate Law Economic Reform Program. This will be done against the underlying principles of takeover law as discussed in Little's book and expanded upon by myself. It can be argued that at least one of the proposals contained in the draft legislation greatly reduces the protection provided to minority shareholders in corporate takeovers. Accepting that this is so, we need to consider whether such reduced protection is justified in the interests of promoting greater efficiency in the market for corporate control.

### ***Reform of corporate takeover law***

As one commentator has recently stated, 'Australian corporations law continues to be subject to a roller coaster ride of reform activity which has now gone on for at least a decade.'<sup>1</sup> The area of corporate takeover law has certainly been taken along for the ride. During the last few years, reports and proposals have been produced by the Companies and Securities Advisory Committee<sup>2</sup> and the Simplification Task Force.<sup>3</sup> The Simplification Task Force addressed the recommendations made in the CASAC Anomalies Report and made a number of recommendations designed to simplify various aspects of the takeover provisions. These included a redefinition of the control aggregation rules,<sup>4</sup> replacing the checklist of content rules for disclosure documents provided by bidders and targets (Part A, B, C and D statements) with a general disclosure test;

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1 Tomasic R, 'Editorial' (1998) 8 *Aust Jnl of Corp Law*.

2 *Anomalies in the Takeovers Provisions of the Corporations Law Report*, Legal Committee of the Companies and Securities Advisory Committee, March 1994 (CASAC Anomalies Report); *Compulsory Acquisitions Report*, Legal Committee of the Companies and Securities Advisory Committee, January 1996 (CASAC Compulsory Acquisitions Report).

3 *Takeovers - Proposals for Simplification*, Corporations Law Simplification Task Force, January 1996.

4 These proposals involved changes to the 'relevant interest' and 'entitlement' rules but it is doubtful whether they would have greatly simplified these concepts. The concept of 'associates' would no longer have been used to measure relevant interests but the already difficult definition of relevant interests would have been expanded: Lessing, *Disclosure Obligations in Corporate Law*, paper delivered at the University of Southern Queensland, 2 May 1996.

improving the liability and defence provisions for takeover documents (and bringing them into line with those proposed for prospectuses); restricting the operation of the basic prohibition in s 615 to companies with more than 50 members; and widening the circumstances in which the Corporations and Securities Panel could make declarations of unacceptable conduct or unacceptable acquisition.

The Task Force also expressed its agreement with the thrust of the recommendations made in the CASAC Compulsory Acquisitions Report, the most important of which was the introduction of a new general power compulsorily to acquire securities once certain conditions had been met.

The change of government in Australia, however, saw the scrapping of the Simplification Task Force and the announcement by the Treasurer, in March 1997, of the Corporate Law Economic Reform Program (CLERP). Government publications describe this as 'a comprehensive initiative to improve Australia's business and company regulation as part of the Coalition Government's drive to promote business, economic development and employment' and it is claimed that 'CLERP will contribute to the efficiency of the economy, while maintaining investor protection and market integrity'.<sup>5</sup> One of the policy reforms specifically states that the equal opportunity principle will be retained to 'ensure that all shareholders of a target company have reasonable and equal opportunities to participate in any benefits under a change in corporate control'.<sup>6</sup>

During the course of 1997 various CLERP Policy Papers were released containing proposals for reform. On 9 April 1998 the Treasurer released draft legislation in the areas of fundraising, accounting standards, directors' duties and takeovers. The legislation will also give effect to a number of recommendations of the Financial Systems Inquiry. As far as takeovers are concerned, the main proposals are designed to:

- Promote a more competitive market for corporate control by
  - allowing a bidder to exceed the statutory threshold of 20% of total voting rights to gain control of a target, provided that the announcement of a full takeover bid (the 'mandatory bid') immediately follows the acquisition that takes the bidder through the threshold. The bid price must be the same as, or higher than the best price paid by the bidder for shares in the target in the previous four months.
  - modifying the compulsory acquisition rules to:

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<sup>5</sup> *Corporate Law Economic Reform Program - Policy Reforms* (AGPS 1998).  
<sup>6</sup> *Ibid* at 19 (Reform no 36).

allow all types of securities (not just shares) to be compulsorily acquired;  
allow compulsory acquisitions to take place at any time (not just following a takeover bid);  
facilitate the acquisition of the outstanding securities in a class by any person who already holds 90 per cent of the class; and make it easier for majority shareholders to obtain the benefits of 100 per cent ownership by providing for the acquisition of all the securities, in all classes, of a target, where overwhelming ownership of the target by the majority shareholder can be demonstrated.

