CORPORATE TAKEOVERS IN SINGAPORE*

The two broad threads that underlie this paper and indeed the whole subject of corporate takeovers are (a) the current regulation of corporate takeovers in Singapore and its inherent limitations and (b) the regulation of foreign corporate takeovers which have quite recently found expression in the London-based Slater Walker activities in Singapore.

The first thread involves a legalistic study of the multifaceted corporate and fiscal regulation that exists and highlights the local differences. The basic thesis in this segment is that a potentially impressive array of weaponry already exists and that piece by piece legislation in the abstract does not further effective regulation. Instead the desired response advocated is that the ambit of regulation be tightened and the diverse regulation from stamp duty and income tax to exchange control be harnessed by a concerted policy towards such regulation.

The second thread deals with the catalystic activities of Slater Walker in Singapore. It traces their activities briefly and records their impact on the local corporate scene. It then analyses the ramifications of such activity as it reflects the dilemma between regulation and encouragement of foreign investment and evaluates the governmental response. The second thread therefore involves essentially policy considerations which find legal expression in the devices used to respond to foreign corporate takeovers.

To preserve a complete perspective of the developments in the regulation of the field it is necessary also to focus on the case of *P.P.* v. *Fraser & Co.*[1] and its implications as the final securities legislation is a culmination of the response of the Government to these multifaceted and quite distinct problem areas.

A.I. *REGULATION OF CORPORATE TAKEOVERS*

This part begins with a brief economic justification of the role of corporate takeovers in a modern growing economy and then proceeds to justify governmental regulation of such activity in a mixed (neither totally capitalistic nor totally socialist) economy, both of which form the basic assumptions of this paper and which give rise to the basic dilemma of whether and how to regulate corporate takeovers. It then focuses on the dilemma in the contemporary Singapore context, briefly delineating the types of takeover techniques involved and their significance.

* This paper was submitted to the Seminar in Corporate Planning as partial requirement towards the LL.M. degree in 1972/73 at the Harvard Law School. It has been substantially revised to incorporate wide ranging changes up to 1 January 1974.

1. District Court, unreported. See *Straits Times* 1 June 1972.

Finally a few definitional problems are dealt with before embarking upon the main investigation to consider the limitations of current regulation in Singapore in the light of recent economic and corporate developments (in particular the spate of corporate takeovers) and to evaluate governmental response.

Ideally, it is desirable that the capital resources of a nation are utilised fully in producing the maximum profit possible i.e. at maximum efficiency. While this is not the case in any economy, several mechanisms function towards producing this end. One of them is the takeover bid:

> A company which sacrifices profit either to an easy life or to unprofitable growth makes itself liable to a takeover bid. Suppose that the management of a large concern has become slack in the sense that it is not effectively selling the product for which consumers are prepared to pay most or it is not cutting its costs of production most efficiently; or suppose that the management of the concern is sacrificing profit to growth by using funds to finance the company's growth, even though this is a relatively unprofitable form of business. In such circumstances the replacement of the management by one which is more efficient or profit minded could increase the market value of the company's shares. It may well be true that the ordinary shareholders dispersed throughout society will not in fact be able to get together to enforce such a change. But a generous bid for the company's shares on the part of some other large company or institution may enable a majority of the shares to be acquired by a single institutional owner which can enforce the change of management, increasing thereby the value of the company's shares and thus reap a large benefit. Experience suggests that large companies are in fact threatened with this fate if they fail to be sufficiently profit-minded.[2]

The traditional form of regulation, which is almost identical to that of the English without the City Code on Takeovers and Mergers,[3] will be surveyed in the next section. Following Singapore's independence in 1965 after secession from the Malaysian Federation, economic policies changed. The primary thrust of such policies culminated in the attempts to transform Singapore into the financial centre of the area. To this end international banking operations were expanded, more foreign banks granted licences, liberalised tax incentives, expansion of the Asian Dollar market to US$2.5 billion by 1969 ensued.[4]

Together with the 'boom' economic activity came the spate of corporate takeovers in the 1970's, viz. the Slater Walker/Haw Par International/Chung Khiaw Bank; the Borneo Company's bid for Motor Investments; Wheelock Marden and United Engineer's bid for McAlister; Sime Darby's bid for Seafield Amalgamated in London; the combined Chinese Bus Companies' purchase of the assets of Singapore Traction Company; Sime Darby's takeover of Woodward & Dickerson; Haw Par's takeover of Island & Peninsular Development and Austral Malay Tin in Malaysia and Kwan Loong of Hong Kong; Ben & Company's purchase of most of Framroz; Central Securities (Holdings) acquisition of Garden City Development; Hongkong and Kowloon Wharf and Godown's acquisi-

2. J.E. Meade "Is 'the new industrial state' inevitable?" (1968) *Economic Journal* 387.

3. Revised Notes on Company Amalgamations and Mergers, prepared by the Executive Committee of the Issuing Houses Association, in cooperation with the Accepting Houses Committee, the Association of Investment Trusts, the British Insurance Association, the Committee of London Clearing Bankers and the Stock Exchange, London (Revised (1972)).

4. For a brief survey see 'Singapore, 'Switzerland of the East'; *New York Times* January 21 1973, Economic Survey of Asia and the Pacific page 56.

tion of the assets of Hotel Malaysia; Hume Industries' (Far East) acquisition of Federal Paper Products; Jack Chia/Malayan Publishing House's acquisition of Woodworking Industries of Singapore; Jardine Waugh purchase of 75 per cent of E.I. Parrish (Singapore); Oversea-Chinese Banking Corporation's acquisition of Four Seas Communications Bank and United Overseas Bank's acquisition of control of Lee Wah Bank. The list is by no means exhaustive as it merely catalogues the more publicised bids.

What exacerbated the problem, beyond the detailed blow-by-blow account of the flurry of activity in the local newspapers was the fact that part of the cause and indeed the catalyst of this activity was the arrival of Slater Walker Securities of London under the shell first of Haw Par Brothers (International) Singapore[5] whose

> "smooth but ruthless liquidation of the assets of Haw Par Brothers' (International) in Singapore — a republic remarkable for the warmth of the welcome it usually extends to foreign capital — nevertheless provoked a new type of 'economic nationalism' from the Singapore Government."[6]

It was the activities of Slater Walker in Singapore which prompted the outcry for regulation since it was a foreign raider swallowing up an old established though not too well run local company. This will be the subject of greater survey in the last section of this paper where it will be the basis upon which the limitations of current regulation are discussed.

The second type of takeover in Singapore was prompted also by prevailing government policy but this time with its persuasion. Thus the United Overseas Bank, having acquired the Chung Khiaw Bank in 1970, in 1972 proceeded to acquire the Lee Wah Bank under the pretext that it was necessary for local banks to merge to play a more effective role on the financial markets and to face successfully the strong competition from the large foreign banks. This activity is prompted by the fear that the entry of foreign commercial and merchant banks with their sophisticated international networks would swamp local concerns out of business if they continued to function under primitive conditions of organisation.

With a view to creating a financial centre in Singapore with pretensions of being the Switzerland of the East, have come governmental measures to liberalise entry bans to banks, investment and merchant bankers and like institutions. This has caused concern to protect local interests from being totally swamped. Protection was also granted in the prohibition of foreign banks from having more than the then existing number of branches and from being able to participate in local money deposits. Yet it was realised that without the stimulus of competition most local concerns would continue to be "straight jacketed by family ownership, patriarchal power and paternalistic staff policies

5. For the adulation of another expatriate See Derek Davies "Jim Slater: Asia's Worried Welcome' in *Far Eastern Economic Review* March 25 1972. Contrast the reporting of the English press which is generally uncomplimentay e.g. *The Times* Friday January 26 1973 page 18 and the report of the spectacle of one of Mr. Slater's former protegees in grave danger of being taken over himself.

6. *Ibid.*

inherited directly from feudal societies."[7] Thus the approach of the government has been to encourage through the grapevine the mergers and modernisation of local concerns, the two being approximated as necessary concomitants as the costs involved are more easily borne by the larger concerns. Hence we see here the two locally motivated takeover bids, the difference in approach being a reflection of the official benign approval.

In early December 1972, the Oversea-Chinese Banking Corporation, the largest bank and business enterprise in Malaysia and Singapore announced its acquisition of the Four Seas Communications Bank. The *modus operandi* was firstly the acquisition of 1.4 million shares out of 2 million issued shares from the controllers, all board members and officers, followed later by extending the offer to remaining shareholders. The local flavour of this bid is well described thus:

> "The OCBC announcement of the proposed takeover was a classical exercise in traditional Chinese business diplomacy: everybody gained and nobody lost. It never mentioned words like 'takeover' and 'acquisition'. It spoke only of 'the desirability of an arrangement between the two banks in order to pool their resources so that they may be better able to meet the ever increasing financial and technical demands of large-scale, industrial and commercial customers."[8]

But it was intended under the arrangement that the two banks should operate as separate units 'under their respective boards of directors, but the two boards will work together in closest cooperation.'

The motivation behind the maintenance of the separate business operating units was the fact that the clientele and shareholders of the Four Seas Bank was of the Chinese Teochew clan, while the Oversea-Chinese Banking Corporation had Hokkien progenitors. That such provincialism should exist in apparent conflict with the image of a modernised financial and commercial metropolis is a fact which substantiates the observation that Singapore is a society in transition notwithstanding the Western modern facade that deceives the unpenetrating eye.

In December of 1972, United Overseas Bank[9] announced its acquisition of a controlling interest of 54.57 per cent from the major shareholders of the Lee Wah Bank, while a formal offer was circulated to all shareholders of the latter shortly thereafter. Thus the desired size of combined assets of S$1.35 billion with loans amounting to S$699 million and total deposits of S$1.21 billion was achieved together with an added windfall of a combined total of 26 branches in Malaysia, three in Hongkong and one in Japan, and a covetous eye being cast in the direction of the Peoples' Republic of China.

The third type of activity involves that which is more prevalent in the Western world i.e. horizontal and vertical and conglomerate takeovers by local companies via public offers to purchase shares of the target company. This type has not been significant as yet except for the activities of British agency houses like Sime Darby. As this category

7. Like all exaggerations, this quote from Derek Davies, *op. cit.* bears an ounce of truth.

8. Arun Senkuttuvan, *Far Eastern Economic Review*, December 23 1972 at page 38.

9. For documentation see *Straits Times,* December 22, 1972.

is not to be the subject of closer study in this paper it is proposed to dispose of it briefly by recounting some of the activities that have emerged and their significance.

The activities of Sime Darby, a British-owned agency house dominate this area. These agency houses originally had monopolistic control over the imports and exports of Malaysia and Singapore and acted as selling agents for foreign manufacturers as well as purchasing agents for foreign manufacturers.[10]

The conglomerate-type activities of Sime Darby both in Singapore and London evolved thus

> "from a trading company with plantation interests, it has become massive in the plantation field, linked its traditional trading operations with PERNAS of Malaysia (the State Trading organisation) and expanded into manufacturing particularly on the food side (reference to its acquisition of Amoy Canning) and entered the world of high finance (reference to its merger with Clive Holdings, a discount house in London) not forgetting its American acquisition (of Woodward & Dickenson, commodity brokers) which will give it a stake on the commodity trading side internationally which is a natural for its estates division."[11]

As other aspects of the takeover phenomenon engage the attention and energy of the government it is inconceivable that in the near future such activity will become the subject of regulation except incidentally. To some extent this conglomerate-type activity is a response to the unsettling horizons for the continued domination by the agency houses.

The role of government in such regulation is justifiable when there is a conflict between private and public interests even under a *laissez-faire* policy. In Singapore with its mixed economy i.e. free enterprise as well as State enterprise, governmental involvement in the economy beyond peripheral regulation is assumed.[12] All essential services e.g. public utilities, radio and television are government controlled, hence there is no public pressure as in Australia for local control in these areas. Government involvement in industry e.g. Singapore International Airlines, Development Bank of Singapore and INTRACO (state trading corporation) and its success therein has created a momentum for involvement of its own. The basic question in Singapore therefore is whether and how to control foreign intrusions into traditionally local areas of economic activity. The Government's reluctance to overextend its economic activities to some degree accounts for its attempts to encourage self regulation of the stock market rather than to legislate. The goal thus set for itself is:

> "the highest proportion of local content in the manufacturing process, the greatest potential for wage increases, the greatest prospect for national entrepreneurs to move into allied industries."[13]

10. James Puthuchearry's *Ownership and Control of the Malayan Economy* Eastern Universities Press Ltd., Singapore 1960, deals at length with the thesis that these houses totally dominated the Malayan economy and although the data presented is outdated, makes a cogent argument which is to a lesser extent equally pertinent today.

11. *Straits Times* Monday December 25 1972 with references added.

12. See Brian Hindley "Industrial Merger and Public Policy" Institute of Economic Affairs (1970) pages 12-21 for a contrary view that in the absence of conflict of public and private interests governmental action is undesirable.

13. Finance Minister of Singapore Hon Sui Sen, *Straits Times* March 20 1972 page 1.

The fundamental issues are therefore posed. While wanting to encourage foreign investment and the creation of a financial centre with its entailing of free foreign enterprise, there is the politically and nationally distasteful activity of foreign takeovers which once regulated too rigidly would serve to scare away investment, if viewed as a prelude to further regulation.

While this paper concerns itself both with the policy aspects of such regulation as well as the mechanics involved in such regulation, the emphasis is on the former with details so far as is necessary, to make intelligible the directions of that policy.

Finally it is here intended to provide working definitions of the terms used frequently in this paper:

> "A 'takeover' may be defined as a transaction or series of transactions whereby a person (individual, group of individuals, or company) acquires control over the assets of a company, either directly by becoming the owner of those assets or indirectly by obtaining control of the management of the company."[14]

> "A 'takeover bid' is a technique for effecting either a take-over or a merger: in the case of a takeover, the bid is frequently against the wishes of the management of the offeree company."[15]

A.II(a) *THE COMPANIES ACT:*

The basic philosophy of s.179 of the Companies Act[16] is one of disclosure. It defines a takeover scheme as:

> "a scheme involving the making of offers for the acquisition by or on behalf of a corporation or on behalf of a proposed corporation —
>
> (a) of all the shares in another corporation or of all the shares of a particular class in another corporation; or
>
> (b) of any shares in another corporation which (together with shares, if any, already held beneficially by the first-mentioned corporation or by any other corporation that is deemed by virtue of section 6 to be related to that corporation) carry the right to exercise, or control the exercise of, not less than twenty per cent [17] of the voting power at any general meeting of the other corporation:"

This section applies not only to locally incorporated companies but also to foreign corporations as s.4 defines "corporation" to mean 'any body corporate formed or incorporated or existing in Singapore or outside Singapore and includes any foreign company'. Also it is clear that schemes by individuals are not within its ambit. It has been suggested by the Eggleston Committee of Australia[18] that one third voting power is too high in view of the dispersion of ownership in modern economies and that fifteen percent would suffice.

14. Weinberg on *Takeover and Mergers,* Sweet & Maxwell (1971) London, page 3.
15. *Ibid.*
16. There is no statutory equivalent in the United Kingdom although this provision is modelled on the U.K. Licensed Dealers (Conduct of Business) Rules 1960.
17. By amendment of s.14 Act 49 of 1973 the previous one third voting rights was reduced to twenty per cent.
18. The Company Law Advisory Committee's 2nd Interim Report to the Standing Committee of Attorneys-General, 28th February 1969, para. 29.

Once s.179 is applicable a whole gamut of disclosure mechanisms is brought into play, all with the purpose of providing information to shareholders, and to protect them from being pressured into acceptance by surprise and lack of time to consider. S.179 requires the offeror corporation not earlier than twenty-eight days, and not later than fourteen days, before the offer is made, to give the offeree corporation notice in writing of the takeover scheme containing particulars of the terms of the offer and a statement which complies with the Tenth Schedule Part B, which requires identification of the offeror; its business; the amount of offeree corporation stock it holds; restrictions on transfer rights; whether payment is to be made by cash and arrangements to secure the cash payment;[19] compensation of directors of the offeree corporation for loss of office; material changes in financial position of the offeree corporation; and the latest available market sale price prior to date of notice, if its securities are listed on the stock exchange.

S.179 2(b) requires the offer itself to comply with Part A of the Tenth Schedule which requires the offer to be dated and despatched within three days; remain open for acceptance for at least one month; whether or not it is conditioned upon acceptance of offers in respect of a minimum number of shares and if so, that number; the consideration whether cash or otherwise; where conditional a period as to the latest date on which the offer may be declared to be free from the condition; and a further period during which offer open for acceptance after declared to be unconditioned.

Within fourteen days of receipt of such notice or statement, the offeree corporation may either give the offeror corporation a statement which complies with Part C of the Tenth Schedule or transmit to its own shareholders the offerer's notice and statement. Part C of the Tenth Schedule requires that the statement by the offeree corporation shall include: whether or not the board recommends to shareholders the acceptance of the offer, or if it declines to make such recommendation, this should be stated; the number of marketable securities in the offeree or offeror corporations held by the directors, and if none, explicitly so stated; any payments proposed for their loss of office, any other arrangements; and any material change in the financial position of the offeree corporation.

S.179 (7) approximates statements made by the offeror corporation to prospectuses, with all the ensuing civil and criminal consequences for misleading and false statements.

The above regulation of takeover bids is thus clearly designed to give shareholders sufficient information and time in which to consider the offer and to preclude excessive compensation to directors of the offeree corporation in consideration for their pending loss of office, all this by way of disclosure. As will be demonstrated shortly, it does not go far enough. After that, it is necessary to survey other provisions of the Act which bear upon the takeover transaction.

19. Details of arrangement to secure payment of cash consideration, and if none then so to be stated. This makes it clear that such security is optional. The Jenkins Committee recommendation that such a statement be binding is provided for indirectly as s. 179(7) equates such statements to prospectuses and this imposes civil and criminal liabilities for misleading or false statements.

The embryo of a takeover panel to regulate such activity was created in 1973 by the Companies (Amendment) Act of 1973 which in introducing s.179(11) allows the Minister power to direct by notice all parties to comply with general principles and rules of a non-statutory nature beyond compliance with the 10th schedule as specified in such notice as well as the creation of a panel to administer these rules. The exercise of such power is conditioned only by the minister making such action to be necessary in the public interest or for the protection of investors.

The shortcomings of the existing Companies Act regulation have been the subject of study by the Australian Eggleston Committee.[20] In recent years, the Singapore draftsman has revealed a tendency to use Australian legislation as models for local legislation in similar areas. It is not inconceivable therefore that any amendments to the Companies Act will be closely modelled on the New South Wales or Victoria State[21] amendments *vis a vis* takeovers.

The Committee considered[22] the problem of maintaining equality of opportunity[23] in different situations and also the problem of sale of control at a premium and recommended that the offerer who increases the price offered in respect of some shareholders be required to pay the increased price to those who have already accepted. S.180L of the New South Wales Act thus prohibits any variation of takeover offers except by way of increases in the consideration and sub-s. (4) extends any such variation to those who have already accepted.

The device of "first-come-first-served invitation" whereby a broker invites offers from shareholders at a stated price, indicating his instructions to accept the first offers received up to a stated percentage of the share capital was the subject of some difficulty.[24] As an invitation to treat is not an offer, such a practice is not within the ambit of the regulation by the Companies Act. Further evasion of the Act is effectuated by simply making such invitation or even offer for about one third of the shares while if tendered acceptance is made for the higher proportion. This raises the whole array of inequities inherent viz. non-disclosure of identity of the offeror; and inequality between shareholders. S.180L (3) of the New South Wales Act on the basis of the Eggleston Report now includes invitations within its coverage. Further, S.180N in regulating conditional offers, provides the machinery by which offerees who wish to accept only if it ultimately appears that they will be left as a small minority, will be adequately informed on the progress of the takeover scheme and have additional time in which to consider whether or not to accept the offer.

