

# TAKEOVERS LAW REFORM - SOME PROPOSALS

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Legal Briefings - By **Rodd Levy** and **Baden Furphy**

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## SUMMARY

- Takeover bids are essential to the operation of Australia's economy and capital markets.
- The takeover rules could be reformed in certain ways to enhance the effectiveness of the rules.
- This includes relaxing share acquisition prohibitions after a person reaches 50%, requiring a 50% minimum acceptance condition to ensure control only passes at an acceptable price, allowing compulsory acquisition at 75% in recommended bids and allowing shareholders to commit to accept bids for more than 20% of shares.

Takeovers are regarded as an integral part of the operation of equity markets and of the Australian economy. Takeover activity promotes economic efficiency and the better allocation of economic resources.

It is therefore surprising there has been no general review of the principles underlying our takeovers laws for many decades. In this respect, Australia lags many overseas countries which have revised their rules from time to time as their markets have developed.

Many of the features of our takeover laws are out-dated and should be revised. The authors have written a paper on this subject which appears as a chapter in the recently released book entitled [\*\*\*Towns under Siege - Developments in Australian Takeovers and Schemes\*\*\*](#). In the chapter, the authors suggest a number of reforms to our laws.

The key reforms ideas can be summarised as follows:

1. A person who controls more than 50% of the shares in a company should be free to acquire further shares without having to make a bid or satisfy another exemption. The law should focus only on transactions resulting in a change of control. Regulating acquisitions by a person already in control just introduces red tape and unnecessary cost. Shareholders would know this rule when considering whether to accept the bid and would act accordingly if they were concerned about being locked into a minority position.
2. All bids should be subject to a mandatory 50% minimum acceptance condition so control of the target company only passes at a price acceptable to the majority of shareholders. This would bring our laws into line with the rules in many other jurisdictions. It would ensure that effective control could not pass quickly unless the bid was strongly supported. This rule would mean that other rules would require amendment (such as the 3% creep rule) so that a shareholder could not end up with more than 20% and less than 50% to negate the operation of the rule.
3. Where a bid has been recommended by target directors, the bidder should be able to compulsorily acquire all the shares in the company if it achieves acceptances for 75% of outstanding shares. We consider that the dual test of target director support and 75% acceptance provides sufficient protection. Lowering the threshold from 90% to 75% would bring the rule more into line with the rule applying in scheme of arrangement, reductions of capital and alterations to company constitutions. Minority shareholders would still have the protection of being able to resist compulsory acquisition of their shares if fair value was not offered by the bidder.
4. A bidder should be free to obtain commitments to accept the bid from shareholders with more than 20% of the shares on issue, subject to the commitment lapsing if a higher bid is made. This is the ordinary effect of our rules now with bidders frequently securing public commitments under the 'truth in takeover' rule anyway. Introducing a specific rule would at least clarify the legal position.
5. The equal treatment principle should only apply during the bid period. The minimum price rule and the escalator prohibition should be repealed. We consider that adequate protection for shareholders exists due to the 20% prohibition (given control cannot pass unless other shareholders accept the bid). This would be enhanced by our proposed 50% minimum acceptance rule as discussed above.
6. Collateral transactions between bidders and shareholders should be allowed if their combined stake is less than 20% or if the transaction is conditional on the bidder receiving acceptances for more than 50% of shares held by independent shareholders. We consider this new safe harbour would facilitate many break up bids. This type of takeover proposal is frequently critical to being able to restructure an industry, but these bids are often hamstrung by the current strict rules.
7. The rules governing the bid timetable and process should be reformed to avoid bids dragging on for too long and to bring matters to a head quickly. For example, bidder should not be able to sit on a decision whether to waive a breached condition, as that

creates uncertainty and gives the bidder an option over the bid.

8. Finally, the Takeovers Panel could be given additional powers (such as powers to give exemptions or modifications and to make advance rulings). To discharge these functions, the Panel should be given additional funding.

These proposals are intended to reflect the current principles in legislation of providing fairness for shareholders, but to promote greater takeover activity for the benefit of the Australian economy. They are intended to promote discussion about takeovers laws and how they should best be framed to advance the Australian economy.

There is further discussion and other reform proposals in the chapter which appears in the book. We welcome any thoughts or debate on these issues.

## KEY CONTACTS

If you have any questions, or would like to know how this might affect your business, phone, or email these key contacts.



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