- Improve resolution of takeover disputes by reforming the Corporations and Securities Panel so that it, rather than the courts or the Administrative Appeals Tribunal (AAT), is the primary forum for resolving takeover matters. This will be achieved by:
  - opening up access to the Panel to any interested party (rather than being limited to the ASC as at present);
  - except on the application of the ASC or another public authority of the Commonwealth, ensuring that the courts will not grant injunctions during the bid period; and
  - having the Panel, rather than the AAT, deal with appeals against ASC exemption and modification decisions relating to takeovers.
- Extend the takeovers provisions to listed managed investment schemes, so that members of these schemes will have the same rights to share in a control premium as shareholders, while the management of these schemes will face the same competitive pressure to perform as company directors do.
- Streamline the rules for off-market and market bids, including bringing together disclosure requirements into a bidder's statement ( replacing the current Part A and Part B statements) and a target's statement (replacing the current Part C and Part D statements). It is hoped that these statements will facilitate better disclosure by replacing the checklist of content rules with a general disclosure requirement for all information material to a shareholder's decision whether of not to accept an offer.
- Rationalise liability provisions by ensuring that the liability regime for the contents of takeover disclosure documents is generally consistent with that applying to the proposed new fundraising rules.<sup>7</sup>

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<sup>7</sup> *Corporate Law Economic Reform Program - Commentary on Draft Provisions* (AGPS 1998) at 93-94. Copies of the draft legislation are available from the AGPS or from the Treasury website: <http://www.treasury.gov.au>.

Another important change will be brought about by provisions in the draft fundraising rules which will have the effect of removing the overlapping application of s 52 of the Trade Practices Act to takeover activity.<sup>8</sup>

This essay does not go into the detail of all these proposed changes. But the most interesting, and contentious, is the proposal to introduce the mandatory bid rule and the proposal to dramatically increase the role of the Panel.

It is claimed that the mandatory bid rule is being introduced to 'facilitate a more competitive market for corporate control',<sup>9</sup> but it may achieve the opposite by reducing the opportunity for rival bids to emerge. It may well make takeovers cheaper and thus encourage takeovers for this reason. It is perhaps not surprising that the main proponents of the introduction of this method have been those who work in the industry. It has even been suggested that they will be the main beneficiaries, because of the increased amount of fees to be earned through a greater number of takeovers taking place.<sup>10</sup> The government has, however, undertaken to review the operation of the mandatory bid rule two years after its commencement to ensure that the policy goals are being achieved.

It will be interesting to see how much use is made of this method, as there are a number of conditions applying to its use. These include:

- the bidder must start from below the 20% threshold, with only one acquisition being allowed before the mandatory bid requirement is triggered, which must immediately be followed by the announcement of the mandatory bid;
- the bidder must disclose to the selling shareholder that the mandatory bid requirement will be triggered by an agreement to sell;
- the bid must be for cash only - an important limitation;
- the bid must be for an amount at least equivalent to the highest price paid by the bidder in the last four months;
- the bid must be unconditional - again, an important limitation;
- target shareholders must be provided with an independent expert's report;
- a bidder must not exercise control of the target until the mandatory bid is made; and
- no shares may be issued by the target company for a certain period after the announcement of a takeover without shareholder approval.

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8 The removal of the overlapping application of s 52 is a most welcome amendment, called for by the writer at an ASC conference in 1995: see Lessing, *Prospectuses: the liability of directors and professional advisers*, paper delivered at the Corporate Lawyers and Regulators Forum convened by the ASC at the Hyatt, Coolum in May 1995.