The problem of 'bluffing offers' i.e. an attempt to inflate market prices by announcing intentions to make an offer without having such

20. Eggleston Committee, *op. cit.* See also John Peden 'The Control of Company Takeovers' 44 Australian L.J.208 (1970).

21. No. 8184 of 1971.

22. Other shortcomings with direct bearing on foreign takeovers are mentioned in the last section of this paper.

23. Para. 18.

24. Para. 22.

intention was dealt with by a provision in s.180Q making such offers unlawful. In Singapore additional legislation on this problem is superfluous. S.84 of the Securities Industry Act[25] prohibits false trading and markets while s.85 makes unlawful market rigging transactions and s.87 makes it unlawful to employ manipulative and deceptive devices in the purchase or sale of securities.

Notwithstanding the Eggleston Report[26] that expenses properly incurred by the directors of an offeree corporation in connection with a takeover scheme in the interests of the members, are to be refunded to such directors, S.180P uses the term 'reasonably incurred'. The significance of the distinction is that the Committee thought such expenses should be limited to those 'properly incurred' i.e. with the express or implied authority of the members or those -incurred in the performance of the obligations imposed by the Act. The term 'reasonably incurred' implies a wider coverage and makes inevitable future litigation to determine the legality of individual payments. All that was intended by the Committee was that it 'should be expressed in declaratory form so as not to throw doubt on the propriety of past reimbursements'.[27]

In view of the foregoing, these lengthy amendments have had the effect not so much of radically altering the previous regulation but rather of tightening its applicability to the different situations created to evade regulation.

A.II(b) *INSIDER TRADING:*

In a takeover scheme, three facets of a director's duty of loyalty to the company are usually brought into focus:[28]

1. The abuse of inside information about a prospective sale of assets, takeover bid or merger, which enables insiders, directors and controllers to purchase shares from other shareholders with the assurance of gain to themselves and loss to the selling shareholders;

2. Tactics to resist takeover bids which are prompted more by the instinct of self preservation of the directors of the offeree corporation, than with a view to getting the best terms possible for all shareholders; and

3. The levy by existing controllers of additional consideration for their cooperation well above that accorded to other shareholders, usually in the form of inordinate compensation for loss of office.

The uniqueness of the Singapore provisions in these areas, although based on the English model, necessitates some discussion to put into focus the whole range of regulation.

25. Act No. 17 of 1973. See infra at page 69 where the Act is considered at some length.

26. Para. 44.

27. *Ibid.*

28. Weinberg on *Takeovers and Mergers* 3d Edition 1971 chaps. 23-25.

The Singapore regulation of insider trading has come a long way from its English progenitor, s.195 of the 1948 Companies Act[29] which required disclosure of director's shareholdings in a register. While the English amendments of 1967[30] require further disclosure in the form of three registers: of director's holdings and dealings in shares; of persons having substantial (10 per cent and above) of shares in a company listed on the Stock Exchange; and the third to disclose details of directors' service contracts,[31] the Singapore regulation goes much further in some respects. S.132(2) of the Singapore Act provides:

> "An officer or agent of a company shall not make use of any information acquired by virtue of his position as an officer or agent of the company to gain directly or indirectly an improper advantage for himself or for any other person or to cause detriment to the company."

By extending coverage to 'officers' defined in s.132(5) to include past officers and 'agents' to include bankers solicitors and auditors past and present, the Act went beyond its English model. Further it also covered advantage to 'any other person'. S.132(3) provided relief to the company to recover profits so made. S.132(4) additionally provided relief by way of compensation to the person suffering loss as a result of the use of such information. S.132(4) has however now been repealed, but it is in substance retained by the new S.132A.

As progressive as it was made out to be, it failed to be effective to curb insider trading as witness the absence of any cases under it. Yet without a doubt insider trading continued and to this day continues unimpeded to any degree by legislation.[32] The 1970 amendments made drastic changes to s.132 and added a new potentially powerful deterrent to insider trading in the form of S.132A:

> (I) "An officer of a company, who, in any transaction to which this section applies, makes use for his own benefit or behalf, of any special confidential information which if generally known, might reasonably be expected to affect materially the value of the subject matter of that transaction, shall be liable to any person who suffers a direct loss as a result of the transaction for the loss suffered by that person unless the information was known or ought reasonably to have been known to that person at the time of the transaction."

S.132A(2) defines the transactions to which the section applies as including shares, debentures, interests other than shares and options to buy or sell shares or debentures. The provision is more precise, it uses "special confidential information acquired in his capacity as officer" and would "affect materially the value of" and makes the officer directly liable to the person suffering loss thereby. Thus the restrictive and wholly unjust ruling of *Percival* v. *Wright*[33] where a director was alleged

29. 11 & 12 Geo. 6 c.38.

30. 10 & 11 Eliz. 2, c.81.

31. Sections 29, 34 and 26 of the 1967 Act, *op. cit.* respectively.

32. See for example the Prime Minister's advice of caution to small speculators against being caught in the heavy activity on the Exchange by becoming victims of the large operators with inside knowledge. *Straits Times* 17th February 1973 page 1.

33. [1902] 2 Ch. 421. See also A. Afterman *Company Directors and Controllers* 1970 page 114, who argues that s.132(2)'s 'improper advantage' should be interpreted to include insider trading, which argument is now academic in view of S.132A.

to have used inside information of an impending takeover bid to purchase a shareholder's shares at a price below that offered by a prospective offeror, was held not liable insofar as the shareholder initiated the sale to the director at a quoted price with the director accepting without disclosing information of the impending takeover bid, is now clearly obliterated although arguably s.132 had put it to rest.

However it must be noted that S.132A is limited to transactions defined in sub-s. (2) i.e. those relating to shares or debentures of any company of which the officer is an officer, or of a related company;[34] interests other than shares or debentures as defined in s.84 as amended by the 1970 amendment to mean 'any right to participate or interest, whether enforceable or not, and whether actual, prospective or contingent in any profits assets or realisation of any financial or business undertaking or scheme... whether or not the right or interest is evidenced by a formal document and whether or not the right or interest relates to a physical asset.'

This provision which finds expression in the Eggleston Committee Fourth Interim Report thus makes officers trading in securities and options of their companies and related companies liable to outsiders who can demonstrate having suffered a direct loss by reason thereof. What is clear is that the plaintiff in *Percival* v. *Wright*[35] could now recover. Could a shareholder who was not involved in a sale to the director, but rather sold to a third party, recover if it later appears that the director was involved in insider trading? The words "liable to any person who suffers a *direct* loss *as a result of that transaction"*[36] would compel a negative conclusion. If the publicity of a director's insider trading has the effect of depressing the market value of the company's shares then the case of the penumbra has arisen and it is no longer clear whether or not recovery is available as the question of causation in determining a "direct loss" evokes the spectre of controversy so familiar in the law of torts. One limitation however is that s.132A(3) provides a two-year limitation period of litigation.

S.132A has been repealed and a differently worded substitute has been introduced by the amendments of 1973. It is now intended to consider the changes wrought by the amendment and whether such dealings have been demonstrably curbed at least as far as the statute goes. The persons covered by S.132A have now been widened to include agents who are defined to include bankers, solicitors, auditors, accountants or stock-brokers and any person who has at any time within the preceding twelve months been such. Employees are still regulated; and "officer" is now defined restrictively as to include anyone who has within the

34. Defined in s.6 to mean the following 'where a corporation
    a) is the holding company of another corporation;
    b) is the subsidiary of another corporation; or
    c) is a subsidiary of the holding company of another corporation.... deemed to be related to each other'.

35. *Op. cit.*

36. Emphasis added. Contra the United States Supreme Court in *Strong* v. *Repide* 213 U.S. 419 (1909) where the controlling shareholder and manager was held guilty of fraud in purchasing the holdings of a minority shareholder without disclosure of current negotiations for sale of the property.

preceding twelve months been a director as opposed to the previous definition adopted from s.132(5) which included those who at any time have been officers.

Another extension of the coverage lies in the usage of the term "corporation" rather than the previous "company", which former term includes foreign incorporated companies and related corporations.

Within the elements of the offence itself certain changes have been made whose final impact is unclear. Thus now the insider must additionally acquire an advantage to himself or others over and above the consequent loss to the third party. It is doubtful whether this advantage (previously termed benefit) adds any new requirement as any gain because of a sudden rise in share prices or gain by virtue of selling before a drop in share prices concurrently satisfies both requirements. Again the use of the term 'specific confidential information' as opposed to the previously used 'special confidential information' does not involve anything significantly new. The degree of specificity required rather than general background information is surely required under either terminology.

The purview of the section is now however restricted to dealings on the stock exchange. The new provision makes this implication necessary as it combines the specific confidential information with its materially affecting the price of the subject matter of the dealing on a stock exchange.

S.132A(5) applying the same formula proceeds to delineate two specific instances which it is arguable would ordinarily have come within s.132A(l). It extends the section to such instances where the information relates to the possibility of a takeover offer or bid being made or the possibility of the corporation entering into a substantial commercial transaction with another.

S.132A(6) permits investigation by a committee of the Stock Exchange into such dealings either on its own initiative or on the Ministers' direction. As a preventive remedy s.132A(7) empowers the Minister by regulation to restrict dealings by such officers, agents or employers in certain specified circumstances or during certain periods of a financial year of a corporation during which such person is likely to be in possession of such material information.

The apparent gaping loophole in the otherwise watertight regulation of insider trading is well described by the United States Senate Banking and Currency Committee of 1934:[37]

> "Closely allied to this type (insider trading by directors) of abuse was the unscrupulous employment of insider information by large stockholders who, while not directors and officers, exercised sufficient control over the destinies of their companies to enable them to acquire and profit by information not available to others."

A partial deterrent is provided by the disclosure of substantial shareholdings in a company register, required by the new sections 69A-

37. Stock Exchange Practices, Report of Committee on Banking and Currency, S. Reports No. 1445, 73d Cong. 2d Sess. (1934) 55.

69M,[38] a substantial shareholder being defined as one who has an interest in the voting shares of a company, the nominal value of those shares being not less than one tenth[39] of the nominal amount of all the voting shares of that company. Interests in shares for this purpose is defined widely in s.6A to include, inter alia, trusts, controlling interests, and options to purchase. This deterrent is partial as it makes readily apparent on public inspection shareholdings by controllers which would tend to identify insider trading transactions. Without more the sanction is meaningless for non-registration of dealings is visited only with a criminal sanction.

The basic problem therefore is whether controllers of a company or substantial shareholders can be construed as regulated by sections 132 and 132A, both of which expressly apply to officers (including directors). S.4(1) of the Singapore Companies Act defines directors as "any person occupying the position of a director of a corporation by whatever name called and includes a person in accordance with whose directions or instructions the directors are accustomed to act." It is thus conceivable that a controller is a person in accordance with whose directions or instructions the directors are accustomed to act — a factual determination. As s.4 is the definitional provision for the whole Act it would therefore be consistently referred to in determining the content of frequently recurrent words like 'directors' in all provisions of the Act e.g. s.132 and 132A, except where the context otherwise requires.

A corollary is whether a holding company can be deemed to be a director for purposes of disclosure. S.122 states that all companies shall have two directors, one of whom is ordinarily resident in Singapore. S.122 (2) precludes a corporation from being a director. This is the only inconsistent provision with the above-proffered wide definition of 'director'. It has been suggested[40] that s.122 (2) "would not apply to prohibit the courts from deeming (constructively) the holding company as director of its subsidiary under the s.4(1) definition of 'director'. The policy behind the broad definition is to reach the real controllers of a company, regardless of their official or technical relationship."

It is suggested that while s.122 (2) prevents anyone other than natural persons from being directors of companies, it does not prelude companies from being directors of corporations (inter alia, foreign companies). S.4(1) defines corporations to include foreign incorporated companies; and 'company' is defined to mean locally incorporated companies. Thus the policy of s.122 (2) would appear to be to prohibit inter alia, companies from being directors of local companies. This is consistent also with the requiring of foreign corporations doing business in Singapore to have local residents responsible for service of documents and other formalities.[41]

38. As amended in 1970 by the Companies (Amendment) Act. This device also finds similar expression in the U.S. s.16(a) Securities Exchange Act 1934 15 U.S.C.A. s.78a-78jj, where the beneficial owner of now 5 per cent is required to register his interest.

39. This figure is much higher than that recommended by the United Kingdom Cohen Committee (1945) Cmnd. 6659 'directly or indirectly the beneficial owner of one per cent...'.

40. Afterman, *op. cit.* at page 41 fn. 11.

41. S.333 of the Companies Act.

Thus natural controllers are conceivably within the range of the term 'director' in s.4 and are therefore covered by the disclosure requirements and sanctions of s.132 and s.132A. A convoluted process of argument can be made that the same is true of corporate controllers but this meets with the thorny problem of s.122(2). It is thus suggested that s.122(2) be expressly limited to its policy and not extended to qualify the otherwise wide purview of s.4.

The American[42] analogy proceeds on a different basis and consideration of it here serves the dual function of highlighting the defiencies of the Singapore regulation as well as suggesting the possible trend of future regulation. S.16(a) of the Securities Exchange Act 1934[43] utilises the familiar device of requiring a register of substantial shareholdings. The only sanctions for non-compliance are criminal prosecution and mandatory injunction. S.16(b) is more far reaching in its attempt to facilitate recovery of short-term trading profits. Without this, it is suggested that the value of the register of substantial shareholdings is nebulous. S.16(b) provides:

> "For the purpose of preventing the unfair use of information which may have been obtained by such beneficial owner, director, or officer by reason of his relationship to the issuer, any profit realized by him from any purchase and sale, or any sale and purchase, of any equity security of such issuer (other than an exempted security) within any period of less than six months, unless such security was acquired in good faith in connection with a debt previously contracted, shall inure to and be recoverable by the issuer, irrespective of any intention on the part of such beneficial owner, director, or officer in entering into such transaction of holding the security purchased or of not repurchasing the security sold for a period not exceeding six months. Suit to recover such profit may be instituted at law or in equity in any court of competent jurisdiction by the issuer, or by the owner of any security of the issuer in the name and in behalf of the issuer if the issuer shall fail or refuse to bring such suit within sixty days after request or shall fail diligently to prosecute the same thereafter; but no such suit shall be brought more than two years after the date such profit was realized...."

When directors, officers or 10 per cent shareholders buy and sell securities of the corporation within a six month period, it is conclusively presumed that they are trading on inside information. The provision was designed to protect 'outside' stockholders against short-swing speculation by 'insiders' with advance information.[44] It has been held by the Second Circuit in *Smolowe* v. *Delendo Corporation*[45] that the establishment of actual unfair use of insider information is not essential to recovery under s.16(b). A defect of the provision exists when a director holds the shares for more than six months and then sells on use of insider information. *Diamond v. Oreamuno*[46] is such a paradigm example, but it did not avail the directors much as the court proceeded to delineate a common law ground of recovery by the corporation for gains realised by the directors on the transaction in the corporations' stocks as a result of the use of inside information. While there is no prohibition against

42. See generally L. Loss *Securities Regulation* 2d Edition Little, Brown & Co., 1961 chap. 6C page 1037.

43. *Op. cit.*

44. Loss, *op. cit.* at page 1041.

45. 136F 2d 231 (2d Circuit) 1943; cert. denied 320 U.S. 751.

46. 24 NY 2d 194 (1969).

the use by other persons to benefit from insider trading under the Securities Exchange Act except incidentally in the fraud provisions and Rule 10b(5), this, as has been noted earlier, is prohibited in the Singapore s.132(2) which extends to advantages to 'any other person'. S.16(c) rounds off the regulatory scheme by prohibiting short sales:

> "It shall be unlawful for any beneficial owner, director, or officer, directly or indirectly, to sell any equity security of such issuer (other than an exempted security), if the person selling the security or his principal (1) does not own the security sold, or (2) if owning the security, does not deliver it against such sale within twenty days thereafter, or does not within five days after such sale deposit it in the mails or other usual channels of transportation.... "[47]

The object of s.16(c) being "preventing sales against the box whereby those in possession of inside information sell their holdings but keep the stock registered in their name, so that their change of position does not become known until delivery is made at a later date."[48]

Additionally and more significantly available is Rule 10b-5 to wit:

> "It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails, or of any facility of any national securities exchange,
>
> (1) to employ any device, scheme, or artifice to defraud,
>
> (2) to make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, not misleading, or
>
> (3) to engage in any act, practice or course of business which operates or would operate as a fraud or deceit upon any person,
>
> in connection with the purchase or sale of any security."[49]

The courts have liberally interpreted this rule beyond recognition. In *Securities Exchange Commission v. Texas Gulf Sulphur Company*[50] it extended the common law definition of fraud to encompass not only affirmative misrepresentations, relied upon by purchaser or seller, but also the failure to disclose material information that might have affected the transaction. Further in J.I. *Case Company v. Borak*[51] the Supreme Court created a private cause of action out of Rule 10b-5.[52]

In view of the foregoing, while the Singapore regulation is potentially powerful it lacks the teeth available under s.16 of the Securities Exchange Act of the United States. If regulation is not to deteriorate into legislating in the air, it is submitted that an empirical survey needs to be

47. Note however the extensive exemptions from those provisions by Act and Rules, see Loss, *op. cit.* page 1108 *et. seq.*

48. House of Representatives Report No. 1383, 73d Cong, 2d Sess. (1934) 25.

49. 17 C.F.R. s.240. 10b-5.

50. 401 F 2d 833 (1964).

51. 377 U.S. 426 (1964); Contra *Colortone Holdings Ltd.* v. *Calsil Ltd.*, (1965) Victoria Reports 129 where it was held that in the absence of evidence to show any evasion of any personal right of a proprietary nature or of a right analogous thereto or any special injury arising from the contravention, neither the offeree corporation nor a shareholder had any right to an injunction restraining the registration of a transfer of shares obtained from other shareholders consequent upon the offer contained in the takeover scheme.

52. For a more detailed analysis see Loss, op. *cit.* chap. 9 page 1421.

conducted before further legislation as well as consideration of the remedies available either by aggrieved shareholders or by the Registrar of Companies. The latter to date seems destined for a bureaucratic role of form analysis, not endowed with investigative functions and the corresponding sanctions to enforce compliance. While the reluctance to emulate the Securities Exchange Commission is understandable in view of the costs and the preference for self regulation, it is submitted that the median might be reached by endowing the Registrar of Companies with greater staff and functions so that far reaching legislation does not degenerate into dead-letter laws.

The creation of the Securities Industry Council by the Minister as empowered by s.3 of the Securities Industry Act of 1973 appears to be a step in this direction. Its close association with the Monetary Authority of Singapore and its gradual accretion of functions previously performed by the latter permits the greater exploration of the facilities and manpower available. However, the creation of a cohesive unit with the ability to defect abuses and enforce the legislative sanction has yet to be achieved if the experience of the Anti-Tax Evasion Unit of the Inland Revenue Department is of any assistance, it would appear that the imposition of punitive damages to be collected by the Council would be an added incentive to an otherwise non-profitable policing of the securities market.

A.II(c) *RESISTANCE TO TAKEOVER BIDS:*

The mechanics available to thwart a takeover bid are legion and include raising dividends; declaring stock dividends; sale of superfluous assets; stock splits; rights issues ;[53] interlocking shareholdings by management and long term service contracts; open market purchases of the company's shares by friendly third parties; defensive mergers; discriminatory voting provisions; publicity.

The device of the company purchasing its own shares as available in the United States in unavailable in Singapore because of statutory prohibition. Yet the simplest form of contravention is where the offeror borrows money required for a takeover bid from a bank which in turn is secured by a floating charge device over the offeror company's assets. As will be noticed shortly, the floating charge itself is preserved notwithstanding the illegality by s.67(4). S.67 of the Companies Act states that 'no company shall give any financial assistance for the purchase or in connection with the purchase by anyone of shares in the company.' There are three specific exceptions viz. a) where lending money is part of the ordinary business of the company; b) pursuant to a scheme for the purchase of shares for the benefit of employees or directors; and c) financial assistance to employees, to persons other than directors, bona fide in the employment of the company or of a subsidiary of the company; with a view to enabling those persons to purchase fully-paid shares in the company, to be held by themselves by way of beneficial ownership. The last exception provides for a *Hogg* v. *Cramphorn*[54] type of resistance to a bid by issuing such shares to employees or for

53. Though in Singapore now this is subject to approval by the Securities Industry Council where publicly quoted companies are involved. See infra at page 64.

