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JR Wiblin

Mandatory takeover offer — too high a price for the economy to pay?*

Summary

In this article the mandatory takeover provisions of the Securities Regulation Code on Takeovers and Mergers ('the Code') are discussed. The origins of the Code are traced to the English *City Code on Takeovers and Mergers* and the concept of affording protection to minority shareholders in such circumstances as contained in American case law. The application of the Code by the courts is also discussed. Modern theories on company law relating to mergers are traced and analysed. Ultimately the article argues for the repeal of the Code on the grounds that it is an unsatisfactory piece of legislation that has given some difficulty to courts in its interpretation and which is too costly to the South African economy.

Die vereiste bepalings ten opsigte van oornames — kan die ekonomie dit bekostig?

Die artikel handel oor die vereiste bepalings ten opsigte van oornames van die Sekuriteitereguleringskode vir Oornames en Samesmeltings ('die Kode'). Die Kode spruit voort uit die Engelse *City Code on Takeovers and Mergers* asook uit die beginsel van beskerming van minderheidsaandeelhouers tydens oornames en samesmeltings, soos in die Amerikaanse regspraak vervat. Die toepassing van die Kode deur die howe word ook in die artikel bespreek. Hedendaagse vertolking van Maatskappyereg, bepalings ten opsigte van oornames en samesmeltings word in diepte bespreek. Die artikel sluit af deur die herroeping van die Kode voor te stel. Die Kode word beskryf as lomp wetgewing; die vertolking daarvan 'n kopseer vir die howe en dat dit die Suid-Afrikaanse ekonomie skade berokken.

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JR Wiblin, Advocate, South Africa; Member of the California Bar.

1. Introduction

In a classic text describing his journey through the United States in 1831, the French journalist Alexis de Tocqueville made many trenchant observations about the fledgling civilization that he encountered. His book was published in an English translation as *Democracy in America* (1835), and it sounded a now famous warning about the future of that country. In a celebrated chapter of the book entitled, 'The Omnipotence of the Majority in the United States and Its Effects',[1] De Tocqueville warned that the wilful social exclusion of a minority portion of the American populace was the Achilles's heel of American democracy. Just as an individual in whom ultimate power is vested might abuse that power to the detriment of his adversaries, so might a majority behave in a similar fashion. De Tocqueville observed that the germ of tyranny lay dormant within the concept of majority rule, and that in spite of the idealism of apologists for democracy, there was no avoiding this inherent difficulty.

The concept of the tyranny of majorities has found expression in disciplines outside of social and political critique. Indeed, it has long been a topic of considerable discussion and interest in the comparatively cold-blooded discipline of company law. Although the analogy with the exercise of political power must not be pressed too far, it is surely for very similar reasons and with like concerns in mind that company lawyers have recognised the disadvantaged position of the minority shareholder. Minority shareholders are particularly at risk in circumstances where the majority shareholding of a corporation is suddenly placed in the hands of a new shareholder as a result of an unexpected takeover bid. It is suggested that these very same concerns inform General Principle 8 of the Introduction to the Securities Regulation Code on Takeovers and Mergers[2] (hereafter 'the Code'), where it is stated that:

> Rights of control shall be exercised in good faith and the oppression of a minority is unacceptable.

And the explanatory notes to the Code state that the Code

> … will operate principally to ensure fair and equal treatment of all holders of relevant securities in relation to affected transactions.

The Code itself, states the explanatory notes

> …represents the collective opinion of those professionally involved in the field of takeovers and mergers as to acceptable business standards and as to how fairness to holders of the relevant securities may be achieved.

This paper examines the provisions of the Code that are intended to protect minority shareholders in the event of a takeover bid being made for the company in which they hold shares. It traces the origins of the provisions, their application and their effectiveness. Ultimately, the paper argues for their elimination.

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1 De Tocqueville 1835:246-76.

2 The Code derives its authority from, and was promulgated under the *Companies Act* 61/1973: sec 440(C)(4)(a),(b),(c) and (f).

2. Application of the Code

The Code applies to a narrow range of transactions only; those which fall under the definition of an 'affected transaction' as carefully defined in the Code. An affected transaction is:

> … any transaction (including a transaction which forms part of a series of transactions or scheme, whatever form it may take, which —
>
> (a) taking into account any securities held before such transaction or scheme has or will have the effect of —
>
> (i) vesting control of any company (excluding a close corporation) in any person, or two or more persons acting in concert, in whom control did not vest prior to such transaction or scheme; or
>
> (ii) any person, or two or more persons acting in concert, acquiring or becoming the sole shareholder or holders of, all the securities, or all the securities of a particular class, of a company (excluding a close corporation); or
>
> (b) involves the acquisition by any person, or two or more persons acting in concert, in whom control of any company (excluding a close corporation) vests on or after the date of commencement of section 1(c) of the Companies Second Amendment Act, 1990, of further securities of that company in excess of the limits prescribed by the rules.[3]

Rule 8.1 of the Code states:

> Whenever an affected transaction occurs, then the person or persons who have acquired control of a company, or who acquire further securities in excess of the limits prescribed by the rules, shall … extend offers to the holders of any class of equity capital, whether voting or non-voting, and also to the holders of any class of voting non-equity capital of which such persons acting in concert with him are holders, to acquire all of their securities or such portion of their securities as the Panel on application may determine. In making such determination, the Panel shall have regard to the facts of the case, the general principles of the Code and equity. The offers shall be for the same or a comparable consideration …