9 Above, n7 at 97.

10 See eg Frith B, 'Follow-on rule is good for bankers, bad for holders' *The Australian*, 12 November 1997.

### *The market for corporate control*<sup>11</sup>

In judging the potential impact of the mandatory bid rule, it is necessary to examine the market for corporate control. It would have been useful to have more discussion in Little's text of the wider social and economic effects of takeovers, though the draft legislation was only published after the text. The preface says that takeover or merger bids for large public corporations have emerged as significant commercial and social phenomena; and, quoting Professor Michael Jensen in the Harvard Business Review, that the takeover market 'provides a unique, powerful and impersonal mechanism to accomplish the major restructuring and redeployment of assets continually required by changes in technology and consumer preferences'.

Chapter 1 discusses the pro-takeover and anti-takeover theories and the nature of corporate takeover regulation in Australia. Pro-takeover theories generally attach great value to the market for corporate control and argue that takeovers (and the threat of takeovers) promote efficient use of corporate assets and economic resources. Anti-takeover theories generally rely on the argument that managers pursue self-interest and that market forces are insufficiently strong to protect shareholders.<sup>12</sup>

Little seems to align himself with the argument 'that takeovers serve as an external control mechanism that limits managerial departures from maximisation of shareholder wealth although it is unlikely that the threat of takeover ensures complete coherence of managerial actions and maximisation of shareholder wealth' (p3). He points out that the notion that the threat of a takeover would act as a spur to management was recognised by the Eggleston Committee in its 1969 report<sup>13</sup> when it considered the need for takeover law reform and 'has since constituted a fundamental principle of corporate takeover regulation in Australia'. There is no discussion in the text of the efficient capital markets hypothesis,<sup>14</sup> but it states that: 'A fundamental premise of the market for corporate control is

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11 See Hutson E, 'The Market for Corporate Control in Australia' (1997) 16(2) *Economic Papers* 51 for a review of the relevant Australian literature on the market for corporate control.

12 See eg Campbell, 'Adam Smith, Farrar on Company Law and the Economics of the Corporation' (1990) 19 *Anglo-American Law Review* 185. Campbell states (at 204, footnotes omitted): 'It is my opinion that in fact shareholders *do* control corporations. But the shareholders involved are a small elite of capitalists (typically with directorships) and top management (typically with significant equity holdings). Through interlocking holdings and directorships and financial supervision, this elite does command the strategic heights of the economy. But these are not the shareholders of company law, who are the mythical equals of the general meeting.'

13 *Second Interim Report of the Company Law Advisory Committee* (AGPS, 1969). The underlying principles of takeover regulation laid down in this report are colloquially referred to as 'the Eggleston Principles' for the chairman of the committee, Sir Richard Eggleston. The other members of the committee were Rodd JM (solicitor and partner of Arthur Robinson & Co) and Cox PCE (chartered accountant). For a historical description of the introduction of the Principles into the legislation, see, eg, Renard I, and Santamaria J, *Takeovers and Reconstructions in Australia*, Butterworths looseleaf, par 201.

14 Which essentially argues that in an efficient market all public information is rapidly reflected in the price of a (listed) company's shares to the extent that it is financially significant: see eg Cox, Hillman and Langevoort, *Securities Regulation Cases and Materials* (2<sup>nd</sup> ed, Aspen Law & Business, New York 1997) pp 31-42.

the existence of a high positive correlation between managerial efficiency of a company and the price of its shares.’ This implies that, for the market for corporate control to operate successfully, the market for the company’s shares must be at least informationally efficient.

There are, in any event, considerable transaction costs associated with any change in corporate control. The market for corporate control is afflicted by serious informational asymmetries, even if one has a mandatory disclosure regime. This leads to considerable search costs to obtain relevant information.<sup>15</sup>

### *Equality of opportunity*

Another fundamental principle of the regulation of takeovers is that of equality of opportunity.<sup>16</sup> This is discussed briefly on pages 9-11 of the text. ‘The requirement to treat shareholders equally is based on equity and fairness and recognises that a sale of control alters and, to some extent, sells some of every investor’s participation in the corporation. Thus, whenever a controlling shareholder sells its shares, every other holder of shares of the same class is entitled to sell its shares (all or a proportion) on substantially the same terms.’ Essentially, this principle involves sharing of the ‘control premium’, the amount above the market price that acquirers generally pay for a controlling, or even a substantial, shareholding in a company.