54. [1966] 3 All E.R. 420.

their benefit and as held in that case, is still subject to the limits of the doctrine of improper purpose.[55]

The inevitable problem of this rule was the consequence of such purchases or assistance on the validity of the transaction itself. The Australian courts, echoing the early English decisions, held in *Dressy Frocks Pty. Ltd.* v. *Bock*[56] that violation of such provision rendered the transaction illegal and void. Realising that the upshot of such a ruling would be to deny the company the benefit of any security taken for the delinquency of the directors, efforts were made by the English court to narrow the rule. Thus in *Selangor United Rubber Estates Ltd. v. Craddock (No. 3)*,[57] the English court denied the applicability of such consequence where the basis of the action was not contract or property, but breach of trust.

The above wrangling is put to rest in Singapore by s.67(4) which seeks to preserve the security of the transaction to the company thus:

> "Nothing in this section shall operate to prevent the company from recovering the amount of any loan made in contravention of this section or any amount for which it becomes liable on account of any financial assistance given in contravention of the provisions of this section."

Its effectiveness in so doing is another matter. It is arguable that by its very wording s.67(4) extinguishes any bar from recovery by virtue of the illegality of s.67(l) itself and nothing more. This is consistent with the reading of the opening words 'nothing in this section.' Thus the argument goes that the common law bars to recovery on an illegal transaction are still operative.

The problem area however is the obvious conflict between the instinct for self preservation of present management of the offeree corporation and the best interest of the company and its shareholders, although this is not to deny that in some cases the two coincide. In this context the common law regulation in Singapore is identical with the current British expression. For this reason it is only intended to make very brief reference to the common law rules here.[58]

It is clear that if a tender offer is adverse to corporate and shareholder interests, management is obliged to resist the attempt.[59]

The basic principle applicable is that directors must exercise the powers conferred on them by the articles in the interests of the shareholders of the company, present and future, as a whole *Park* v. *Daily News Ltd*.[60] Thus if in resisting a takeover bid new shares are issued to consolidate control, the fact that the directors concurrently believe the proposed bid detrimental to the company, will not operate to preserve

55. Discussed below.

56. (1951) S.R. (N.S.W.) 390.

57. [1968] 1 W.L.R. 1555.

58. See Weinberg, *op. cit.* at page 349 and R. Pennington, 'Takeover Bids in the U.K.' 17 American Journal of Comparative Law 159 (1969).

59. *Northwest Industries Inc.* v. *B.F. Goodrich* 301 F Supp. 706 (1969).

60. [1962] Ch. 297.

the new issues.[61] However it would appear that ratification by the shareholders of such action, unless such ratification is fraudulent or opressive, would operate to cure the defect, as in *Bamford v. Bamford*[62] where Plowman J. held that a general meeting can itself give the required approval in the company's name as it was not restricted by a fiduciary duty.

These common law rules have been somewhat denied by Rule 38 of the Singapore Code on Takeovers and Mergers[63] (hereafter referred to as the Singapore Code).

Even so, the defects of this provision are still apparent. The penalty for breach is a comparatively mild fine or one year's imprisonment which is a rare sanction almost never imposed for corporate crimes. Further the alleged complicity of banks and financial institutions[64] merits an extension of the provision to include such secondary parties.

The Jenkins Committee[65] recommended in this regard amendment to make it unlawful for the company to give financial assistance for the acquisition of its shares unless the transaction was approved by a special majority of the shareholders and a declaration of solvency filed with the Registrar; as well as to allow a ten per cent dissentient minority to apply to court to prohibit the proposed transaction. In Singapore it is submitted that the statutory rights accorded to shareholders at this stage of our economic development would be a futile gesture. If the practice is to be effectively curbed it is suggested that assent of the Registrar of Companies be required.

A.II(d) *COMPENSATION FOR LOSS OF OFFICE:*

> "Dato Lee Chee San — 'president for life' of Chung Khiaw Bank Ltd., — is to get S$750,000 as retirement gratuity under a motion approved by the bank's shareholders today.
>
> United Overseas Bank Ltd. which recently bought over the controlling interest in Chung Khiaw, is also understood to have bought over Dato Lee's remaining shares in the Bank.
>
> It is believed to have paid S$1.7 million to Dato Lee for his 6,708 shares (par value S$50 each) — at S$250 a share.
>
> United Overseas Bank now controls 'well over fifty per cent' of Chung Khiaw's shares."[66]

61. *Ansett* v. *Butler Air Transport Ltd.*, (No. 1) 75 Weekly Notes (N.S.W.) 299 (1958); *Ampol Petroleum Ltd.* v. *R.W. Miller (Holdings) Ltd.* (1972) 2 N.S.W.R. 850 noted in (1973) 11 U of W.A.L.R. 68.
62. [1968] 2 All E.R. 655; affirmed C.A. [1969] 1 All E.R. 969. Pennington, *op. cit.* at page 181 points out that this is inaccurate as the further inquiry to discover whether there would have still been a majority in favour of ratification at the general meeting if the directors and their nominees and agents had not voted in respect of shares held by them; ought to have been made.
63. See infra p. 81 where the Code in discussed.
64. These defects are highlighted by the investigation into the affairs of H. Jasper & Co., Ltd., Report by Neville Franks (H.M.S.O.) London.
65. Para. 187, Cmnd 1749 H.M.S.O. London 1962.
66. *Sunday Times* August 5 1972 page 1.

Thus headlines a local newspaper story of a none-too-subtle golden handshake. For some background it is to be noted that the controlling interest mentioned is that of Dato Aw Cheng Chye, who had sold his interests in the bank earlier to Slater Walker, who being a foreign concern, decided to dispose of this interest post haste for fear of disfavour by the licensing authority for banks under the Banking Act.[67]

S.137 of the Companies Act, which seeks to regulate the quantum of such payoffs and has significant limitations, requires the board to submit to the general meeting for approval by ordinary resolution the amount to be paid to a director for loss of office or retirement, failure to do so results in the director receiving such payment in trust for the company. The Singapore Act is an improvement upon the English mode) insofar as it covers loss of office as officer (contra director) ; past officers (contra current officers). Even then it has gross limitations as the extracted incident discloses. It does not regulate payments if the officer continues in office though with lessened functions. Payment to directors in a takeover scheme is illusorily controlled if a mere majority of the shareholders is sufficient to endorse such payment. While this is not generous enough to constitute expropriation of the corporate assets or looting to enable minority shareholders to bring an action for recovery, it nevertheless requires more than the current regulation.

S.137 (2) requires such directors to take reasonable steps to secure particulars of any proposed payments, including the amount, to be made to them in conjunction with a takeover scheme, to be included in any notice of the offer to shareholders unless s.179 and the Tenth Schedule have already been complied with. S.137 (4) deems the excess or any other consideration received by directors in contemplation of loss of office over that obtainable by ordinary shareholders, to be a payment made by way of compensation for loss of office and therefore subject to general meeting assent.

8.137(5) however, cuts into whatever limited effectiveness s.137(l) may have by exempting payments made under an agreement approved by special resolution[68] of the company; bona fide payments by way of damages for breach of contract; bona fide payments by way of pension or lump sum payment in respect of past services where the value does not exceed the total emoluments of the director in the three years immediately preceeding his retirement or death; or any agreement to a director pursuant to an agreement made before he became a director as consideration for his agreeing to become a director.

The exemption of sums paid in liquidation of damages for breach of service contracts encourages directors to enter long-term service contracts to enable them to deter takeover bids to some extent, failing which they are rewarded by huge sums in liquidation of damages.

The Tenth Schedule requires disclosure of any prospective payments to directors for loss of office in the statement to be disseminated to shareholders. This disclosure requirement is of dubious effect because of the easily avoided ambit of s.179 and the availability of devices to

67. Banking Act Cap. 182.

68. Defined to mean a three-quarters majority in s.152 of the Companies Act.

evade the disclosure itself e.g. by leaving it to be settled by a party after the bid has materialised and thus stating only that it is to be agreed in future.

It is submitted that in the Singapore context, disclosure of such compensation is of no great value, and regulation should be in the form of prohibition. The maximum sums payable should be easily determined by a formula which preserves the requisite protection for directors losing office and yet prohibits exorbitant levies. Alternatively such payments could be made subject to court or the Registrar of Companies or the Securities Industry Council's assent.

A.II(e) *COMPULSORY ACQUISITION UNDER S.180 COMPANIES ACT*

The theory behind this statutory compulsory buy out of minority shareholders is that it is undesirable that a minority hostile to a takeover bid be locked in a company whose control has been acquired by a new majority or that the bid may not have come to the knowledge of holders like trustees or that they may not have had power to accept. Additionally, such a situation, it is said, lends itself to oppression of the minority and although s.181 provides far reaching relief, it is thought that the prevention of such oppression particularly if it is court-approved, is to be facilitated.

S.180[69] is the product of the varying experience of its English and Australian counterparts and therefore seeks to avoid their defects. It is instructive to notice that many of the defects identified by the Jenkins Committee[70] have been avoided.

S.180 (1) provides for the acquisition of shares of dissenting shareholders[71] thus: where a scheme or contract involving the transfer of all the shares or all of a class of shares, and approval for such transfer, has been granted by holders of not less than nine-tenths in nominal value of those shares, then within two months of the approval the transferee company may give notice to the dissenting shareholders of its intention to acquire their shares, and unless application is made to court and the court otherwise orders, may proceed to acquire these shares on terms identical to those of the scheme or contract. The dissentient shareholder is given one month in which to make the application to court.

The ambiguity of the English s.209 as to offers for different classes of shares *vis a vis* the ninety per cent requirement i.e. ninety per cent of the nominal value of all the outstanding shares notwithstanding the offer is for different classes and ninety per cent of a particular class may have been achieved, is alleviated. S.180 clearly delineates the shares

69. In this section the terms transferee company is equivalent to the offeror company in a takeover scheme, and transferor company is equivalent to offeree company. This transition of expression is made necessary by the wording of s.180.

70. Para. 284 op. *tit.*

71. Defined in s.180 (8) to include 'a shareholder who has not assented to the scheme or contract and any shareholder who has failed or refused to transfer his shares to the transferee company in accordance with the scheme or contract'.

involved as those "approved as to the shares or as to each class of shares whose transfer is involved by the holders of not less than nine-tenths in nominal value of those shares or of the shares of that class."

Under the English s.209(1) the court may allow or disallow the compulsory acquisition while under s.209(2) it could vary the terms of acquisition. This anomaly is set right under the Singapore Companies Act which allows the court, if it 'thinks fit to order otherwise' under both situations.

Another defect set right relates to evasion of the right of the dissenting shareholder to be bought out.

> "It is possible for an offeror to defeat the rights of an offeree under s.209(2) by procuring the offer to be made by a subsidiary of a company which already had a substantial holding; the result of such an offer might be to vest in a subsidiary a number of shares which was insufficient to bring the provisions of s.209(2) into operation but which, when added to the shares already held by the subsidiary's holding company, put the dissentient shareholder in precisely the position from which s.209(2) was designed to protect him."[72]

S.180(1) of the Singapore Act consequently provides that it operates only when the offer has been approved by the holders of not less than nine-tenths of the shares whose transfer is involved, other than shares held by, or by a nominee for the transferee company or any company in the same group as the transferee company.

The dissenting shareholder is entitled by s.180(2) to a list of all other dissenting shareholders to be provided by the transferor company on demand in writing, within one month of the date of the notice of intention to acquire his shares.

Where in pursuance of a scheme or contract, shares are transferred to another company or nominee which together with shares already held by it comprise nine-tenths in nominal value of the shares of the acquired company, the transferee company is compelled by s.180(3) to give notice of such fact to the holders of the remaining shares within one month of the transfer, whereupon the shareholders may give notice to the company to acquire the shares in question upon terms of any prior scheme or contract by which the nine-tenths were acquired or on terms ordered by the court on an application.

To obviate difficulties of transfer where the dissenting shareholder upon notice of the desire to acquire his shares, is, for a variety of reasons,[73] silent, s.180(4) provides the mechanics for an enforced sale and transfer. Subject to the court ordering otherwise, if within one month after giving the notice required by s.180(3)(a), the transferee company is entitled to transmit a copy of such notice and an executed instrument of transfer as well as the consideration for the transfer to the transferor company and the transferee company is thereupon entitled to be registered as holder thereof. S.180(5) designates the transferor company as holder in trust for the persons entitled to the shares. Pro-

72. Para. 291, Jenkins Committee, *op. cit.*

73. Difficulties include overseas shareholders, nominee shareholders, holdings by trustees or executors without power to accept such offers.

vision[74] is also made for the handing over of consideration other than cash to the Official Receiver after the expiration of two years and before the lapse of ten years.

The cases under which the courts have been persuaded to order otherwise are few: *Blue Metal Industries Ltd.* v. *Dilley;*[75] *Re Bugle Press Ltd.*[76] and *Re Carlton Holdings Ltd.*.[77] the upshot of which is that the onus is upon the dissenting shareholder to persuade the court to otherwise order; the courts are more prone to sanction a scheme where ninety per cent have accepted as this fact is a strong indicia of fairness; and the fact that a better scheme could have been arranged does not establish unfairness.[78] The ambiguity of s.209(1)[79] *vis a vis* an alternative set of terms of an offer and which is to be extended to the dissentient shareholder was partly resolved in *Re Carlton Holdings*[80] on the basis of the policy of the provision that a dissenting shareholder should receive no less favourable treatment than an approving shareholder, with the anomalous result that in this particular case the dissenting shareholders ended up with more favourable treatment than the approving shareholders.[81]

The significance of the existence of such provision can only be assessed by the extent to which it is used in a context of heavy takeover activity. To date, there have been none in Singapore, at least to the extent that purchases of minority shareholders have proceeded without use of the s.180 mechanics. Indeed the unsuccessful attempt of the United Overseas Bank to acquire the minority shareholdings of the Chung Khiaw Bank held by the employees of the latter bank was not followed by resort to s.180. The efforts to keep abreast and even ahead of developments in England and Australia, while commendable, have limited value if this is done without realising its impact on local methods of conducting business.

A.II(f) *SALE OF CONTROL:*

As is apparent by now the obvious targets for bids are the closely held companies which are almost completely owned by individuals or families. Acquiring control of such companies is effectuated by offering a premium for the sale of controlling shares and in many cases no attempt need be made to acquire any remaining minority shareholdings. Even where s.179 is applicable no disclosure of the premium paid to controllers if they are not directors need be made and even if disclosed by deeming controllers to be directors via s.4,[82] such disclosure is meaningless. This

74. S.180(6).
75. [1970] A.C. 827.
76. [1961] Ch. 270.
77. [1971] 1 W.L.R. 918.
78. *Re: Gierson, Oldham & Adams Ltd.*, [1968] 1 All E.R. 192.
79. The same exists under s.180(1) Singapore Companies Act.
80. *Supra.*
81. See D. Prentice 'Takeovers Bids: The Compulsory Acquisition of Dissentients' Shares' 35 Modern Law Review 73 (1972) whose analysis points this out.
82. See supra at page 52 for the discussion of directors which is defined to include those from whom the board are accustomed to take instructions.

is so particularly if no attempt is being made to acquire the minority shareholdings. S.180 by which the minority can compel purchase of their shares is only available if nine-tenths of the shares have been acquired.

The weakness of the Jenkins Committee report[83] in this regard is manifest in that while disclosure is required for payments to directors, these do not apply to a simple transfer of control with no offer extended to other shareholders. Paragraph 2212 (e) of its recommendations sought to give the court an express power, where it thinks fit, to authories the bringing of proceedings in the name of the company on such terms as directed by it. This suggestion has yet to find expression in any Commonwealth legislation. However, the Singapore Act in s.181(2) empowers the court to make any order it thinks fit. This, it has been suggested[84] would enable the court to award the proceeds of a judgment initiated by a shareholder to the minority shareholder and not the company, as mandated by *Foss* v. *Harbottle*.[85] However, in view of the Committee's understanding of the thrust of the provisions, as is apparent from paragraphs 201-205, the relief available is to be premised upon remedying 'abuses directly calculated to impair the value of the minority's shares with the object of persuading them to sell their holdings to those who control the company.'[86]

In the United States two bases of recovery have been created by the courts in such situations. The 'sale of office' theory is exemplified by *Gerdes* v. *Reynolds*[87]

> "Is the price in reality a price paid for the stock; or is it in part at least a price for the resignation of the existing officers and directors and the election of the buyer's nominees?"

The second base is illustrated by *Perlman v. Feldman*[88]

> "When the sale necessarily results in a sacrifice of this element of corporate goodwill and consequent unusual profit to the fiduciary who has caused the sacrifice, he should account for his gains."

S.181(1) (b) of the Singapore Companies Act goes much further than its English counterpart and it is suggested, provides an avenue towards judicial limitation of sale of control situations. It provides:

> "Any member of holder of a debenture of a company..., may apply to the Court for an order under this section on the ground....
>
> . . . .
>
> (b) that some act of the company has been done or is threatened or that some resolution of the members, holders of debentures or any class of them has been passed or is proposed which unfairly discriminates against or is otherwise prejudicial to one or more of the members or holders of debentures (including himself)."

83. Paras. 201-205, op. cit., Pointed out by A. Boyle, 'The Sale of Controlling shares: American Law and the Jenkins Committee' 13 International and Comparative Law Quarterly 185 (1964).
84. Boyle, *op. cit.*
85. (1843) 2 Hare 461 to the effect that the company is the proper plaintiff to redress a wrong done to it or to recover moneys or damages alleged to be due to the company.
86. Boyle, *op. cit.*
87. 28 N.Y.S. 2d 622 at page 653 (Sup. Ct. 1941).
88. 219 F 2d 173 (2d Circuit) 1955.

The width of this provision is at once remarkable for it allows not only past but also future threatened acts to be the subject of judicial scrutiny. In the light only of the wording of the provision, it is conceivable that sale of control situations which discriminate minority shareholders as in the *Perlman v. Feldman*[89] situation could be controlled. However the history of judicial conservatism of the Singapore courts and their tendency uncritically to absorb English precedents dictate against any such development locally. Were the English courts to adopt the approach of the American decisions, it would then be most probable that such a development would occur in Singapore. Change in this rule has now been effected by the Singapore Code Rule 10 which prohibits such sales without comparable offers being extended to the remaining shareholders.[90]

This then completes the survey of regulation of corporate takeovers by the Companies Act. It has been demonstrated that the Act while an impressive piece of law reform legislation in comparison to its models, suffers a great deal in implementation from the absence of administrative agents with adequate power and staff to do so.

A.III(g) *STOCK EXCHANGE REGULATION:*

Berle and Means[91] have identified the functions of the stock market as essentially: maintaining a meeting place and facilities for trading, by bringing together buyers and sellers; supplying a continuous measure of worth[92] making the security useful as a basis of credit or exchange at a figure based on market prices; and affording the only substantial means by which an investor can withdraw his capital either for other capital employment or for personal expenditure.

The underlying theory which permits the market to fulfil these functions rests upon some measure of responsibility whether self imposed or otherwise. An exchange which permits uncontrolled unfair and devious practices by insiders at the expense of other investors or speculators soon degenerates into a gambling operation. To a large extent the crisis of the Singapore and Malaysia Stock Exchange represents a failure of management and an attempt by the government to stem this tide.

The hallmark of governmental response to the problem has been one of insisting on self regulation. This no doubt in concurrence with the English approach. What has failed to surface, or perhaps it is optimism, is that the history of self-regulation (although a short one) of the business community has not proven to be gratifying. The inevitable personal dilemma of amassing a fortune and public service when occuring simultaneously, has proven disastrously in favour of the former.

89. *Ibid.*

89a. For an example of such rigidity see *Re Chi Liung & Son Ltd.* [1968] 1 M.L.J. 97.