This requirement of equality forms the basis of many of the statutory provisions relevant to corporate takeovers in Chapter 6 of the Corporations Law, particularly the basic prohibition in s 615 which in general prohibits acquisitions beyond the 20% threshold unless the offer is made to all shareholders under one of the permissible methods.<sup>17</sup> Section 731(d) states as one of the overriding principles that, as far as practicable, all shareholders of a company should have reasonable and 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.

### *The other Eggleston principles*

In spite of the many provisions in the Corporations Law that govern a substantial acquisition of shares, Little states that Australian corporate takeover law may best be described as a trade-off approach.<sup>18</sup> This is an approach in which the government’s philosophical approach to takeovers is neutral and contrasts with a pro-merger or anti-merger approach. Chapter 6

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15 Mannolini J, ‘The Reform of Takeovers Law - Beyond Simplification’ (1996) 14 C&SLJ 471 at 482.  
16 See Hall K H, ‘The Interior Design of Corporate Law: Why Theory is Vital to the Development of Corporate Law in Australia’ (1996) 6 *Aust Jnl of Corporate Law* 1, for an overview of the various corporate law theories and a discussion of the impact of liberalism on corporate law theory and principles. The concepts of equality and rationality of individuals are fundamental to liberal thought.  
17 The equality principle is embodied in various other provisions as well, eg, s 698 provides that a bidder cannot offer a collateral benefit to some shareholders.  
18 At 11.

of the Corporations Law is thus essentially an attempt to balance facilitation of takeovers with investor protection. The regulatory trade-off is summarised by the so-called Eggleston principles which are given statutory form in ss 731 and 732 of the *Corporations Law*. Section 731 instructs the ASC, when exercising its discretionary powers, to take account of the desirability of ensuring that the acquisition of shares in companies takes place in an efficient, competitive and informed market. This has been held to be a fundamental principle of Chapter 6.<sup>19</sup>

The further principles embodied in ss 731 and 732 are:

- that the shareholders and directors of a company should know the identity of any person who proposes to acquire a substantial interest in the company;
- that the shareholders and directors of a company should have a reasonable time in which to consider any proposal under which a person would acquire a substantial interest in the company;
- that the shareholders and directors of a company should be 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, lastly,
- the equal opportunity principle mentioned earlier.

#### *Evaluation of the protective measures<sup>20</sup>*

The four Eggleston principles are aimed mainly at protecting target shareholders. The first three could be described as procedural in nature, whereas the fourth principle is substantive. It effects a positive allocation of property rights in corporate control. It allocates those rights to all shareholders of the target company. It has been said that this principle embodies a particular juristic conception of the nature of the incorporated firm and one that considers shareholders, and shareholders alone, to be the residual 'owners' of the incorporated firm.<sup>21</sup> This has been, and remains, the prevailing approach in Anglo-Australian company law. This approach quite logically leads to the conclusion reached by the Eggleston committee

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19 See eg *ASC V Bank Leumi Le-Israel* (1996) 14 ACLC 157 at 188 per Sackville J. For a discussion of the extent to which the courts have adopted a purposive interpretation of the takeover provisions, see Renard & Santamaria, above n13, par 206.

20 It is interesting to note that the Eggleston Committee was apparently given only one month to look at takeovers and that no discussion period was allowed: Baxt R, 'Comment' in *Takeovers and Corporate Control: Towards a New Regulatory Environment*, Centre for Independent Studies, 1987 p89 cited by Hutson E, 'The Regulation of Corporate Control: The Australian Experience', paper presented to the 3<sup>rd</sup> Annual Asia-Pacific Economic Law Forum, Christchurch, December 1997.