90. See discussion infra at page 81.

91. Adolf Berle and Gardiner Means *The Modern Corporation and Private Property* Harvest Books 1968 Revised.

92. Though this may be doubtful on occasion like the massive gambling spree of the Hong Kong Stock Exchanges and a similar effect on the Singapore and Malaysia Stock Exchange in the later half of 1972 and early 1973. See A. Senkuttuvan 'SEMS: Mass Optimism' *Far Eastern Economic Review* February 5 1973.

Of course one hears the oft repeated rhetoric of various Chairmen of the Board exhorting responsibility but this is accompanied by feeble sanctions like suspension of trading which arguably jeopardises the public interest in maintaining the market for a particular security. The further difficulty was that the Stock Exchange operated in two independant countries. Thus, while the Singapore Securities Industry Act was passed in 1970, it was never brought into force until the Malaysian Government was persuaded to pass an identical bill in early 1973. This necessitated the repeal of this Act and new legislation inter alia for identical regulation. Governmental reluctance to impose statutory regulation also emanates from the expense and administrative expertise that would be required, a commodity that is scarce and better utilised in other sectors of the economy particularly monetary and financial. Some reflection of this realisation was the new requirement of permission from the Monetary Authority (now transferred to the Securities Industry Council) for the following by publicly quoted companies:[93]

> "No rights issue should be made unless prior approval has been obtained from the Monetary Authority of Singapore;
>
> No announcement should be made of any intending rights issue until such approval is given;
>
> No quotation on the Stock Exchange shall be granted until the approval of the Monetary Authority of Singapore has been given.
>
> The purpose of raising the additional capital by way of rights issues must be made known to the Monetary Authority of Singapore."

In early 1973 the sudden split between the Malaysian and Singapore currencies and stock markets again necessitated amendments to the legislation.[94]

Article 5 of the Listing Manual[95] contains six requirements in the case of takeovers which deal mainly with the question of survivorship. To a large extent the remaining provisions are nothing more than verbiage because they make reference to already existing statutory regulation. Thus Article 5A requires the maintenance of secrecy during discussions preliminary to an offer, in order to avoid disturbances in the price level of the shares. This is a feeble attempt as it only requires those concerned to do 'everything possible to maintain secrecy'. Beyond the merely exhortatory nature of this clause is the absence of any sanction outside suspension of the listing which arguably hurts the public more. Article 5A(1) requires advice of the Exchange as to which of the company's securities the offer relates.

Article 5A(2) extends the legal requirements of s.179(3) of the Companies Act which requires communication of a takeover offer to the shareholders only of the offeree corporation. Article 5A(2) requires the communication of all documents so required "to all holders of other classes of shares and convertible notes in the company". Thus it purports to protect creditors of the company by notification, beyond that required by the Companies Act.

93. *Straits Times*, November 6 1972 page 15. This function has now been taken over by the Securities Industry Council. See Appendix 6 Listing Manual of Stock Exchange of Singapore Limited.

94. Securities Industry (Amendment) Act No. 51 of 1973.

95. Listing Manual, The Stock Exchange of Singapore.

Article 5A(4)-5A(6) deal with the question of survivorship, thus: if a non-listed company has merged, amalgamated or formed an association with a listed company, the surviving company is required to lodge all documents as are currently required for listing; where ninety per cent of the securities of a listed company have been acquired, then on announcement of such acceptances by the offeror all such securities will be removed from the official list; and where the offer relates to less than ninety per cent of the company's securities, on receipt of acceptances of more than fifty per cent of such securities, the offeror shall disclose to the Exchange his plans and intentions with regard to the offeree.

While the general thrust of the survivorship provisions are easily understood, the imprecision of drafting is outstanding. 'Securities' of the listed company are undefined in relation to types or numbers thereof. Thus it is unclear what the position is with regard to the total acquisition of a particular class of shares and whether they are exempt since it is conceivable that not fifty per cent or more of all the securities are involved. Again there is implicit dependance on the Companies Act s.55 which disallows the classification of shares at least or involves voting rights in public companies. Article 5B clearly anticipates a Code on Mergers and Takeovers by rendering companies bound to observe any such Code that may be enunciated either by the Exchange or the Securities Industry Council. Most of the above regulations were in existence in the Joint Malaysia/Singapore Stock Exchange. However with the split and the new regulations imposed certain vastly improved regulations on acquisitions have been enunciated. Article 4 of the Listing Manual 1973 is new and seeks to regulate the acquisition or disposal of assets (including share capital) by a company or its subsidiaries, while exempting share dealings by companies whose ordinary business is such dealing.

Disclosure to the Exchange and subsequently the public is required by article 5(3) where the transaction exceeds 5% of the value of assets acquired or disposed; the net profits attributable to the assets acquired or disposed; the aggregate value of the consideration; all compared with the assets of the acquiring/disposing company; the equity capital issued in consideration for the acquisition compared with the equity capital previously in issue. The absence of qualification of each of these clauses and the use of the semi colon would suggest that these preconditions are to be cumulatively satisfied, which reading cuts into the efficacy of the disclosure for it is quite conceivable that in most acquisitions/disposals at least one of these preconditions is not satisfied thus leaving disclosure unavailable. If these conditions are satisfied then the terms of disclosure required include: particulars of the asset and business; description of the trade carried on, the aggregate value of the consideration and the terms of any deferred payment, the value of the assets as well as the net profits attributable to such assets; the expected benefits and details of any service contracts of proposed directors of the company.

Where less than 5% is involved in the transaction and the consideration is satisfied in cash or unquoted securities, article 5(a) requires no announcement of the transaction. If information is given to the Exchange by choice then it should include details of the consideration and the value of the assets involved. Article 5(b) requires disclosure identical to that of article 5(3) if the consideration is satisfied partly or wholly in listed securities. Further article 4(6) permits the Exchange to treat separate transactions as one if they were completed within a short time and the total is in excess of 5%.

This is a dramatic *volte face* in the Stock Exchange regulation of takeovers and is in part a delayed response to the experience of the early 1970's. It should be noted that the disclosure required is no longer limited to companies for article 4(1) defines person to include company. At first glance it is hoped that this means that acquisitions by individuals are thus regulated. However the word 'person' is only used in article 5(5) which deals only with transactions involving directors. Yet it is submitted that individuals involved in such transaction still come within these regulations. The basis of this submission is that the word transaction is defined merely as 'either the acquisition or the disposal of assets (including share capital) by a company or its subsidiaries'. This definition merely stipulates the existence of a company at one end of the acquisition or disposal. It is open that the other party *i.e.* the purchaser or vendor of the transaction be an individual. If such reading is taken then the effect of these provisions is indeed radical.

The shortcoming of this code of regulation relates to the time of disclosure. Article 5(3) requires disclosure 'as soon as possible after terms have been agreed'. This imprecision is unfortunate. The duty of the directors is to make premature disclosure causing thereby the agreement to fall through is balanced on the other extreme with delayed disclosure which could cause speculation on the market.

Article 4(7) requires in the offer document or any circular which is sent to shareholders of the offeror company, a statement as to the effect of the bid on the offeror company.

In the case of substantial acquisitions or reverse takeovers, the committee would require the transaction to be subject to the approval of the shareholders and the company's share listing to be suspended from the announcement of the acquisition until such approval is granted and all information including an accountant's report on the business or company to be acquired to be made available.[96]

As companies whose assets consist wholly or substantially of cash or short dated securities other than investment trusts will not ordinarily be listed, the creation of any such situation will thus result in the suspension of the listing which listing will not be resumed until the normal requirements for listing have again been satisfied.[97]

Finally any transaction which results in the diversion of 20% or more of the net assets of the company into an operation which differs from those operations previously carried out by the company should be made conditional upon approval of the company in general meeting.[98]

This review of the new Stock Exchange Listing Manual regulation of takeovers has revealed a sudden tightening of the rules. However as with other regulation the efficacy of such rules is to be judged by its enforcement. The close dependence of the Exchange upon the Securities Industry Council makes the development of the latter essential to effectiveness. The staffing of the Council with both governmental and business

96. Article 4(8).

97. Article 4(10).

98. Article 4(11).

representatives together with a professional staff marks the demise of self regulation and a tendency towards joint governmental and business regulation.

Incomplete and inaccurate information about a contemplated or pending offer will disrupt investor confidence and, consequently have the same effect on the market. The best local example of this type of situation is exemplified by the following episode of the Slater Walker/ Haw Par bid:[99]

> "Market operations today were puzzled by the two statements, the second of which strongly implied that no final agreement has yet been reached, regarding the ownership or re-acquisition of the 15.2 million shares in Haw Par which Slater Walker recently acquired.
>
> The first statement delivered to the exchange at 2.20 p.m. yesterday stated: 'Agreement has been reached whereby Dato Aw Cheng Chye will acquire Slater Walker securities 15.2 million shares of $1 each in Haw Par'.
>
> The second, supposedly to clarify the position... reached the Exchange at 9.15 this morning. It said: 'Slater Walker and Haw Par are continuing their discussions regarding the sale of Haw Par's shareholdings in the Chung Khiaw Bank and an announcement can be expected by Friday.'"

The stock response of the Exchange was to demand an explanation and threaten suspension of the issue. An investigation was later conducted and the Exchange emerged satisfied by the explanations which were never publicly disclosed.

With the split in the Exchanges a new attempt at self regulation has been made. The Exchanges' Corporate Disclosure Policy issued in 1973 seeks to answer basic questions on insider trading by spelling out in detail the legal requirements of the Companies Act and other common sense rules of prudence. In some areas the policy strays very closely to being dangerous. For example in answer to the question. "How soon after the release of material information may insiders begin to trade?" the Exchange replies: "twenty four hours after dissemination in a national medium or forty eight hours after dissemination via a less wide spread medium, depending on the actual circumstances." This attempt to crystallise a time frame is bound to lead to difficulty and it is submitted that the Exchange should rather have left itself some discretion in extreme cases.

In marked contrast the self regulated Federation of Stock Exchanges in Great Britain and Ireland has issued six guiding memoranda which operate against the backdrop of the City Code: admission of securities to quotation; reports by accountants; acquisitions and realisations of subsidiary companies; information required in prospectuses; requirements for quotations for the securities of foreign companies and communication of announcements.

While most of them bear peripherally on the subject of takeovers, it is here intended to delineate some pertinent aspects of the memorandum on acquisition as it highlights the deficiencies of local stock exchange regulation. Paragraphs two to five delineate the types of publicity for acquisitions and sales of business and assets or shares in other companies

99. *Straits Times*, June 17 1971 page 1. It finally transpired that the repurchase materialised with the further sale of the same interests in Chung Khiaw Bank to another local bank the United Overseas Bank, *ibid* June 18 1971.

1. Admission of Securities to Quotation: Memoranda of Guidance and Requirements of the Federation of Stock Exchanges of Great Britain & Ireland.

thus: when fifteen per cent[2] or more of the assets, capital or revenue position of the company is affected, the Exchange, the press[3] and the stockholders must be informed; if less than five per cent of the company's assets or revenue position is affected and the transaction is wholly for cash, only the Exchange need be informed; and in all other cases only the Exchange and the press need be informed.

Additional regulation exists if the acquisition or disposal involves a director past or present or a substantial shareholder, then the Exchange is to be informed and it may require disclosure to or ratification by the shareholders.[4]

The other important innovation is to approximate the regulation on licensed dealers by the Licensed Dealers (Conduct of Business) Rules 1960 (similar to the Tenth Schedule of the Singapore Companies Act), to quoted companies involved in takeover bids.

It is at once apparent that the existing self regulation in Singapore is woefully inadequate and discloses a predominantly parasitic dependence upon statutory regulations. It is but a small step from what exists to total statutory regulation of the Stock Exchange. The dearth of trained and effective staff is confirmed by the Ferris Report:[5]

> "To be an effective organisation, the Exchange will need a sufficient and properly trained staff. The manager must be given not only sufficient responsibility but also the necessary authority to be effective in his job, and individual members and member firms should not be allowed to browbeat the manager when he is carrying out the policy set by the Committee. Only if the manager's authority is properly established will he be able to relieve the Committee of administrative details."

So long as the manager conceives his role as being subservient to the powerful and influential members of the Exchange, a change in direction and policy will not be forthcoming. A belated attempt to demonstrate its independance and capacity emerged when the Exchange amended[6] its rules to require companies to apply to it for permission before convening extraordinary general meetings to obtain the shareholders approval for further issues of shares (other than bonus or rights issues) where the aggregate issues of which in any one year do not exceed ten per cent of the issued capital. A partial realisation of this is the increasing regulatory role accorded to the Monetary Authority, which being a governmental agency, can bring more power and influence to bear. Also a recent development, the Securities Industry Council, is an attempt to forestall such total statutory regulation.

2. A formula is prescribed comparing the value of the assets in the transaction and the total assets of the company; net profits attributable to the asset and the net profits of the company; price or consideration given and the net assets of the company; if shares are issued the proportion between those issued and the amount previously issued.

3. Which will specify the nature of the assets or business, the price paid, the value, the net profits attributable to them and the projected benefits of such acquisition or disposal.

4. Para. 6.

5. George Ferris Jr. ' A Study of the Securities Market in Singapore and Malaysia' International Executive Service Corps Project 2067, Singapore Government Printing Office, Art. II(c).

6. See *Straits Times*, May 15 1972 page 15.

It is thus now intended to evaluate the potential effectiveness of the Securities Industry Council. Its functions include keeping the Registrar of Companies informed of the activities of any company which in the opinion of the Council are suspect. It is also expected to recommend to the Exchange Committee action to be taken to prevent or expose unlawful or dishonest forms of trading. It will also advise the Minister on all matters concerning the securities industry 'including the administration of legislation, particularly on the protection of investors'.

These wide functions are easily rendered illusory. The membership of the Council is impressive if only because of the capabilities of its members in other fields. It is one thing to have an already-elsewhere-employed glamour council and another to have effective regulation. The Registrar of Companies with a small staff is unable effectively to perform the functions already delegated to him viz. liquidation, inspection and investigations. What is more significant is the growing power and staff of the Monetary Authority whose increasing role in financial and corporate regulation makes it the only organisation with the capacity and potential to regulate the industry.

The problem is best put into focus by the following quotation from Sidney Robins[7] which is a mere restatement, for the gray line between the objective of effective self regulation and malpractices which result in regulation is an ill defined one:

> "Self regulation is the foundation upon which the operating mechanisms of the securities markets rests. It permits swift, on-the-spot decisions to be rendered in a field whose existence depends upon speed of action, and where the regulatory response often must be immediate and made on delicate grounds. It permits those best aware of the sensitivities built into the industry's price mechanism to create underlying policies governing the activities of its members. But it also exposes the industry to the risk of overlooking its public responsibilities and slipping into the role of a private club, free from the restraints of either competition or government supervision. Accordingly, the effective implementation of self regulation depends upon the existence of statutes and rules that clearly define the relationship between the securities business and government; upon a reasonable attitude on the part of the business in administering its public responsibilities: and upon the vigor and understanding with which the SEC, as the principal supervisory agency, fulfills its role."

A.III(b) *SECURITIES INDUSTRY LEGISLATION:*

The setting in of a trend of irresponsibility in the activities of the Exchange and its demonstrated impotence or lack of will to curb abuses of trading practices came to the forefront in the late 1960's. What gave legislation a new impetus in this area was the house-cleaning efforts embarked upon to facilitate the creation of a financial centre in Singapore and the existence of the then current flurry of regulation in the Australian states.

In 1970 the Securities Industry Act[8] was passed. It was a tentative attempt to impose legislation over the activities of the Exchange. The Act sought to emulate the United Kingdom and Australian models, in permitting self regulation (in the sense of the absence of an adminis-

7. 'The Securities Markets: Operations and Issues' The Free Press, New York 1966 at pages 121 and 122.

8. No. 61 of 1970.

trative regulatory body like the Securities Exchange Commission) to continue subject to a legislative framework:[9]

> "However, stock exchanges, stock brokers and other dealers in securities will under the legislative scheme be subject to the following distinct forms of control—
>
> a) The Minister's approval is required for the establishment of any new stock exchange.
>
> b) The Minister may disallow any further alteration of the rules of a stock exchange.
>
> c) Dealers in securities (including stock Brokers) are required to maintain accounts including trust accounts which will be subject to audit.
>
> d) Dealers in securities (including stock brokers) are required to be licensed.
>
> e) The Stock Exchange is required to establish and administer a fidelity fund...."

Additionally four new offences in securities trading were created. S.66 outlawed creating a 'false or misleading appearance of active trading in any securities on any stock market in Singapore, or a false or misleading appearance with respect to the market for, or the price of, any such securities.' Market rigging transactions i.e. 'which have the effect of raising or lowering the price of securities of that class for the purpose of inducing the purchase or sale of securities...' was prohibited by s.67(1) and sub-s. (3) prohibited the circulation of any statement or information to the effect that the price of any securities would rise or fall, for consideration. Fictitious transactions or devices which inflate, depress or cause fluctuations in the market price of any securities were prohibited by s.68. Finally, s.69 prohibited the making of any statement or the dissemination of any information which the maker knows or has reasonable grounds to know is false or misleading. In all these cases, only a penal sanction was prescribed by s.70.

The Act was never brought into force, mainly because of the difficulty of enforcement so long as the Stock Exchange served two countries and one limb remained unregulated. The Malaysian government finally introduced a Securities Industry Bill in February 1973. This was immediately followed by a similarly patterned Singapore Act[10] in March 1973 which was not a radical revision as the Malaysian bill was based on the Australian States and Singapore legislation. The split of the Malaysia and Singapore Stock Exchange in early 1973 caused further consequential amendments.[11]

Basic additional changes in the new Act involve the extension of its application to brokers and investment advisers, their employees and representatives and financial journalists. Investment advisers and their representatives are required to be licensed,[12] and dealers in securities, investment advisers, their representatives and financial journalists are required to keep a register of securities in which they have an interest.[13]

9. Explanatory Statement, Bill No. 52 of 1970.

10. Act No. 17 of 1973.

11. Securities Industry (Amendment) Act No. 51 of 1973.

12. S.11 and 12.

13. S.25.

What is of greater pertinence are the new offences in Part 10 of the Act relating to trading in securities. From the brief survey of the parallel provisions in the 1970 Act, it would have been apparent that the offences were couched in terms of generality. Terms like 'fictitious transactions' abounded and the Singapore experience, at least from the tax cases[14] with identical terms, have generated a tendency for the courts to embark on a course of obfuscation while attempting to unravel the mysteries involved; does not inspire any measure of confidence that such terms would be utilised with any great efficiency. Further the nexus between these devices and the market effects as phrased left much to be desired. Both s.66 and s.67 of the 1970 Act used the phrase "shall not create or cause to be created or do anything which is calculated to create. .. ." Bearing in mind that the sanctions were penal it would be difficult to gauge the element of proximity necessary before an act could be said to have created such false or misleading appearance of activity.

Further the experience of the *Fraser* case [15] has much to do with the motivation of the new legislation in extending its coverage to include investment advisers. Some consideration of the decision is germane at this point. In the *Fraser* case, the defendants, the investment advisers and its representative were charged with making a reckless statement in its circular which was misleading and that they induced an investor to enter into an agreement to acquire a number of shares in the Singapore Traction Company. They were also charged with recklessly making statements and forecasts that the said shares were an excellent investment, in attempting to induce the purchase of the shares. The basis of their statements was a gross overvaluation of real properties of the company which had been in bad financial straits for many years. The charges were made under s.366(l) of the Companies Act which creates an offence of making reckless statements or misleading forecasts to induce or attempt to induce another person to enter any agreement to acquire marketable securities. The basic legal issue was whether dishonesty was an essential ingredient of the offence.

S.366 having its origin in s.13 of the English Prevention of Fraud (Investments) Act 1958[16] it was inevitable that English cases would be referred to which cases had become redundant by the amendment which added the word '(dishonest or otherwise)' after 'reckless making'.[17] This amendment was consonant with the interpretation in *R.* v. *Bates*[18] that even without such amendment, a high degree of negligence without dishonesty was culpable and *R.* v. *Grunwald*[19] that so also were rash statements made regardless of whether the maker had any real facts on which to base them. The only dissentient appeared to be *R.* v.