21 Mannolini, above n15, at 472 where some of the well-known cases equating the 'interest of the company as a whole' with the interests of 'the corporators as a general body' are cited. Mannolini points out that, although this principle is known as the 'equality principle', it actually allocates rights on a proportional rather than an equal basis.

that the protection and equitable treatment of shareholders should be the main focus of takeover regulation.

The equality principle, in particular, has been the subject of criticism on the basis that it makes corporate takeovers so costly that potential bidders are discouraged and that it thus severely impedes the market for corporate control and skews the Australian system of takeover regulation towards the protection of target company shareholders.<sup>22</sup> It is argued by some that the market for corporate control is now highly inefficient in Australia and that this has led to relatively low levels of takeover activity and low returns on shareholders' funds in Australian companies compared to, for example, the United States.

These points may have some merit, but they seem to be simplistic and the conclusions glib. Why, for example, have the anti-takeover statutes in many parts of the United States not reduced economic efficiency there?

The protective measures clearly place restrictions on the market for corporate control. The question arises whether removing these restrictions and allowing the market greater freedom would increase the incidence of takeovers and thus protect shareholders' interests by encouraging greater efficiencies. In Australia, 'the need to protect shareholders has been consistently asserted as a fundamental requirement, even though, on a purely economic analysis of the law, this may increase the cost of takeovers and deliver the major gains to target company shareholders'.<sup>23</sup>

Little points out that in 1991 the House of Representatives Standing Committee on Legal and Constitutional Affairs<sup>24</sup> concluded that regulation was in the interests of shareholders generally. It ensured that they received adequate information to assist them in deciding whether or not to retain their investment when takeovers are proposed. The Report also noted that the time and resources involved in the recent past in administering the Takeovers Code appeared to be disproportionate to the objectives sought to be achieved. Some prefer self regulation along the lines of The City Code on Takeovers and Mergers but this has been considered and rejected on a number of occasions in Australia.<sup>25</sup> This is mainly due to the lack of a central financial area such as the City of London and its accompanying tradition.

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22 For a summary of the views of some of these commentators, see Hutson E, 'The Regulation of Corporate Control: The Australian Experience', paper presented to the 3rd Annual Asia-Pacific Economic Law Forum, Christchurch, December 1997.

23 Here Little refers to the Eggleston Committee Second Interim Report where in para 14 it is said: 'There appears to be general agreement that some regulation of take-overs is necessary to ensure fair treatment of shareholders.'

24 *Corporate Practices and the Rights of Shareholders*, November 1991 at 3.3.23.

25 For example, the *Report from the Senate Select Committee on Securities and Exchanges* (Rae Report) (AGPS Canberra, 1974) Pt 1, Vol 1, Ch 15; and House of Reps Stdg Ctee on Legal and Const Affairs, *Report on Corporate Practices and the Rights of Shareholders*, November 1991 at 3.3.8 to 3.3.23.

Regulation has a distributive effect upon the 'wealth' generated by takeovers. There have been many studies (some of which are referred to in the text) indicating that the major beneficiaries of takeovers are target shareholders. In a regulated environment, such as the current provisions in Australia, the offeree company is often able to encourage a bidding contest which increases the premium. Such bidding contests will occur less frequently once the mandatory bid rule is introduced. In this context, the following statement by Little is relevant: 'The efficient<sup>26</sup> competitive and informed market principle in Australia implies not only full disclosure of information *but also competitive bidding*.'<sup>27</sup>

There have, for some time now, been calls that the equality principle should be re-examined or even abolished.<sup>28</sup> It has been argued that there are two key problems with the equality principle. The first is the technical point that shareholders do not in fact hold the beneficial title to company property so that, if we regard corporate control as an asset of the company, individual shareholders should have no claim against that asset. If, on the other hand, we regard corporate control, not as an asset of the company, but of its shareholders, then the question arises as to why it should be considered an asset of a shareholder who has little influence, as opposed to a controlling shareholder. The second objection is that the equality principle is not consistent with 'modern and sophisticated economic theory'. This is based on the assumption that the company has completed a fundamental transition from trust to contract.<sup>29</sup> This contractual view of the corporation sees the corporation as a nexus of 'contracts' which is defined as 'a meeting place in which disparate individuals and groups exchange factors of production in return for an entitlement to future wealth flows'. The enforcement mechanism for these explicit and implicit 'contracts' is viewed as the various markets in which the corporation must operate. These markets include the product market, the managerial labour market and, importantly for present purposes, the market for corporate control.

It has also been argued that the protection of target shareholders is less necessary today when we have continuous disclosure, electronic

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26 On various occasions throughout the text, there are missing or misplaced commas. This is one example where a comma should have been used. No doubt these minor flaws will be corrected in the second edition.

27 At p12 (my italics). As an example, fn 39 refers to the comments of the High Court re the awarding of remedies where an offeror's contravention may have the effect of deterring competing offers in *Metals Exploration Ltd v Samic Ltd* (1994) 12 ACLC 752 at 763 per Mason CJ, Dawson and Gaudron JJ.

28 See, eg, Hutson E, above n 22; Mannolini J, 'The Reform of Takeover Law - Beyond Simplification' (1996) 14 C&SLJ 471.

29 See Mannolini at 475-478 for a useful synopsis of the contractual view of the corporation. The recent integration of ideas from the law and economics movement has resulted in economic concepts of the firm being added to the basic ideas of the aggregate theories (a belief that the status of the corporation and its internal and external relations can best be explained by reference to principles of contract). Under both these theories, the role of corporate law and state regulation declines. These theories have, however, been criticised for 'failing to recognise the inappropriateness of some of their assumptions to the reality of corporate existence. In particular, it has been suggested that ideas about market control of the corporation are inappropriate in the context of imperfect competition.' See Hall, above n 16 at 9-13.

communications, a sophisticated secondary securities market with easy rights of exit, diversified portfolios, derivatives markets, and the evolution of an active market for corporate control with imaginative takeover funding alternatives.

Whilst there is much truth in all of this, there are many counter-arguments:

- The courts in Australia have not embraced the contractual approach to corporations and generally prefer the 'proprietary' categorisation of shareholders' rights.<sup>30</sup>
- The contractual concept of the incorporated firm has its limitations and may even have served its purpose. Corporate law is more than a simple set of default rules that can be overridden by contract. As Branson states: 'The idea of corporate law solely as contract law was useful as a hermeneutic but peaked several years ago. As far as its adherents in the academic world are concerned, perhaps now is the time for them to retool, becoming teachers of family law, or land use, or to take up golf or serious gardening.'<sup>31</sup>
- Not all countries with more relaxed takeover requirements necessarily enjoy economic prosperity. The market for corporate control probably has less influence than many other factors and any statements attributing differences in Australia to this factor alone need to be examined critically.<sup>32</sup>
- Experts differ on the alleged benefits of takeovers and even if they are beneficial at all. One point upon which there seems to be agreement is that target shareholders in general receive positive abnormal returns but this may be argued to be due to wealth redistribution (for example, from bidder shareholders to target shareholders) rather than due to wealth creation. Mannolini concludes that 'the perception that the principal players in corporate takeover activity in the 1980s did not *create* new assets, but merely prospered on the reorganisation of assets created by others, may have some substance'.<sup>33</sup> One could add that some did not prosper for very long - whereas others were obliged to enjoy their prosperity elsewhere.

### **Conclusion**

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30 See eg the decision of the High Court in *Gambotto v WCP Ltd* (1995) 16 ACSR 1.

31 Branson DM, 'The Death of Contractarianism and the Vindication of Structure and Authority in Corporate Governance and Corporate Law' in Mitchell LE, (ed), *Progressive Corporate Law* (Westview Press 1995) 93, 105-106.

32 It is interesting to note the absence of a Takeovers Code in New Zealand. This has been, at least partly, attributed to the profound influence of the New Zealand Business Roundtable over the reform of New Zealand company law. Wishart D, 'Simplification and motherhood' *Butterworths Corporation Law Bulletin*, 31 January 1996, 16 at 19 n13.