14. See *Comptroller of Income Tax* v. *C.E.C.* [1971] 2 Malayan Law Journal 54 discussed infra at page 93.

15. *Public Prosecutor v. W. Measor* unreported. District Court No. 1, Arrest Case No. 31, 32 and 49 of 1972; *Public Prosecutor* v. *Fraser & Co. (Pte)* unreported. Summons Nos. 870/71, 117/72 and 118/72.

16. 6 & 7 Eliz. 2 c.45.

17. By s.21(l) of the Protection of Depositors Act (c.61).

18. [1952] 2 All E.R. 842.

19. [1963] 1 Q.B. 935.

Mackinnon & Ors.[20] where dishonesty was implied as necessary, a view consistent with the Jenkins Committee suggestion[21] that there should be no criminal offence without dishonesty.

By a curious piece of reasoning the District Court while noting that the English 1963 amendment merely clarified the position in England, went on to hold that notwithstanding the absence of any like amendment in Singapore, the 'amendment had not altered the law in England. By the 1963 amendment Parliament in England explained its intention, and the law of Singapore and the law of England are, in my judgment, still the same.' While it is clear that the English amendment set beyond doubt the law in England on this point, the existence of a reasonable basis of difference between the courts in fact served to render the amendment the full force and implications of an amendment. It was not as if Parliament had extra-legislatively expressed a preference for one view in indicating to the courts its 'intention'. Even if it did the plain meaning rule of interpretation would preclude any reference to it in construing the express language of the statute. To give such an amendment what is in essence extra territorial application in Singapore in the presence of a local statute however defective, is an exercise that strains credulity.[22] What would have been much simpler and more easily defended would have been for the judge to accept the views expressed in *R.* v. *Bates*[23] and *R. v. Grunwald*[24] in preference to any other.

Also of some interest is the court's interpretation of the term 'inducement'. It considered 'inducement' to be established if the 'reckless statement was the substantial or effective cause of the agreement'.

With that background, it is not surprising that the new Act in delineating the offences involved utilises a greater degree of specificity. What is of greater significance however is the source of the new ss.84-87. With minor changes these provisions are identical copies of the United States s.9 of the Securities Exchange Act 1934[25] and Rule 10b-5.[26] This *volte face* from the English and Australian models previously used gives rise to a host of problems.

The relationship of these provisions to takeover bids is again indirect. While they are not directed specifically to takeover activities, many practices that accompany such bids by both the offeror and offeree corporations and their officers and insiders, run afoul these prohibitions. The Securities Exchange Act 1934 makes specific fraud provisions almost identical to the general fraud provisions, equally applicable to takeover activities. While it was clear that Rule 10b-5 applied without more to

20. [1959] 1 Q.B.D. 150.

21. Para. 254, *op. cit.*

22. Its decision does not bind any court in the judicial hierarchy of Singapore.

23. *Op. cit.*

24. *Op. cit.*

25. *Op. cit.*

26. *Op. cit.*

such activities, s.14(e) of the Act which rounds off the s.14 [27] regulation of takeover schemes or 'tender offers' is identically worked. Such express provisions do not exist under the Securities Industry Act scheme of regulation and as such the fraud provisions generally have to be examined with this view in mind.

The new phenomenon of attempting to impose an attenuated form of American regulation over the existing English and Australian framework creates problems which will be highlighted. In the first instance much overlapping exists. The regulation of the Companies Act, particularly prospectus liabilities,[28] takeover schemes,[29] and general insider trading and fraud provisions [30] are already available. If the coverage of the new ss.84-87 is restrictively interpreted then the overlapping would result in redundant lawmaking.

It is arguable that the coverage of persons differs. Thus essentially persons caught by the Companies Act regulation are officers, directors and agents of the company, the latter Act extends to 'any person' including stock brokers, dealers and investment advisers. *Public Prosecutor* v. *Fraser & Co. (Pte)*[31] belies this somewhat as the s.366 conviction was there extended to cover investment advisers. The American Rule 10b-5 was a creature of the Securities Exchange Commission to combat insider trading, a gap created by s.17(1) of the 1934 Act which though almost identical in working, only regulated sales of securities and the rule extended covered purchases as well. In Singapore s.132 and 132A of the Companies Act as well as S.69A already provide an adequate framework of regulation via civil and criminal remedies and the registration of substantial shareholdings.

What is exceedingly clear under both schemes is that any purchase or sale by anyone even at arms-length is subject to the three grounds mentioned in 10b-5. The American courts have gone beyond this and decided that any purchase or sale by any insiders implies an affimative duty to disclose any material facts. This is to slur over the exact categories in the rule and are justified in passing by reference to the fraud or deceit part of the provision. It is therefore very possible that a conservative Singapore court would restrict s.87 to the express categories mentioned and thus effectively shackle the remedy from being of any utility.

An activist posture is desirable by courts in dealing with these provisions if the effect of redundancy is to be avoided. Such a role is consistent with the wording of 'any person' as distinct from 'any officer'

27. Securities Exchange Act Rule 14-1 (c) requires information on the offeror, the offer, including dates of withdrawal and pro rata acceptances; the source of funds used in the offer and a description of any borrowing transaction and parties; the purpose and plans of the acquisition; information on the securities offered and any arrangements and undertakings including transfers, joint ventures, loans, options, guarantees and proxies; both to given to the offeree corporation and to be filed with the Commission-Rule 14-1 (d).

28. S.45.

29. S.179 *et. seq.*

30. S.132A and 366.

31. *Supra.*

as used in s.132. The American courts have finally evolved towards in *Texas Continental Life Insurance Co.* v. *Dunne*[32] abandoning the requirement of any privity between the plaintiff and the defendant, where an action by a secondary buyer against the original underwriter on a non-disclosure of the terms of the issue, was sustained. The evolution began initially in the courts sustaining actions against issuers where a relationship existed through securities holdings or controlling persons or insiders where there was a similar link. The coverage has now extended to include accountants,[33] bankers,[34] lawyers,[35] and even aiders and abbettors.[36]

A parallel development under ss.84-87 is statutorily available. S.132(6) as well as S.132A of the Companies Act define 'officer' widely to cover past officers and 'agent' to include bankers, solicitors and auditors, past and present. S.87 of the Securities Industry Act 1973 which is identical to Rule 10b-5 is available in the case of insider trading by investment advisers and financial journalists which is therefore an extension of the coverage beyond s.132 and 132A of the Companies Act. This extension is consistent with the purposes of the 1973 Act to extend regulation to these two additional participants of the securities industry.[37]

Beyond these two express categories of persons, it is still an open question as to the width of the new provisions. What is undesirable is the development of rigidity in the classes covered. Instead it is suggested that the legislative purpose in regulating insider trading should be the guiding principle in any case. This purpose is always to promote arms-length dealing particularly when officers or employees of the company are involved. Thus an insider is usually defined as a person who because of his position or intimate association with a company has greater knowledge of the financial affairs of the company.[38]

The next category of persons who ought to be and can be brought within the ambit of s.87 are 'tippees'[39] i.e. recipients of inside information from corporate officers. In this category are of course the family, friends and business associates of the insider. The theory of liability of such persons is based on the common law doctrine of restitution viz:[40]

> "where a fiduciary in violation of his duty to the beneficiary communicates confidential information to a third person, the third person, if he had notice of the violation of duty, holds upon a constructive trust for the beneficiary any profit which he makes through the use of such information."

32. 307 F 2d. 242 (6th Cir. 1962).
33. *H.L. Green* v. *Childree* 185 F. Supp. 95 (S.D.N.Y. 1960). See A Bromberg *Securities Law: Fraud SEC Rule 10b-5,* Magraw Hill, N.Y. 1971 at p. 205.
34. *Pettit* v. *American Stock Exchange* 217 F. Supp. 21 (S.D.N.Y. 1963).
35. *Katz* v. *Amos Treat & Co.* 411 F. 2d 1046 (2d Cir. 1969).
36. *Buttrev* v. *Merrill. Lynch, Pierce, Fenner & Smith Inc.* 410 F 2d 135 (7th Cir. 1969).
37. S.24 requires the maintenance of a register of shareholdings by, inter alia, investment advisers and financial journalists.
38. *Myzel* v. *Fields* 386 F. 2d 718 at page 739 (8th Cir. 1967). cert. denied 390 U.S. 951.
39. A term coined by L. Loss in *Securities Regulations, op. cit.* chap. 9C.
40. U.S. Restatement of Restitution s.201(2). Thus in *Ross* v. *Licht* 263 F. Supp. 395 (S.D.N.Y.), the controlling family of a corporation gave information to their friends who were in turn held liable as 'tippees' i.e. person who are given information by insiders in breach of trust.

Although the doctrine of constructive trust has not in the English common law system, as distinct from the American common law, developed to be a widely used device for recovery for unjust enrichment, it is nevertheless available and used on occasions as in *Selangor United Rubber Estates Ltd.* v. *Craddock (No. 3).*[41] Thus the same theory is equally available under s.87 to permit recovery from such category of persons. Thus the 'tippee' for example, a stock broker has been held to violate Rule 10b-5 in *In the Matter of Cady, Roberts & Co.,*[42] a director of a corporation disclosed a dividend cut to a broker who immediately sold off his customers holdings of the stock of the company involved. Such conduct was held to be a violation of 10b-5 as a fraud or deceit upon purchasers. In considering the class of persons covered and the underlying provisions and principles the Securities Exchange Commission stated:[43]

> "...the anti-fraud provisions are phrased in terms of 'any person', and that a special obligation has been traditionally required of corporate insiders e.g. officers, directors and controlling stockholders. These three groups, however, do not exhaust the classes of persons upon whom there is such an obligation. Analytically, the obligation rests on two principal elements: first, the existence of a relationship giving access, directly or indirectly to information intended to be available only for a corporate purpose and not for the personal benefit of anyone, and second, the inherent unfairness involved where a party takes advantage of such information knowing it is unavailable to those with whom he is dealing. In considering these elements under the broad language of the anti-fraud provisions we are not to be circumscribed by fine distinctions and rigid classifications. Thus our task here is to identify those persons who are in a special relationship with a company and privy to its internal affairs, and thereby suffer correlative duties in trading in its securities."

The above extract summarises the underlying policy of the Act well enough. It is extremely clear therefore that in exceptional cases a wide category of persons can be convicted under s.88. But since the civil remedy is premised on prior criminal action the utility of such provision will be restricted a great deal. What is significant outside the criminal and civil sanctions under the United States legislation is the administrative powers granted to the Securities Exchange Commission. S.21(e) of the Exchange Act of 1934 empowers the Commission to obtain injunctions against violations of the Act as well as endowing it with rule making power. A necessary concomittant to such powers is the existence of trained staff and facilities. S.91 of the Securities Industry Act of 1973 empowers the court to make far reaching orders on the application of the Registrar of Companies if the Act has been violated or is about to be. These orders include restraining persons from further dealings in a security; declaring a contract void or voidable and directing persons to do or refrain from doing specified acts. The sanction for non-compliance is criminal and the courts inherent contempt powers.

A second major anomaly of the structure of the new Act relates to the problem of private causes of action. A civil suit for recovery under s.132 and 132A of the Companies Act is expressly provided for therein, and is independent of any criminal action, at the initiation of anyone who has suffered loss as a result of insider trading. Ss.84-87

41. *Supra* at p. 56, and see now *Karak Rubber Co. Ltd.* v. *Burden* (1972) 1 All E.R. 1210. where liability imposed on a third party who was impugned as having constructive notice of the dishonest intent of the trustee, was affirmed.

42. S.E.C. Disciplinary Hearing 40 S.E.C. 907 (1961).

43. *Ibid.,* at page 912.

however are all predicated upon the criminal sanctions in s.88. S.94 however provides:

> "A person who is convicted of an offence under Part X shall be liable to pay compensation to any person who has purchased or sold any securities at a price affected by the act or transaction, the subject of the offence, for the damage suffered by him as a result of the purchase or sale."

It is thus a curious arrangement which is coloured by a double penalty intent. Conviction is a prerequisite to civil recovery on the basis of the violation of ss.84-87. The offence in s.366 of the Companies Act is not similarly restricted if the class of persons convicted are not made equally vulnerable to civil action by other provisions of the Act. The essential advantage of a s.94 civil suit is that the section itself is the basis of the cause of action. The plaintiff need only establish the conviction and the loss incurred by him as a result of the purchase or sale of any security affected by the act or transaction which was the subject of the offence. S.95 requires the Attorney-General's consent before any prosecution may be commenced.

Since the civil burden of proof of balance of probabilities can conceivably be established in circumstances where a criminal standard beyond reasonable doubt may not be, it is a nice question whether persons covered only by the Securities Industry Act 1973 i.e. investment advisers and financial journalists are to be permitted to indulge in insider trading and like practices without sanction of civil suit if for any number of reasons prosecution is not forthcoming.

Again the creativity of the American courts proves instructive. Rule 10b-5 made insider trading unlawful with no mention as to whether civil liability was available. The court in *Kardon* v. *National Gypsum* Co.[44] experienced no difficulty in creating civil liability from 10b-5 on the theory that "where a legislative enactment contains no express liability provisions, the disregard of the command of a statute is a wrongful act and a tort".[45] On this theory however, which is a common law theory that a tort exists where a statute passed for the benefit of a class of persons (investors) is violated and no civil remedy is expressly provided for, no parallel development is conceivable under the Singapore Act. The prevailing common law as to such availability of civil remedy is expressed thus: "Where an Act creates a stipulation, and enforces the performance in a specified manner, we take it to be a general rule that performance cannot be enforced in any other manner".[46] It is arguable that s.94 is facilitative and does not prohibit the creation of a civil remedy distinct from one coupled with the criminal suit. The elements of this tort are a) that the duty must be owed to the plaintiff, *b*) the injury caused must be of the kind contemplated by the statute, *c*) the defendent must have breached his statutory duty, and *d*) the breach must have caused the damage. S.94 does provide for a civil remedy under the precondition of prior conviction and as such this theory is of no assistance to extend civil liability beyond that provided for by s.94.

44. 69 F Supp. 512 (1946).

45. *Ibid* at page 513.

46. Per Lord Tenterden L.J. in *Doe* v. *Bridges* (1831) 1 Bl Ad. at p. 859.

It is now intended to survey the provisions in some detail, particularly s.87 which will thus conclude this study of this part of the securities industry regulation.

S.84[47] which outlaws false trading and markets is almost identical to s.9(a)(1) of the Securities Exchange Act 1934. Several of the terms used occur in the other provisions and as such are of some relevance in determining their content interchangeably. The term 'directly or indirectly' has been utilised under s.9(2) of the 1934 Act to render a manipulatory responsible for the transactions of anyone acting on tips and rumours traceable to the manipulator.[48] S.84(1)(a) prohibits wash orders i.e. transaction which involve no change in beneficial ownership. S.84(1)(b) and (c) prohibit matched orders i.e. orders for the purchase of substantially the same price knowing that the sale on the same terms has been agreed to previously, and vice versa.[49] It is significant that only the latter two sub clauses specifically mention the requirement of knowledge.

S.85 in prohibiting market rigging transactions to wit: 'for any person directly or indirectly to effect a series of transactions in any securities on a stock market in Singapore creating actual or apparent active trading in such securities, for the purpose of inducing the purchase or sale of such securities by others' is almost identical to s.9(2) of the U.S. Act of 1934.

The twin South African cases of *R.* v. *McLachlan and Bernstein*[50] and *S.* v. *Marks*[51] considering the elements of market rigging are instructive: In the earlier case de Waal J.P. confined the three elements thus:[52] "(1) the rigger must hold a parcel of shares (generally a large parcel) which he wishes to off-load on the ignorant public, and which he cannot otherwise off-load than by fraudulent market, (2) the shares must be intrinsically valueless or practically valueless, or at any rate intrinsically far below the level at which the rigger intends and hopes to off-load and

47. S.84(l) "It shall be unlawful for any person directly or indirectly for the purpose of creating a false or misleading appearance of active trading in any securities on any stock market in Singapore or a false or misleading appearance with respect to the market for any such securities:

(a) to effect any transaction in such securities which involves no change in the beneficial ownership thereof;

(b) to enter an order or orders for the purchase of such securities with the knowledge that an order or orders of substantially the same size, at substantially the same time and at substantially the same price, for the sale of any securities, has been or will be entered by or for the same or different parties; or

(c) to enter any order or orders for the sale of such securities with the knowledge that an order or orders of substantially the same size, at substantially the same time and at substantially the same price, for the purchase of such securities, has been or will be entered by or for the same or different parties".

48. *Michael J. Meehan* 2 SEC 588 (1937).

49. For an example of a transaction involving such wash sales see *Wright* v. *SEC* 112 F 2d 89 (2d Cir. 1940).

50. (1929) W.L.D. 149.

51. (1965) 3 S.A. 834.

52. *Supra* at p. 156.

(3) as a result of a successful 'rig' the unsuspecting public must be left in possession of the worthless scrip, at which moment of time the rigger withdraws his support by ceasing to operate, as an inevitable result whereof the shares recede to their original value, that is to the value at which they stood before the 'rig' commenced."

In qualifying the first element Mill J. in the later case said[53]

> "I do not think that by saying that it is essential that the rigger must hold a parcel of shares which he wishes to off-load upon the public, the learned Judge-President meant that a parcel of shares is a necessary prerequisite for the perpetuation of a rig. It is only at the time when the rigger wishes to benefit by the result of his rigging operations that he must have a parcel of shares to off-load upon the buying public at a profit. The rigger may manipulate market dealings by placing buying and selling orders without becoming the holder of any shares but with the view to acquiring, at some stage during the operation, a quantity of shares for off-loading at a later stage when the prices have risen to the desired level or the rigger may have the right to a call or an option to buy shares which he would exercise when a profit could be made as a result of his manipulations. It may even happen that a person or persons who have control of a company would proceed to an increase of the capital of the company with the motive of acquiring the additional shares at a particular price and selling them at a profit."

The requirement of 'series of transactions' and the 'inducement' elements are crucial. Every purchase or sale on the market has the effect of creating trading activity. What is unlawful is the creation of such effect for the purpose of inducing purchases or sales by others. The Securities Exchange Commission has held that even three purchases constitute a series,[54] and a single order in a multiple of the unit of trading might constitute a series, if the order were not executed all at one time.[55] The term 'transactions' transcends purchases and sales and can be interpreted to include activities preliminary to them.

The second requirement of 'purpose of inducing' has been the subject of liberal construction in the *Federal Corp.* case:[56]

> "It is necessary in the usual case (that is, absent an admission), that the finding of manipulative purpose be based on inferences drawn from circumstantial evidence," and "a prima facie case exists when it is shown that a person who has a substantial direct pecuniary interest in the success of a proposed offering takes active steps to effect a rise in the market for outstanding securities of the same issuer."

This reference from circumstances is easily made when the defendant is a person knowledgeable in securities trading and financially interested in the shares particularly in the absence of any other reasonable explanation.[57]

Unlike s.9(2) s.85 does not have the words 'alone or with one or more other persons' and thus arguably does away with any necessity to establish conspiracy or complicity when more than one person are involved.

53. *Supra* at p. 835.

54. *Kidder Peabody & Co.* 18 SEC 559 at p. 568 (1945).

55. *Ibid.* at pp. 568-70.

56. 25 SEC 227 (1947).

57. *R.* v. *MacMillan* (1968) D.L.R. 2d. 680.

The market rigging provision has been the subject of much litigation in the United States. It has been more significant in injunction proceedings by the Securities Exchange Commission to restrain violation, which itself is the result of continued surveillance of the market. As such its success in Singapore necessarily depends upon the use that injunction proceedings will be put to by the Registrar which is premised upon a trained and equipped staff which so far does not appear to have been created.

S.86 combines both s.9(3) and 9(5) of the 1934 Act in regulating the dissemination of information in the course of business of dealers or brokers that the price of any security will rise or fall because of the activities of any persons conducted for such purpose. The combination is a natural one as the two separate U.S. provisions deal with the same situations firstly when there is consideration passing for such dissemination and secondly when it is gratuitous.

S.87 is identically modelled on the SEC Rule 10b-5. As it is the most significant and heavily utilised provision it is intended here to reproduce it *in extenso* and to provide some indication of the directions taken by courts in determining the content of its many phrases.

> S.87 "It shall be unlawful for any person directly or indirectly in connection with the purchase or sale of any security —
>
> (a) to employ any device, scheme or artifice to defraud;
>
> (b) to engage in any act, practice or course of business which operates or would operate as a fraud or deceit upon any person; or
>
> (c) to make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made in the light of the circumstances under which they were made, not misleading."

S.87 prefaces the separately defined offences with the clause 'in connection with the purchase or sale of any security'. Two problems arise immediately. What is the degree of connection required which is basically a question of causation. Secondly whether the defendant who has been caught under any of the three clauses is nevertheless not liable if he personally did not involved himself in the actual purchase or sale complained of. Both these questions were dealt with in the landmark case of *Securities Exchange Commission* v. *Texas Gulf Sulphur Co.*[58] where these questions were approached by close reference to the legislative history of the Act:[59]

> "Therefore, it seems clear from the legislative purpose Congress expressed in the Act, and the legislative history of s.10(b) that Congress when it used the phrase 'in connection with the purchase and sale of any security' intended only that the device employed, whatever it might be, be of a sort that would cause reasonable investors to rely thereon, and, in connection therewith, so relying cause them to purchase or sell a corporation's securities. There is no indication that Congress intended that the corporations or persons responsible for the issuance of a misleading statement would not violate the section unless they engaged in related securities transactions or otherwise acted with wrongful motives, indeed, the obvious purposes of the Act to protect the investing public and to secure fair dealing in the securities markets would be seriously undermined by applying such a gloss onto the legislative language."

58. 401 F 2d. 833 (U.S. Court of Appeals 1968).

59. At p. 860.

The preferences for a wider interpretation of the term is equally permissible under the Singapore Act as the legislative purposes do not differ. It is thus clear that were a company to issue a misleading statement, and the information is material, that sufficient 'connection' exists for a s.87 violation, even though the company itself or the directors concerned were not themselves personally involved in the securities transactions that ensued. The purport of the judgment makes it manifestly evident that any statement issued by a publicly listed company is made 'in connection' with the purchase or sale of securities. Notwithstanding the above persuasive determination of the term, it is foreseeable that the Singapore courts would require a closer nexus between the acts and the securities transaction particularly when criminal prosecutions are involved.

Some light is thrown upon: s.87 (a)'s 'device, scheme or artifice to defraud' by the case of *U.S.* v. *Ross*[60] where the court held that there is no requirement of proof of participation by more than one person under this clause. Further, on the question of a scheme it said:[61]

> "a 'scheme' involves some connotation of planning and pattern, and it is hard to doubt that evidence showing that the conduct charged to a defendant followed a pattern of fraud similar to one that was being contemporaneously practiced by a fellow employee, or even that was followed later by another employee of the same house with respect to the same stock, has enough logical bearing to pass the test of relevancy."

S.87(b) specifically mentions acts which operate as a fraud or deceit upon any person. In the United States most cases of insider trading have been couched under this clause. The common law definition of deceit in *Derry* v. *Peek*[62] strictly requiring a high degree of *scienter* is out of place here as this would mean redundancy again. Some American cases have extended this clause's coverage to include cases where the tipper by virtue of his disseminating or utilising inside information himself is said to have committed the offence.[63] In *Schoenbaum* v. *Firstbrook*[64] the sale to the controlling holding company of shares at an inadequate price just before the public disclosure of an oil strike by the subsidiary was held to be such a fraud or deceit to the minority shareholders. This overview is necessary in Singapore as the U.S. Rule 10b-5 was the only fraud provision available to curb insider trading purchasers. In Singapore the prior existence of insider trading legislation compels the conclusion that in enacting s.86 a wider coverage of persons and terms was intended.

The final aspect of these provisions to be considered here is the problem of *scienter*. In s.9 of the U.S. Act of 1934, knowledge is required specifically as an ingredient of the offence in s.9 (a) (1) i.e. the matched orders prohibition. In the remaining offences no such state of mind is mentioned as necessary. S.9 (a) (3)-(5) of the Act use instead the purpose requirement that others reply on the statements made. In s.9 (a) (2) the requirement is that others rely on the effects on the market

60. 321 F 2d. 61 (2d. Cir. 1963), cert, denied 375 U.S. 894.

61. *Ibid.* at p. 68.

62. (1889) 14 App. Cas. 337.

63. *SEC* v. *Texas Gulf Sulphur, supra.*

64. 400 F 2d. 200 revd. *en banc* 405 F 2d. 215 (2d. Cir. 1968).

of statements made by the defendant. Bromberg[65] identifies three categories of *scienter* available viz: knowledge-actual or constructive; state of mind- intent, purpose or motive, and bad faith; and care- recklessness or negligence, all of which are adequately backed by precedents. He expresses a preference for the knowledge criterion in all cases as it is more attuned to the basis of the regulation which is information and that the other criteria are at best misleading in this context.

Under ss.84-87 Securities Industry Act 1973, a slighly varied scheme exists. S.85(2) makes it a defence if the defendant satisfied the court that he acted without malice and to protect his own lawful interests. The s.86 problem of *scienter* may have been predetermined if any weight is to be accorded the prior determination under s.366 Companies Act of the same issue in the *Fraser's case.*[66] The same is equally true of s.84(1). The approach of the Singapore courts would therefore be less problematic with a tendency to disregard any requirement of *scienter* unless expressly required.

In this survey of the new fraud regulations of the 1973 Act, it has been noted all along that besides the problem of overlapping, a tentatively effective scheme of regulation has been created. It has also been clearly illustrated that the success of the American provisions has been due in no small part to the effectiveness of the Securities Exchange Commission. The mere existence on the statute book in Singapore of such radical legislation will not without more ensure the effective curbing of malpractices in the securities market. In Singapore today only the Securities Industry Council appears to be in the process of acquiring the trained staff and facilities which will give it the capacity to regulate the market effectively. Unless the Registrar of Companies can draw upon these facilities or creates facilities of his own to permit a close surveillance of market practices, these laws will no doubt degenerate into dead letter laws.

A.III(C) *The Singapore Code on Takeovers and Mergers:*

As envisaged in S.179(11) of the Companies Act and art. 5B of the Stock Exchange Manual, a Singapore Code on Takeovers and Mergers (hereinafter called the Singapore Code)[67] has been introduced by the Minister of Finance and administered by the Securities Industry Council. It is closely modelled on the British City Code on Takeovers and Mergers (hereinafter called the City Code): Ostensibly this choice of self regulation over statutory regulation has the following advantages: flexibility and speed in the counselling of all parties; and an attempt to secure compliance with the spirit of fairness of the Code which will not be possible with a statutory body. The basic criticism yet remains in that that whatever close self interest that is shared by the London Commercial Community does not find expression in Singapore. However there is one factor which could spell success for this Code in Singapore even in the absence of the bite of criminal and civil sanctions. This is to be found in the very nature of the Securities Industry Council itself.

65. *Op. cit* Vol. 2, at p. 204. 41.

66. *Op. cit.*

67. Dated 18th December 1973. For the only example to date of the S.I.C.'s exercise of power see Appendix.

Being part of the Monetary Authority of Singapore at least administratively, the whole prestige and force of the Authority is an additional resource to the Council. The activity of the Authority in Singapore has far exceeded what the legislative format envisaged for the Authority exercises powers e.g. the licensing of offshore banks and foreign exchange-brokers. While there is no specific legislative rule preventing foreign based brokers from functioning in Singapore, the approval of the Authority is determinative for the absence of specific legal sanctions is compensated by indirect sanctions in the form of exchange control immigration and work permit requirements which are administered by government departments. The legal force of documents issued by the Authority e.g. Exchange Control notices discussed later[68] which are not primary or subsidiary legislation but are used with full effect gives some indication that the Singapore Code will similarly operate. The difference however is that the Singapore Code is generously strewn with generalities.

Since the Singapore Code is almost identical to that of its City Code model it is not intended here to describe it in any great detail. Focus will be upon its general features and the points of dissimilarity together with the probable differences of administration.

The twelve Principles are identical to the London City Code and involve a general value which runs against current development. This notwithstanding the diminishing influence of shareholders, the Code requires that the final decision of acceptance of an offer is to be made by the offeree shareholders who are to be aided in their decision by adequate information and the reality of their decision making power is not to be curbed by the directors even by attempting to fight off the bid without shareholder approval. Secondly equitable treatment for all offeree shareholders is mandated to be in order.

The Code is to be administered and enforced by the Council. Practice notes are to emanate from it which will no doubt be drawn from the City Panel. To facilitate speed in the processing of transactions a Panel or sub Committee will have delegated to it the Council's powers. The Secretariat is available for consultations and interpretative rulings on the Code. Sanctions for breach vary from private reprimand and public censure to deprivation of facilities of the stock exchange and criminal prosecution where other statutes are breached.

No vetting procedure is to be undertaken by the council unlike the City Panel, but vetting of listed companies is to be done by the listing Department of the Stock Exchange.

The Code's prime targets are the listed public companies but unlisted public companies and private companies are expected to observe the spirit and letter of the principles and rules. The extent to which private companies will in fact be affected is an open question. The scarcity of required information and tell-tale signs like market activity will tend to camouflage abuses. Bids for non-voting non-equity stock are beyond the parameters of the Code.[69]

68. Under Exchange Control *supra,* at p. 94.

69. Definition of the Singapore Code on "offer".

The Singapore Rules are divided into 5 major segments dealing with the initial approach; formal offers and documents; mechanics of formal offers; dealings and changes in the situation of a company during a bid.

In considering these Rules, their status and intended effect must be noted. In many instances the Rules merely restate the common law or statutory rules that prevail. In this instance the sanctions already existing are intact. In other instances the Rules spell out details which supplement the existing legal framework. Thus in the case of the contents of offer documents, additional requirements are made in relation to the offer document already required by S.179 and the Tenth Schedule of the Companies Act.

1. *The Initial Approach:* Rules 1-13.

The Rules mandate that the offer and the identity of the offeror has to be made to the Board of the offeree company or its advisers in the first instance, and the offeree Board is entitled to satisfaction of the offeror's ability to implement the offer.[70]

Once a firm intention to make an offer is made from a serious source, the offeree Board is obliged to inform shareholders first by press notice and by sending them a copy thereof or of the circular.[71] Where approaches are less clear the Rules only require announcement once the basic terms of the offer are agreed upon and there is reasonable confidence of a successful outcome of negotiations. If share prices are unduly affected then appropriate announcements are to be made.

Rule 8 imposes clear cut duties on the offeror in relation to the offer document. He must disclose his identity and his holdings or control of shares in the offeree company together with any preconditions set upon the terms of the offer. If he withdraws his offer he has to consult and justify his withdrawal to the Council.

The duties of the Board in relation to an offer in Rule 9 is a mere restatement of the common law rule *to wit* that they must act bona fide in the interests of the shareholders as a whole.

In a sale of control situation Rule 10 requires equalisation of opportunity by forbidding the controllers to sell unless within a reasonable time the same offer is extended to all other shareholders. This thus denies a premium to controller qua controllers.[72] In a departure from the City Code Rule 11 proceeds further to ensure equality by prohibiting any transfer in a situation of sale of control, from being effected prior to the formal submission of the offer to the shareholders, nor shall any irrevocable commitment by the directors to accept an offer be entered into without the consent of the Council.

As an attempt to equalise positions between rival suitors, any information given one offeror is available on request to the others.[73]

70. Rules 1, 2 and 3.
71. Rule 5.
72. See p. 61 *infra* where the common law rule is discussed.
73. Rule 12.

2. *Formal offers and Documents:* Rules 14-20.

Rule 14 equates any documents or advertisements addressed to shareholders to prospectuses under the Companies Act as far as the standard of care in making statements is concerned; whether the document advertisement is drawn up by the company or by its advisers. To this extent Rule 14 is identical to Rule 13 of the City Code. From here dissimilarity occurs the significance of which is unclear. Rule 13 of the City Code continues:—

> "... Each document sent to shareholders of the offeree company must state that the Board of the offeror company and/or, where appropriate, of the offeree company (or a Committee of the Board duly authorised by the Board so to act) have considered all statements of fact and opinion contained therein and accepted, individually and collectively, responsibility therefor and consider that no material factors or considerations have been omitted."[74]

By contrast Rule 14 of the Singapore Code continues:—[75]

> "Each document or advertisement addressed to shareholders of the offeree company must state that the Directions of the offeror and/or, where appropriate the offeree company, have taken all reasonable care to ensure that the facts stated and expressed therein are fair and accurate and, where appropriate, that no material factors or considerations have been omitted.
>
> "It must also be stated that all Directors (including any who may have delegated detailed supervision of the document) jointly and severally accept responsibility accordingly. If any Director does not so do, this must be formally stated in the document or advertisement."

One obvious difference is that the Singapore Code requires these assertions to be included in any advertisement as well. More significantly the Directors are required to warrant that they have taken reasonable care to ensure accuracy. Secondly each director accepts personal responsibility therefor even if he has not personally examined the document. If he does not accept such liability this must be stated in the document or advertisement. The thrust of these points of difference is clear. The Code seeks to compel all directors to ensure accuracy of statements and if any director knows otherwise it is to his peril to go along with the statement without more. If he demurs his identity raises questions and focuses attention on him. Outside the advantage that this system compels action by pinning direct responsibility on each director it also indirectly for fear of publicity if he demurs compels a greater degree of compliance. However the big question still remains — what sanctions? If it later is revealled that these statements were not made bona fide but that the director were aware of other factors is the common law of misrepresentation operative? Is s.45 of the Companies Act on civil remedy for mistatement in prospectuses also operative? What is the significance of referring to the Companies Act on standard of care in the preparation of prospectuses if no like civil and criminal sanctions follow?

The other basic rules of this part involve the imparting of all the facts necessary to make an informed judgment, to shareholders.[76] Because profit forecasts and asset valuations are particularly subjective exercises with differing impact on takeovers activity, Rule 16 encourages care in these reports and requires disclosure of the underlying assump-

74. *Op. cit.*

75. Differences in italics.

76. Rule 15.

tions on which these forecasts are made. Any accounting bases and calculations for forecasts must be examined by auditors or consultant accountants and their reports are to be attached. Where revaluation of assets is made the opinion and basis of valuation of a named independent professional expert it is to be stated. The object of these requirements is to discourage optimistic forecasts without sound bases being made to entice acceptance of an offer by shareholders.

The contents of the offer document must include the shareholding of the offeror in offeree company; the shareholdings in the offeror and in the offeree company in which directors of the offeror are interested; and the shareholdings in the offeror and offeree companies which any person acting in concert with the offeror owns or controls. The contents of the document of the offeree company advising its shareholders of an offer must state the converse, and additionally whether the directors of the offeree company and anyone acting in concert with them intend to accept or reject the offer.[77] Dealings in shares for both disclosures include any within twelve months (contra six in the City Code) prior to the announcement of the offer. In this instance shareholdings include securities convertible into equity share capital. The ability of the offeror to satisfy a cash offer must be assessed by a financial adviser and so stated.[78] Details of service contracts of directors of the offeree company with more than twelve months to run, and those entered into and amended within six months of the document, must be stated in the document sent to shareholders of the offeree company. The offer document must state whether its director's emolument are to be affected by the acquisition. All documents are to be lodged with the Council.

3. *Mechanics of the Formal Offer.* Rules 21-29.

The basic situation dealt with here relates to the unconditional offer.[79] By Rule 21 no offer shall become or be declared unconditional unless the offeror has acquired or agreed to acquire shares carrying over fifty per cent of the voting rights. Again distinct from rule 20 of the City Code, such offer may not be declared unconditional unless also the offeror has acquired the right to exercise over fifty per cent of the total number of votes exercisable at general meetings of the offeree company. Where different classes of equity shares exist comparable offers must be made to each and if more than one class carries votes the Council is to be consulted in advance.

Close attention is paid by the Rules to dates for the opening of an offer and periods of notice. That Rule 22 states that an offer must be open for at least one month (contra 21 days by the City Code) after posting and if revised an additional 14 days (8 days by the City Code) from the date of posting of the revision. Withdrawal of an acceptance is available after the expiry of 21 days from the first closing date if the offer has not by such expiry become unconditional or so declared. No

77. Rule 17.

78. Rule 18.

79. Defined to include cases in which the offer has, as a result of the receipt of sufficient acceptances, been announced to have become or been declared unconditional, subject only to one or more previously stated conditions, including for example the creation of additional capital, the grant of quotations etc. being fulfilled. See Definitions, Singapore Code.

offer can become unconditional after the 42nd day of posting of the offer unless it has previously become unconditional. Once an offer becomes unconditional the offer remains open for acceptance for at least 14 days after date of its expiry unless it has become unconditional as an expiry date and the offeror has given 10 days notice in writing to shareholders of its closure.

Announcement and information to the Stock Exchange of whether the offer has lapsed been extended or closed and if the offer has become unconditional the number of acceptances received, held before the offer period, acquired or agreed to be acquired during the offer period is to be disclosed, on the day after the date of expiry/date when the offer becomes unconditional.[80]

The Stock Exchange is entitled to consider suspension of dealings in the offeree company's shares if the above is not forthcoming in time. Failure to comply with the disclosure of details of acceptances in time entitles anyone who has accepted to withdraw his acceptance. The City Code rule 24 renders the unconditional declaration void additionally.

Rule 27 embodies the fear against less than total share acquisition for it states that offers for less than 100 per cent of the equity not already held by the offeror are undesirable and can only be conducted with prior approval of the Council. Such an offer must however be made to all shareholders who are entitled to accept *pro rata* in accordance with their holdings.

4. *Dealings:* Rules 30-37.

Rule 30 prohibits dealings in the offeree company's shares except by the offeror company by any person or company who is privy to the preliminary takeover discussions between the time when there is reason to suppose that an approach is contemplated and its announcement or the termination of discussion. The ambiguity of 'reason to suppose' and its subjectivity make these inappropriate for legislation. Here the spirit of the intent and consultations with the Council on a case to case basis only can lend predictability to this time frame: Dealings in the offeror company shares are also prohibited unless the offer is not price sensitive in relation to the shares.

Purchases at arms length are permitted amongst parties to a takeover transaction if the total of all shares of the offeree or offeror company purchased and sold by them or their associates is disclosed daily to the Stock Exchange and the Press and shares transacted by associates for account of investment clients must also be reported to the Stock Exchange and the Council but not to the Press.[81] Such dealings without the assent of the Council is prohibited in the case of partial bids.[82]

This disclosure requirement serves to put the offeree shareholders on notice of the current acquisition by the offeror, it serves to enable them to judge the chances of success of a resistance bid and it puts other investors on notice as to the special reasons causing market activity.

80. Rule 24.

81. Rule 31.

82. *Ibid.*

To ensure equality amongst all shareholders Rule 32 compels the offeror if he purchases shares in the market or otherwise during the offer period at a price above the offer price then such highest price shall accrue to the shares sought to be acquired by the offer. Specific rules follow to crystallise the prices for new issues of already quoted securities, the issue of securities not already quoted and restricted market securities.

If an offeror has acquired for cash within the preceding twelve months 15% of a class of shares or where the Council in the interest of equality so orders, then the offer for the class has to be in cash or accompanied by a cash alternative at the highest price paid in the preceding twelve months.

As Rule 10 prohibited controllers from selling out without similar arrangements being made for the other shareholders Rule 34 prohibits the acquisition of more than 20% of the voting control, without an offer to the remaining shareholders, except where the Council approves.

The basic assumption as to purchases on the market by individuals, was that it 'would be impossible to acquire control of a company through market purchases except over a very extended period of time during which shareholders would be aware of what was happening and could take their own decisions regarding their personal investments.'[83] The City Working Party has concluded[84] that 'this view is no longer tenable against the background of the increased awareness of investors of the implications of bid situations and the fact that it has proved possible for effective control of companies to be acquired through market purchases in a matter of days" while the City Code uses the quantum of 40 per cent, rule 35 of the Singapore Code makes it necessary to extend the unconditional offer to all shareholders on the acquisition of 20 per cent of the voting rights.