33 Mannolini at 481.

Changes to corporate takeover law have been characterised by an absence of attention to quality empirical evidence on the benefits (and disadvantages) of takeovers and the economic effects of regulation. The forces for change have been largely political.<sup>34</sup> Although there often is widespread interest in a particular takeover, there is also widespread public ignorance of the purposes and workings of capital markets.<sup>35</sup> This creates opportunities for those with self-serving motives to push their particular agendas. These could be many and varied. For example, regulators may wish to expand their influence; managers and large shareholders associated with bidding firms may wish to reduce possible defence mechanisms; some may wish to loot target companies; managers of potential targets may wish to protect themselves; so might employees and their unions; legal practitioners as well as accounting and investment banking firms may wish to increase their fees; small and large shareholders may seek to free ride on the resources put into governance activities and research by other stakeholders; politicians may wish to increase their popularity amongst certain sectors; etc.<sup>36</sup>

It is true that in the early 1980s law and economics scholars in the United States were in favour of encouraging takeovers. In accordance with the market for corporate control, takeovers were seen as the means whereby efficient managers displaced inefficient ones and human and investment capital could be allocated to its most productive use. By the end of the decade, however, many of those scholars became apologists for the various state anti-takeover statutes which have been described as 'the ultimate anti-takeover device'.<sup>37</sup>

As is well known, there has been huge retail interest in the floats of government-owned enterprises such as the Commonwealth Bank and Telstra.<sup>38</sup> This is set to continue with the listing of financial service giants like the AMP which will have almost 1.1 billion shares on issue and is expected to be valued at up to \$17 billion.<sup>39</sup> Australians indirect shareownership is also increasing due to their increased funds held by institutions and invested in the share market. This could well lead to increased political pressure to protect the interests of small shareholders.

The Corporations Law currently operates to prevent the transfer of control being presented to target shareholders as a *fait accompli*.<sup>40</sup> The

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34 Hutson E, 'The Regulation of Corporate Control: The Australian Experience', paper presented to the 3<sup>rd</sup> Annual Asia-Pacific Economic Law Forum, Christchurch, December 1997.

35 Ibid.

36 Wilkinson B and Mandelbaum A, 'The Takeover Debate in the Context of Securities Regulation in New Zealand: A Law and Economics Perspective' in Walker G and Fisse B, (ed), *Securities Regulation in Australia and New Zealand* (Oxford University Press 1994) 783-784.

37 Branson, above n 31, at 94.

38 Hutson, above n 34, at 29.

39 Blue T, 'AMP: Full steam ahead', *The Australian*, 7 May 1998, p23.

40 Mannolini at 473.

crucial question is whether the reduced protection for shareholders<sup>41</sup> (as a result of the new mandatory bid system) will be compensated for by the operation of the market for corporate control. As we have seen, it can be argued that the new system will make takeovers easier and cheaper, that there will consequently be more takeovers and thus a more active market for corporate control. Whether this will compensate for the reduced protection seems doubtful, but even those shareholders who believe it will must now face up to the reality that they could wake up with a new controlling partner - though the new partner will be obliged to make them an offer which, with any luck, will be too good to refuse.

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41 Some of the proposed reforms regarding capital raising also pose an increased risk to shareholders and 'new opportunities for the abuse of the corporate form by directors': Tomasic, 'Editorial' (1998) 8 *Aust Jnl of Corporate Law*. See also Coburn, 'The Phoenix Re-examined' (1998) 8 *Aust Jnl of Corporate Law* 321 at 328 where the author (an employee of the ASC) is critical of the proposal to allow small and medium sized enterprises (SMEs) to raise up to \$5m on a once only basis using an offer information statement (OIS) rather than a full prospectus. He states that: '[I]t would be open to SMEs to create another corporate vehicle to carry out the fundraising activity. This may translate into SMEs transferring assets to another company to get around the "once only rule" creating a new hybrid phoenix...It also appears to be an underlying assumption of CLERP that the amounts raised will go into stimulating economic activity rather than lining the pockets of individuals that may seek to abuse this innovative opportunity for SMEs.'