Again to impress equality Rule 36 prohibits the offeror from dealing in the shares of the offeree company during an offer or when one is reasonably in contemplation, if special favourable conditions are attached thereto, which are not capable of being extended to all shareholders. Consultations with the Council to justify proposed dealings as not being prejudicial to other shareholders are required by Rule 37.

5. *Changes in the Situation of a Company:* Rule 38.

Once a Board has reason to believe that a bona fide bid is imminent it may not unless previously arranged by contract without the approval of the shareholders in general meeting issues shares, options, convertible securities on self dispose or acquire or agree thereto assets of a material amount or enter contracts which are not in the ordinary cause of business. To do so the Council must be consulted and its consent obtained. This clause seeks to prevent fact situations like those in *Hogg* v. *Cramphorn Ltd.*[85] where shares with special voting rights were issued in an attempt to thwart a bid. Consistent with that case however, the ratification by

83. Announcement of the City Working Party; City Code concurrent with the passing of a new Rule 298.

84. *Ibid.*

85. [1967] Ch. 254.

shareholders of such action is permissible as the Rule requires the ultimate decision to be taken by the shareholder and not the directors alone. Another device used frequently though not legally has been the delay in registration of transfers, which is now prohibited by Rule 37.

The above brief survey of the outlines of the new Singapore Code reveals the earlier mentioned leanings in favour of shareholder democracy. To this extent the Code reinstates rights to shareholders which were gradually disappearing. At this earlier stage a few comments on the efficacy of the Code can be raised.

In the UK the annual reports of the Panel have given rise to a 'case law' which together with regular notices gives the financial community some degree of predictability as to the rules applicable.[86] Under the Singapore Code, secrecy of consultations is prescribed. Only practice notes on interpretation of the principles and rules will be published. Thus it is unlikely that reports of the Panel will be made public and an important source of development of this case law will therefore be unavailable.

Secondly the Director General of the City Code undertakes the task of vetting documents lodged with the Panel and no identical vetting function is arrogated by the Singapore Council except where the parties make application for rulings to it.

Thirdly the shortcomings of the City Code are a *fortiori* operative in Singapore. Thus in the Pergamon-Leasco Affair the Panel recommended investigation into the affair by the Board of Trade. Investigation in Singapore is to be undertaked by the Council itself or with the assistance of the Commercial Crime Branch of the Police Force where criminal offerees are anticipated.

The Code may prove useful in the controlling of foreign takeover activity if resort is made to the Council and the Council in particular instances enunciates Government disapproval of the bid. It is unlikely in the case of a foreign bidder who anticipates confirmed participation in Singapore, to ignore this disapproval. Thus it is conceivable that the Code may be used indirectly to control foreign takeover activity in Singapore.

Analysis of the Code and current developments in Singapore leaves the writer still unconvinced of the reality of self regulation in Singapore and a preference for total regulation by an SEC type structure as being the more attractive recourse.

A.IV. *FISCAL REGULATION:*

This segment considers the fiscal aspects of regulation as relate to stamp duty considerations, tax consequences and exchange control. This consideration is with a view to establishing the existence of a myriad of possible controls which have not as yet been harnessed to effective regulation of corporate takeovers. To some extent, some of these devices can and are used to facilitate takeovers!

86. For an interesting survey of the Panel's actual working on the Pergamon Press Affair, see B.D. Davies "An Affair of the City: A Case Study in the Regulation of Takeovers and Mergers" (1973) 36 M.L.R. 457.

a) *Stamp Duty:*

S.15 of the Stamp Act[87] provides for relief from stamp duty otherwise payable under section 4 where the reconstruction or amalgamation of a company is involved. When a company is reconstructed with the same members and assets, the only changes in the arrangement or division of the capital, a transfer from the old company to the new is not a sale in substance although there may be the essentials of a technical sale in law, and *ad valorem* stamp duty is not chargeable.[88]

Relief is conditional upon the existence of:

a) increase in the nominal capital of the company;[89]

b) the transferee company has been registered or incorporated or increased its capital with a view to the acquisition of the undertaking or of not less than ninety per cent of the issued share capital of any existing company;[90] and

c) the consideration consists of not less than ninety per cent thereof, where the undertaking is to be acquired, in the issue of shares of the transferee company to the existing company or its shareholders; or where shares are to be acquired, in the issue of shares in the transferee company to the shareholders of the existing company.[91]

Where an instrument is made in connection with the transfer to a company as defined by the Companies Act, no relief is available unless additionally; the instrument is either: executed within 12 months of the registration of the transferee company or the date of the resolution for the increase in share capital; or made to effectuate a conveyance or transfer pursuant to an agreement which has been filed with the Registrar of Companies within the same twelve months.[92]

It is thus apparent that when a takeover scheme results in a merger or amalgamation of the companies involved, by use of the exchange of shares for shares, a windfall by way of exemption from stamp duty is available.

An alternative method available with the same stamp duty exemption is an amalgamation under s.178 of the Companies Act which additionally requires the sanction of the court as well as three quarters of the class of shareholders approving the amalgamation. It is clear that stamp duty regulations merely act as incentives to certain forms of takeovers and do not provide any possible existing means of regulating such activity. The object sought by such exemption is simple. It is not intended to penalise companies when a reconstruction is effectuated with no real change of ownership and structure, for purely economic motives. Even so it is conceivably that such exemptions be granted on a discriminating basis and what are truly mergers and amalgamations should continue to enjoy such exemption.

87. Cap. 147.

88. *In re Seafield Rubber Co. Ltd.* (1920) 2 F.M.S.L.R. 234, C.A.

89. S.15(l) (a) but s.15(4) treats the issue of unissued capital as an increase in share capital.

90. S.15(1)(b), See *Brooklands Selangor Holdings* v. *I.R.C.* [1970] 1 W.L.R. 429 for the basis of determination of whether shares represent 90 per cent of the consideration.

91. S.15(l)(c).

92. S.15(3).

b) *Tax Consequences:*

The income tax structure as it exists has an effect on both types of takeovers considered in this paper. For convenience, much of the discussion relevant to both is made here while reference to peculiar effects are also made in Part B.

Again the tax structure reveals both the existence of regulations which facilitate corporate takeovers and others which are political deterents to such bids or bids by certain types of entities.

The basic problem of dividend or asset stripping as dramatically exemplified by the English cases hereafter considered is equally applicable under the charging section of s.10 of the Income Tax Act[93] thus raising the perennial income/capital analysis.

Basically, there is no difference of treatment between corporate and individual taxpayers except that individual taxpayers are taxed on a progressive graduated scale[94] from six per cent to fifty-five per cent, while corporations are taxed at a flat forty per cent rate.[95] Additionally significant is the absence todate of any capital gains tax and also that there is no separate corporation tax. Any gains accruing by the exercise, assignment or release of right or benefit granted by reason of any office or employment is deemed to be income and the difference between the open market price at the time of the exercise less the amount paid for such shares is taxable under s.10 (5). Tax on dividends is collected at source, with an equal deduction allowed to the individual shareholder as against his personal tax liability. The collection device of s.44 is succinctly described by Lord Pearce in the Privy Council decision of *Government of the Federation of Malaya* v. *A. Omnibus Co. Ltd.:*[96]

> "The company can by deduction (or deemed deduction of tax) from the dividends paid to shareholders recoup itself for any tax payable by it. A running account is allowed whereby the company can carry forward any amounts for which it has hitherto failed to recoup itself in respect of tax payable by it in previous years. As soon however as it collects from its shareholders more tax than it has had to pay, the excess becomes due to the government. There is no provision by which it can retain the excess and carry it over against its future indebtedness for tax. It cannot recover itself in advance."

The peculiar transaction of dividend stripping is a facet, and sometimes the main objective of a takeover bid. The transaction involves

93. Cap 141. S.10 "Income tax shall be payable upon income of any person accruing in or derived from Singapore or received in Singapore from outside Singapore in respect of

    a) gains or profits from any employment;
    b) gains or profits from any trade, business, profession or vocation...;
    c) dividends, interest or discounts;
    d) any pension, charge or annuity;
    e) rents, royalties, premiums and any other profits arising from property;
    f) any gains or profits of an income nature not falling within any of the preceding paragraphs".

94. S.42 Income Tax Act.

95. S.43.

96. (1963) 29 M.L.J. 14 Privy Council, see page 16 for an analysis of the rather complicated procedure involved.

a share dealing or investment company buying control of another company which has substantial reserves, which then proceeds to extract the reserves by a declaration of dividends. After this the shares acquired are sold at a price which is correspondingly lower than the purchase price because of the looted reserves, and as such a trading loss is incurred, which loss is sought to be set off against the total tax liability of the offerer company. The question of the deductibility of such losses devolves upon whether such losses are to be treated as trading losses as distinct from capital losses, and thus deductible under s.37(2)(a) Income Tax Act.

As is quite common this problem has not been the subject of litigation in Singapore and the English cases on this point, although the tax provisions are differently couched, prove germane. The question is not settled and the polarities find expression in the decisions of *Harrison (J.P.) (Watford) Ltd.* v. *Griffiths*[97] and *Finsbury Securities Ltd.* v. *Bishop.*[98]. In *Harrison* v. *Griffith*[99] the appellant originally traded as merchants and later dealt also in shares, incurred a dividend stripping transaction loss and sought to deduct the loss from the rest of its income. The House of Lords held that this was a trading transaction and thus a deductible loss notwithstanding that it was inherent in the transaction that such loss would be incurred and that the object of the transaction was to obtain a deduction for such loss.

In *Finsbury Securities Ltd.* v. *Bishop,*[1] the transaction was identical for forward stripping i.e. the acquisition was followed by the creation of preferred shares with heavy preference on dividends and the acquired company in subsequent years was to be milked by the payment of these preferred dividends. It was here held by the House of Lords that since it was essential to the transaction of forward stripping that the taxpayer retained the shares, the loss incurred on resale of the shares after the objectives were accomplished, was an "artificial device remote from trade to secure a tax advantage."

These activities, while now tightly regulated by the current tax provisions in the United Kingdom, are afforded the whole gamut of tax advantage in Singapore and in fact provides an inducement to asset and dividend stripping.

The second major tax advantage available under the Income Tax Act is the acquisition of tax loss companies.

Before 1969, s.37 2 (a) of the Act in the computation of assessable income, allowed deductions of any losses incurred during the year of assessment or during any year preceding the year of assessment[2] in any trade, business, profession or vocation. This provision lent itself to abuse thus: loss companies incurring recurrent losses acquired a

97. [1962] 1 All E.R. 909, H.L. For the U.K. tax provisions on which these cases are based on see Simons Taxes, vol. B 3d Edition Butterworths, London 1970 page 322 *et. seq.*

98. [1963] 3 All E.R. 105, H.L.

99. *Supra.*

1. *Supra.*

2. S.37(2)(b).

monetary value as objects of acquisition. Thus a company with large profits would eagerly seek out such tax loss companies and seek to take advantage of such losses because s.37 (2) (b) (ii) of the Act allowed for the carrying forward of such loss deductions into succeeding years if the loss was not totally extinguished by the deductions allowed in any one year. These accumulated losses being deductible in succeeding years, thus provided a desirable target for covetous profitable enterprises. It was so greatly utilised that in 1969, the Act was amended[3] to limit the availability of such deductions in such situations. The basis of the deduction was that the people who had borne the losses should be entitled to set off this loss against future profits. It was therefore anathema to allow outsiders who had not borne these losses to enjoy benefits of this deduction. Without wanting to deny the company such benefit and because of the peculiar difficulties involved owing to share transferability, a medium was struck. The new s.37 (5) disallows such deduction unless the "shareholders of the company on the last day of the year in which the loss was incurred were substantially the same as the shareholders of the company on the first day of the year of assessment." Presumably a fifty per cent identity of ownership would suffice to satisfy the 'substantial' requirement. But s.37 (7) goes on to delineate this figure as being fifty per cent of the paid up capital or fifty per cent of the nominal value of the allotted shares. Also, shares held by, or on behalf of, another company, by trustee or executors, are deemed to share this identity.

The intent is clear. Within it still exist points of doubt. The device of using nominees as shareholders e.g. the share-dealing firms themselves, lends itself towards causing difficulty in determining the identity of the shareholders. It is thus now only possible to take advantage of this provision by a merger which results in at least fifty per cent of the original membership remaining intact.

Besides the provisions examined above which provide tax advantages to the takeover scheme, the Act has two significant and hitherto underutilised provisions which can be brought to bear to control undesirable takeover schemes.

Administratively a deterrent to takeover bids exists in not allowing obvious targets to continue being suitable targets. One obvious characteristic of a target is when it has large revenue reserves and has not declared dividends for some time, thus depressing its market value. S.30[4] of the Income Tax Act allows the Comptroller to penalise excessive retained earnings. One area in which excessive retained earnings is popular is in one-man or closely controlled companies. As the maximum rate of corporate income tax is only forty per cent compared to the fifty-five per cent maximum individual income tax rate, it is at one stage of high income a tax-saying device to refrain from having the company declare dividends. This ironically causes the company to be more prone to being the subject of a takeover bid.

3. Income Tax (Amendment) Act No. 23 of 1969.

4. S.30 "Where it appears to the Comptroller that with a view to avoidance or reduction of tax a company has not distributed to its shareholders as dividend, profits made in any period. . .which could be distributed without detriment to the company's business, he may treat any such undistributed profits as distributed, and the persons concerned shall be assessable accordingly".

It is therefore suggested that this power be used more frequently to in fact act as watchdog on unhealthy company situation developing. Thus the individual controlling shareholder's personal tax liability would remain as though such dividends had been declared and it thus does not avail him to have the company excessively plough back earnings.

The second and major deterrent provision bears peripherally and not always on the takeover situation. S.33[5] enables the Comptroller to disregard artificial or fictitious transactions made with a view to reducing tax liability. This power is arguably of some avail in the dividend stripping situations considered earlier. As interpreted by the local courts, it would appear to be a factual determination within the differing contexts, and all that can be said with any degree of certainty is that certain parts of a takeover scheme may lend themselves to attack by this method. It is therefore instructive to consider the decisions for the light they throw upon the use of this power.

In *Comptroller of Income Tax* v. *A.B. Estates Ltd.,*[6] the taxpayer acquired a rubber estate which they let to their subsidiary at a very low rental of M$1,200 per annum. The average net profit of the estate was M$16,000 per annum. The Comptroller held the lease to the subsidiary as being an artificial transaction and included the nett income of the estate in the assessable income of the taxpayer. It was held that the sale of goods or other property by a taxpayer at a price far below the market value, unless forced to do so by circumstances beyond his control, was not a natural transaction in the course of business. Any transaction in the course of trade which is not motivated by economic considerations is unnatural and therefore artificial.

More significantly in the Singapore case of *C.E.C.* v. *Comptroller of Income Tax*[7] the High Court finally accepted the persuasive bearing of the Australian cases[8] particularly *Newton* v. *Commissioners of Taxation*[9] and the principles enunciated therein viz: that the

> "taxpayer must in the first instance have been the actual owner of or person with a vested right in the property on which tax has been sought to be avoided either by a disposition to which effect has not been given or where the whole arrangement was so designed as to enable the taxpayer to retain the income of the property allegedly disposed of or otherwise transacted to another."[10]

5. S.33(l) "Where the Comptroller is of the opinion that any transaction which reduces or would reduce the amount of tax payable by any person is artificial of fictitious or that any disposition is not in fact given effect to, he may disregard any such transaction or disposition and the persons concerned shall be assessable accordingly.

    (2) In this section 'disposition' includes any trust, grant covenant, agreement or arrangement".

6. [1967] 1 M.L.J. 89, Federal Court. See also R.M. Berriman (1967) *Me Judice* 14.

7. [1971] 2 M.L.J. 54.

8. On s.260 which though quite differently worded, deals with the same problem of artificial transactions.

9. [1958] A.C. 450 Privy Council.

10. Per Winslow J. [1971] 2 M.L.J. 54 at page 65.

Further on the point of disregarding a transaction as sham and the requirement that the disregarding must result in a tax liability, Lord Denning's statements in *Newton v. Commissioner of Taxation* were wholly adopted:[11]

> "But the ignoring of the transactions — or the annihilating of them — does not itself create a liability to tax. In order to make the taxpayers liable, the commissioner must show that moneys have come into the hands of the taxpayers which the Commissioner is entitled to treat as income derived by them."

The effect of this decision is to clarify to a large extent the content of the otherwise indefinite terms like artificial and fictitious, whatever disagreement there may be as to the wisdom of relying upon Australian cases couched in wholly different terms.

On balance it is thus noticeable that the tax regulation veers in favour of such takeover schemes, although such is not the expressed and only intention behind such provisions. It has also been noticed that certain regulatory powers already exist within the Tax Act. Other suggestions for the tax control of foreign takeovers are possible as have been much in evidence by the debate in Canada and Australia. Suggestions for tax controls include differential rates for companies owned by foreigners, or the granting of rebates on dividends received by Singapore resident shareholders abound, but these measure are unlikely to find expression in Singapore so long as the need exists to maintain a favourable climate for foreign investment.

c) *Exchange Control:*

The basis of the monetary delineation of areas of the Exchange Control Act[12] is between sterling and non-sterling areas. This delineation continues with diminished significance since the dismantling of the sterling area with Britain's entry into the European Common Market. The significance of sterling area designation implies restrictions on foreign exchange dealings beyond the area and unrestricted dealings within. The scheme of the Act is to prohibit exchange transactions *carte blanche* in all instances except with the permission of the Monetary Authority. However the scheme of regulation is not as rigorous as it appears at first glance. Banks are designated 'authorised dealers' for the purposes of the Act and are therefore granted a general licence to engage in exchange transactions without having to get the Authority's permission in each instance.

The regulation of trading in securities for exchange purposes bears the same degree of control. Thus the purchase by a resident of the sterling area of securities of a sterling country does not require Exchange control permission. It is this freedom of movement that facilitated the foreign activities of British based investment companies involved in corporate takeovers. Their activities to date have ranged in Malaysia, Singapore, Hong Kong and Australia with great fluidity.

11. [1958] A.C. 450 at page 467.
12. Cap. 245.
13. The British Commonwealth including South Africa, but excluding Canada and Southern Rhodesia.

Again the entry of non-sterling area currency is easily facilitated by the Monetary Authority of Singapore and this is merely one facet of the creation of a favourable climate for foreign investment. Together with this is the free repatriation of profits which ostensibly is unimpeded at this stage even outside the sterling area.

The Exchange Control Act requires the permission of the Monetary Authority of Singapore before any share of a Singapore company is issued or transferred to a non-resident of the 'scheduled territories'. The First Schedule of the Act names the so called territories. Section 11[14] thus states

> "Except with the permission of the Authority no person shall, in Singapore issue any security or do any act which involves, is in association with or is preparatory to the issuing outside Singapore of any security which is registered or to be registered in Singapore, unless the following requirements are fulfilled, that is to say:—
>
> a) neither the person to whom the security is to be issued nor the person, if any, for whom he is to be a nominee is resident outside' the scheduled territories; and
>
> b) the prescribed evidence is produced to the persons to whom it is to be issued and that of the person, if any, for whom he is to be a nominee."[15]

Notwithstanding the rather awesome phraseology of the provision, obtaining exchange permission for the entry of foreign currency into Singapore is usually a simple formality. Rather elaborate treatment is accorded to nominee holdings as it presents a difficult problem of control when easily transferable. Thus s.17 seeks to prevent changes in the status of nominee qua holder and *vice versa* on residents of non-scheduled areas without the permission of the Authority. No statutory guidelines are provided to control this discretion. Thus in the case of entry of capital from non-scheduled territories to finance takeover bids, such transfer of shares would require the Authority's permission which could have been readily denied. It is this regulation perhaps that accounts for the past absence of any American, Japanese or West German takeover activity in Singapore. Once non-scheduled currency has entered Singapore it would not be difficult to locally incorporate a company with the purpose of participating in the takeover activity. However even here repatriation of profits would have been subject to controls. The basic problem remains as takeover activity by British concerns, as will be seen later,[13] which nevertheless are foreign continued to operate within and because of the free transferability within the sterling area. It is this very absence of controls on the transfer of capital within the sterling area that has in part resulted in the spate of activities of the British based Slater Walker companies which have been the catalyst of take over activity in Singapore.

Again current developments have necessitated drastic changes in the format of regulation. Three events have brought about this change:

a) Britain's entry into the European Economic Community;

14. For an earlier case which involved the question whether a preparatory act was an offence under the prohibitions from making payments to non-residents of scheduled territories, see *R.* v. *Aik Hoe & Co. Ltd.* (1958) M.L.J. 59.

15. S.12 regulates the transfer of shares in similar fashion.

6) The demise of interchangeability between the Singapore and Malaysian currencies, and

c) The attempt to free, as far as possible financial restrictions of any kind which inhibit the growth of Singapore as a money centre.

In response to these developments the distinction between sterling and non-sterling areas has been effectively dismantled. The controls now take the form of *pro forma* notification to the Monetary Authority of any such transactions without prior permission having been obtained.

Thus, by a notice whose legal status is neither legislative nor subsidiary legislation, but which nevertheless contains the full sanction of administrative fiat, the Monetary Authority has, on 2 July 1973[16] purported to permit residents outside the Scheduled Territories to purchase Scheduled Territory securities without specific exchange control approval and to facilitate the dealing with foreign currency securities in Singapore. The requisite intermediaries are to be by articles 18 and 19 the external account of authorised depositaries and authorised banks. By another such notice[17] individual residents of Singapore are permitted to invest a maximum of $100,000 in securities outside the Scheduled Territories,[18] while companies are permitted a maximum of $3 million at any one time.

This area of fiscal regulation reveals the existence of various facilitative devices which peripherally bear upon and indeed encourage takeover activities. Since not every bid is economically undesirable it is difficult for these devices to be restrictively couched to enable discrimination against undesirable takeover activity. The lessening of the dangers of being the subject of a bid can be effectuated by certain devices considered before, as by preventing huge capital reserves from being accumulated to avoid tax liability.

B. *REGULATION OF FOREIGN CORPORATE TAKEOVERS*

In this final part of the paper, it is intended to trace in some detail the course of activities of foreign takeovers in Singapore[19] of Slater Walker in the first year of their local operations. This backdrop will bring into sharp focus the problem such activity poses. Then it is intended to utilise the Australian and Canadian responses briefly and to consider the relevance of such experience to Singapore.

In June 1971 Slater Walker Securities (U.K.) acquired a substantial minority interest (46%) for about S$20 million and further shares on the market for S$2 million in Haw Par Brothers International, Singapore,[20] a local and regional pharmaceutical manufacturing group. The company had earlier made linkages with Drug Houses of Australia (in which

16. By Notice No. E.C. 2 of 2d July 1973 entitled Exchange Control Act: Securities.

17. Notice No. E.C. 22 of 2d July 1973 entitled Exchange Control Act: Investments in Specified Currency Securities and Specified Currency Deposits.

18. See infra at p. 94 fn. 13.

19. Slater Walker activities in Hong Kong while part of the regional framework of activities of the company will be mentioned in passing in footnotes so as to present an idea of the whole picture of their regional activities.

20. *Straits Times* June 5 1971 page 1.

Slater Walker Securities had a 30 per cent interest), and Jack Chia in forming Drug Houses of Southeast Asia. As a result of their acquisition of Haw Par Brothers International, a new attempt was made to acquire the shares it held in Chung Khiaw Bank. This was achieved only to be followed with employee opposition in the Bank and s.14(l) of the Banking Act[21] which prohibits acquisitions of banks by related companies, of more than 20 per cent of the voting share capital without approval of the Commissioner of Banking. Thus the said shares were reacquired by Aw Cheng Chye.[22] Finally the United Overseas bank acquired from Haw Par 49.8 per cent of Chung Khiaw's equity for S$22 million.

In the heat of such activity over a few days, conflicting statements over the purchase or otherwise of the Chung Khiaw Bank shares, caused violent price fluctuations on the market. The Monetary Authority of Singapore and the Stock Exchange required explanations for these statements without suspending trading on the shares, with a view to investigating any possible insider trading,[23] and was apparently satisfied by explanations tendered. This was apparently a face saving device although probably none of the key actors involved indulged in such trading.

In March 1972 Haw Par Brothers International, which by now had become a shell holding company through which Slater Walker operated acquired controlling interests in Kwan Loong Medicated Oil and King Heng Development and in April it acquired a 40 per cent stake in both Island and Peninsular Development and Austral Malay Tin.[24] The former company incorporated in Malaysia engaged primarily in the development of private residential property and oil palm and rubber plantations. The latter also incorporated in Malaysia held tin leases and other investments. Part of the arrangement was for Island and Peninsular to then acquire 9 per cent of the equity of Austral Enterprise which when combined with existing holdings of the group would allow majority control to be exercised. Austral Enterprises incorporated in Malaysia also held oil palms and rubber plantations. In June 1972 Haw Par Brothers (Malaysia) a subsidiary of Haw Par Brothers International subscribed for 30 per cent of the equity of Edible Oil Products (Malaysia)[25] which processes and refines crude palm oil.

As the first year of its activities came to an end, it was necessary for Slater Walker in Singapore to demonstrate its good faith. Having taken over Haw Par in dramatic, and highly publicised circumstances with local resentment created, the group had to justify its continued local operations. In the background was the governmental attempts to maintain a favourable climate for foreign investment which in the final analysis was responsible for restraining drastic reprisals against them. Thus motivated a demonstration of economic benefits of their operations was necessary as continued hostility was not conducive to future activity.

21. Cap. 182.

22. *Straits Times,* June 15th, 1971 page 1.

23. *Straits Times,* June 16th, 1971 page 1.

24. *Straits Times,* June 14th, 1971 page 1.

25. *Straits Times,* April 25th, 1972 at page 16. All three acquired companies were quoted on the Stock Exchange of Singapore and Malaysia.

Production techniques in the pharmaceutical aspect of Haw Par was rationalised with unproductive assets hived off. Performance in terms of profits leaped to S$4.6 million for the year ending December 1971, with an increased dividend and a one-for-three bonus share issue.[26]

Thus by March 1972 an empire of sorts had been created in South-east Asia climaxing with the incorporation of Slater Walker Overseas Investments in Hong Kong[27] which would invest in its associated companies in Australia, Canada, South Africa and Southeast Asia, as well as offer investment managements service.

With this minimal background of its activities in the region in the first year, the question arises why was the hostility by government and local business aroused. Firstly, the London home reputation of Slater Walker was tarnished as being essentially asset strippers. Secondly, their first target was a venerable, closely held though publicly quoted concern of a philanthropic local family who suffered an immense loss of face as a result of the machinations of the takeover. Thirdly their activities were ill timed. They came at a time when local business areas were being cautiously opened to foreign participation with the acknowledged danger of them being swamped by the better organised and managed foreign competitors. The dramatic effects of their actions served to petrify local business opposition to governmental liberalisation of barriers to foreign business participation. A side effect of its activities was that it forced local banks like the United Overseas Bank into the modernising effort and to seek corporate size by acquiring Chung Khiaw Bank as well as Lee Wah Bank in a bid to forestall being outflanked by foreign banks which are increasingly being licensed (in limited markets) to operate in Singapore.

The problem of foreign control or participation in the securities industry with implications both for the market and the economy is not novel to Singapore. In Canada the political issue of American domination of the economy has found diverse expression and what it to be mentioned here only is the problem of whether securities firms ought to be open game to American investment.[28] Among its many recommendation, the Moore Committee recommended that two types of investors be delineated: industry investors being engaged in the industry itself and approved investors.[29] Both types are to be approved by the board of directors. Acceptance as approved investors would involve such investment in not having any influence over the operations of the

26. *Straits Times,* June 9, 1972 page 13, The Hong Kong activities of the group involved the acquisition of 70 per cent control of Kwan Loong, another pharmaceutical manufacturing concern, which acquisition was to result in integration with the pharmaceutical part of Haw Par in Singapore, by a licensing arrangement. *Straits Times* May 17th 1972 page 13, and *Straits Times* March 2nd, 1972 page 1. Within a week, Haw Par Brothers International acquired control of King Fung Development in exchange for all the shares of Southern Pacific Properties, a resort development concern. *Straits Times,* March 9, 1972, page 1.

27. *Straits Times,* April 14th 1972 page 15.

28. *Straits Times,* March 10th 1972, page 12.

29. See in this respect the 'Report of the Committee to Study the requirements and sources of Capital and the Implications of non-Resident Capital for the Canadian Securities Industry'; Investment Dealers' Association of Canada, Canadian, Montreal, Toronto and Vancouver Stock Exchanges. May 1970.

securities firm invested in beyond the normal shareholder rights. Further in paragraph 5.29 it is recommended that a maximum limit of participation by outside investors of 40 per cent be fixed. In an evaluation of the cost/benefit factor of such foreign investment, the Committee discounted the actual significance of research and development as against the cost of eventual domination of the industry.[30]

Granted that the Canadian problem of American domination of the economy is a peculiar one and with limited relevance to Singapore, the underlying concern and its manifestation in protectionist legislation is still pertinent as it reveals the possible direction that responses to similar problems can take.

The Malaysian response to redress the fact that 60 per cent of the share capital of limited companies were in 1970 held by foreigners, is embodied in the new Guidelines for the Regulation of Acquisition of assets, mergers and takeovers.[30a] The direction encouraged is towards more balanced Malaysian participation in ownership and control; net economic benefits by the country via Malay participation; and the absence of adverse effects on defence, environment and regional development.

The Guidelines to be administered by a Foreign Investment Committee, applies to acquisitions of any substantial fixed assets; the acquisition of ownership or control by foreigners, the acquisition of 15 per cent voting control totalling 30 per cent voting power of a Malaysian company; control through management and technical services arrangements. Any takeovers by both Malaysians or foreigners or any acquisition by both of assets valued M$1 million or more.

The Australian response to the same problem is more pertinent. The Companies (Foreign Takeovers) Act 1972 is a tentative step in this direction. 'Foreign corporations' are defined in s.4 as those in which single non-residents or single corporations formed outside Australia, together with their associates, control 3/20ths or more of the voting power, or where both in groups control more than 2/5ths of the voting power. The radically innovative powers in this direction are s.13[31]

30. Para. 5.91 on approved investors, *ibid.*

30a. See also *Siaran Akbar* PEN 2/74/110 (Pm) issued by the Malaysian Trade office.

31. S.13(1) "This section applies where —

(a) a take-over offer has been made, or two or more take-over offers that form part of a take-over scheme have been made whether before or after the commencement of this Act, in relation to shares in a company to which this Act applies; or

(b) the Minister has reason to believe that —

(i) an offer (other than an offer constituting or made in pursuance of an invitation constituting, a take-over offer) has been made, or two or more such offers have been made, whether before or after the commencement of this Act, to sell or purchase shares in a company to which this Act applies;

(ii) negotiations are taking place, or are about to take place, with respect to the purchase of shares in a company to which this Act applies and an agreement to purchase shares in that company is likely to be entered into as a result of the negotiations; or which enables the Minister to prohibit the acquisition of shares by certain persons and s.15[32] permits the Court on application by the Minister with respect to defaulting foreign owners of shares to *inter alia,* restrain voting or to cause such voting rights to be disregarded.

(iii) a company to which this Act applies is proposing to issue shares in the company.

(2) In a case to which paragraph (a) of the last preceding subsection applies, where —

(a) if the take-over offer or some or all of the take-over offers were accepted, a substantial number of voting shares in the company would be owned by foreign persons, whether or not a substantial number of voting shares in the company are already owned by those persons; and

(b) the Minister is satisfied that —

(i) foreign persons are not in a position to exercise effective control of the company but, if the take-over offer or some or all of the take-over offers were accepted, foreign persons would, as a result of the acceptance of the take-over offer or of some or all of the take-over offers, be in a position to exercise effective control of the company; and

(ii) the exercise of that control would be contrary to the national interest,

The Minister —

(c) may make an order expressed to prohibit the implementation of the take-over offer or take-over offers; and

(d) where he makes such an order, may also make an order expressed to direct that the foreign persons last mentioned in sub-paragraph (i) of Paragraph (b) of this sub-section, and any persons who are associated with any of those foreign persons, shall not together be the beneficial owners of shares in the company carrying more than —

(i) the fraction of the total of the rights to cast votes in respect of shares in the company that was carried by the shares in the company of which those of foreign persons, and any persons who are associated with any of those foreign persons, were the beneficial owners immediately before the day on which the order comes into operation; or

(ii) three-twentieths of that total,

whichever is the greater."

32. S.15(l) "Where a person (in this section referred to as 'the foreign owner') has failed to comply with an order in force under paragraph (d) of sub-section (2), or paragraph (d) of sub-section (3) of section 13, or section 14, of this Act, the Supreme Court. . .being a court that has jurisdiction for the purpose by virtue of sub-section (9) or sub-section (10) of this section, may, on the application of the Minister, whether or not that failure still continues, and whether or not other proceedings in respect of that failure have been instituted, make one or more of the following orders:-

(a) an order restraining the exercise of any voting or other rights attached to any share in the company concerned of which the foreign owner is the beneficial owner;

(b) an order directing the company concerned not to make payment, or to defer making payment, of any sum due from the company in respect of any share in the company of which the foreign owner is the beneficial owner;

(c) an order directing the sale of all or any of the shares in the company concerned of which the foreign owner is the beneficial owner;

(d) an order that any exercise of the voting or other rights attached to specified shares in the company concerned of which the foreign owner is the beneficial owner be disregarded;

(e) for the purpose of securing compliance with any other order made under this section, an order directing the company concerned or any other person to do or refrain from doing a specified act."

S.13(3)(ii) and s.14(l) (b) (ii) on the power of the Minister to limit beneficial ownership of shares, are both premised on such foreign control being 'contrary to the national interest', and raise the question of the basic upon which such determination will be made. The Hansard[33] indicates that takeover proposals will almost invariably be regarded as against the national interest if they involve an economically strategic industry or are so large that they affect the balance of Australian and foreign ownership and control of the industry involved. In all other cases the determination would consider the industry itself and whether the takeover would lead to nett economic benefits sufficient to justify the increased foreign control.

On completion of the first phase of vetting, five criteria are to be considered viz: a) whether after the takeover, the firm concerned could be expected to follow practices consistent with Australia's interest in exports, local processing research, and development, and industrial relations; b) whether the takeover would have adverse effects on governmental objectives of defense, environmental protection or regional development; c) the extent Australian participation in ownership and management would remain after the takeover; d) the interests of the shareholders involved and e) the attitude of the board of directors.

As tardily drafted as the Australian Act is, it reveals the lengths to which a similarly motivated government could go. In Singapore the circumstances at this stage are diametrically opposed. The investment climate created particularly for multinational corporations and the attempt to diversify foreign investment from as varied national sources as possible dictate against any like legislation. The policy at this stage is that foreign investment with the consequent introduction of technology, skills and markets is a necessary prelude to development. In any event the small size of Singapore and the inconceivability of any self sufficiency drive to any significant degree militates against outright hostility to foreign investment. The episode with Malaysia was an attempt to overcome this perpetual dependence on foreign economic activity and that proved premature. So long as this climate continues, and in the foreseeable future it will, the activities of foreign takeovers of local companies will not be regulated as aggressively as the Australian effort for fear of adverse effects on other desirable investment.

However, as this paper has demonstrated, a vast array of direct and indirect powers exist by which the government's approval or disapproval of individual takeovers can be expressed. The creation of the Securities Industry Council with powers to consider takeovers is an indication of this trend. It is therefore anticipated that this is the direction of future regulation.

To conclude this Part it is now intended to survey some of the defects in the regulation of takeover bids in Singapore as they affect

33. 116 Parl. Deb. H.R. s.1919-20; 3081-82, (1972).

foreign activities.[34] S.179(1) Companies Act defines a takeover scheme as one involving the acquisition of 20 per cent of the share capital of the offeree corporation. This arbitrary figure is inadequate as experience has shown that the acquisition of smaller blocks over a period of time is equally effective and avoids the controls here imposed. The Eggleston Committee recommendation[35] of 15 per cent is therefore equally desirable and has to some extent been accepted as the 1973 amendments reduced the figure from one-third to twenty per cent of the share capital.

In like vein, the limitation of s.179(l)(b) of including shares held by a related corporation ought to be extended to include interests i.e. shares, debentures, and stock options held by related persons. Finally s.3 of the New Zealand Companies Act[37] exempts from its definition of takeover schemes, offers made to not more than six members of the company. The Eggleston Committee[38] recommended such exemption. In Singapore it is suggested that such an exemption would be unwise as many old family companies are closely held and as the Slater Walker/ Haw Par bid revealed even they need to be protected.

This then completes the documentation of the initial activities of foreign corporate takeovers in Singapore and evaluation of the local response. Economic nationalism in Singapore is at present downplayed but it is conceivable that as more and more sectors of the economy become exposed to foreign competition and domination, that this sentiment will, surface again. If it does the regulation will merely be a cog in larger reaction towards reasserting economic nationalism.

C. *CONCLUSION:*

As the major conclusions of this paper have been presented at various stages of this paper where they have proved to be stylistically necessary, it is not intended here to collate them again. Instead it is intended to present the broad threads that have emerged from this study.

Both the survey of regulation of domestic and foreign corporate takeovers in Singapore are the subject of diverse and so far unconnected statutory and common law principles which both regulate and facilitate such activity. Foreign takeovers have only recently emerged and in the process caused a similar emergence of domestic takeovers. While the underlying pattern of regulation surveyed in Parts II, III and IV are equally applicable to foreign takeovers, a similar discriminating

34. Other defects were mentioned in the light of the Eggleston Committee Report *supra* at page 17 *et. seq.*

35. *Op. cit.* para. 27.

36. S.69A Companies Act which requires the registration of substantial shareholdings.

37. No. 136 of 1963.

38. *Op. cit.* para. 45.

scheme has not yet emerged to regulate the latter as has been so in Australia. Because of the juxtaposition of economic policy at this stage, such a parallel is unlikely. However, within the framework of existing regulation lies a great deal of permissible discretion and minor amendments are foreseeable if a concerted policy has been articulated as indeed the new legislation and the creation of the Securities Industry Council, indicate it has.

PHILIP PILLAI *

*APPENDIX***

"The Securities Industry Council has asked Haw Par Brothers International for an auditors' certificate stating that figures shown in a circular despatched to shareholders (and advertised in yesterday's Straits Times) have been prepared on a consistent basis.

The circular relates to Haw Par's proposed acquisition of minority shares in Motor and General Underwriters Investment Holdings and Slater Walker Securities (Hongkong).

It summarises the position of Haw Par shareholders on completion of the takeovers. Based on an issued capital of $69 million, net assets and projected earnings per share (ex the M & G and SWS(HK) acquisition) will be $3.05 and 28.9 cents respectively. Cum these acquisitions net assets will be $2.76 while earnings will be 34.4 cents per share on the enlarged capital.

The circular points out that the M and G acquisition dilutes Haw Par's assets by approximately 11 per cent, while increasing its earnings by about 5 per cent. On the other hand, the SWS(HK) deal brings no material change in assets but enhances earnings by almost 16 per cent. Approval, conditional upon the auditors' certificate, has been given by the SIC to Haw Par to issue the necessary shares for the takeovers.

Haw Par which has received acceptances from minority shareholders to give it an 88.56 per cent stake in M and G, and a 97.23 per cent interest in SWS(HK), is extending the date of its offer, which closed yesterday, to Feb. 22.

Directors also wish to point out, in accordance with Singapore practice, that the SIC approval is in no way reflective of the merits of the offer."

* LLB (S'pore), LLM (Harvard), Advocate & Solicitor, Supreme Court, Singapore, Lecturer in Law, University of Singapore.

** *Straits Times* 15 Feb. 1974 p. 13.