Shareholders are not ordinarily entitled to such equality of treatment in respect of offers to purchase their shares. These rules governing affected transactions are as exceptional as they are narrow in their application. The purpose of the provisions are described by Diemont JA in the case of *Spinnaker Investments v Tongaat Group* 1982 (1) SA 65 (A):

> While these sections facilitate a takeover operation they also provide a measure of protection for shareholders in the offeree company. The mischief whereby entrepreneurs operating on a big scale can gain control of a company by buying out one or two of the large shareholders and ignoring the small shareholders is to some extent curtailed. In a word, the operations of the financier, who is sometimes referred to in terms

3 The prescribed limit is currently 35%.

> that are less than flattering as a predator, a white-collar looter or an early-dawn raider, are no longer unrestricted.[4]

But as the learned judge went on to note[5] the legislation does not affect all types of takeover offers but only offers of a very particular kind — those which fall under the definition of affected transactions.

3. The purpose of the Code

Legislation that places restrictions upon the untrammelled, free exercise of capital is often controversial. The argument is advanced that the free market economy works best when it is the subject of minimal interference from the state and that shareholders will place their investments where they are confident of receiving the most significant return. Companies that, through poor management or for other reasons, suffer the misfortune of having their share values sufficiently eroded so that the traded value of their shares upon the floor of the stock exchange is less than the asset value of the company are likely to be taken over. After the take over, such companies may be stripped of their assets, bad managers may be removed from their positions and an unprofitable or ill-conceived business venture may be closed and its valuable assets returned to the marketplace. Hopefully, these assets may then be put to better use and accumulate further capital, in the form of profit, in the hands of shareholders who will, it is further hoped, return that same capital to the market by investing in better run or better conceived companies. At common law in both South Africa and in England nothing prevents such free bargaining.[6] To some this is simply the operation of a market economy; to others the activities described above are those of the predator, white-collar looter and early-dawn raider to which Diemont JA referred so disparagingly in the *Spinnaker* case.

De Tocqueville did not venture to suggest solutions to the weaknesses that he feared were inherent in the pure democratic model of government that he encountered in America in 1832 nor did he offer any lessons that might be learned from post-revolutionary France after forty-three years experience of modern government. But in this area of company law at least the legislator has been alive to the concerns of the small investors — those who might find themselves, unwittingly and unwillingly, at the mercy of a powerful, opportunistic majority shareholder whose intentions for the company do not accord with those of the minority. Similar provisions have been widely adopted in other western countries.[7]

An active and vital takeover industry may prove an invaluable spur to the management of under-performing companies with substantial assets that are not being used to their full potential. The knowledge that the company may readily and quickly be taken over should its share price sink as a result

4 *Spinnaker Investments v Tongaat* 1982 (1) SA 65 (A): 73 A-B.
5 *Spinnaker v Tongaat*: 73 A-B.
6 See *United Trust v SA Milling* 1959 (2) SA 426 (W).
7 Henning and Du Toit 1998:226f.

of disappointing performance may encourage management to use their best efforts to improve the company's competitive performance.[8] In the event of a takeover, bad managers can expect to be replaced.

In a public lecture, Prof. Katz stated:

> It is surely in the public interest that corporate assets should be transferred to the stewardship of good managers. Conversely management of companies must be encouraged to good performance by the realization that neither the corporate laws nor the competition laws of the country will stand in the way of a healthy and thriving takeover industry.[9]

This led Katz to pose the question:

> …whether the mandatory offer to the minority is not an unhealthy impediment to a vital takeover industry by making acquisitions of control too expensive.[10]

4. Origins of the Code

In a very concise discussion Katz went on to trace the history of the intellectual justification for these provisions in American company law and, in particular, the case of *Perlman v Feldman*.[11] This appears to be one of those unfortunate cases where the decision of the court seems to have been shaped, at least in part, by the particular historical context in which it was decided — in this case, the conflict in Korea and a shortage of steel that was badly needed for the American military. The judgment of the court enabled control of the corporation to remain with the existing shareholders and the steel supply was ensured for the war effort. In that case the court made reference to what it called the rule of equal opportunity, holding that:

> …a controlling shareholder cannot sell pursuant to a purchase offer more favourable than available to another shareholder. The rule does not compel a prospective purchaser to make an open offer for all shares on the same terms. He can offer to purchase shares on the condition that he gets a certain percentage of the total or he can even make an offer to purchase 51 percent of the shares, no more and no less. The only requirement is that his offer, whatever it may be, be made equally or proportionately available to all the shareholders … the rule of equal opportunity would require an offer to buy from minority shareholders any time there is a sale of controlling shares.[12]

In 1969 the City Code on Takeovers and Mergers, a voluntarily observed code of conduct, was published in London. It has acquired what a leading

8 *Pace* Coffee 1984:1145 where it is argued that the motivating factor of a potential takeover upon managers who perform poorly is routinely overstated.

9 Katz 1997:37.

10 Katz 1997:37.

11 *Perlman v Feldman* 219 F 2d 173, 50 ALR 2d 1134, cert. den., 349 US 952 (1955).

12 *Perlman v Feldman* 219 F 2d, 173: 175.

English textbook[13] describes somewhat cryptically as '*quasi*-legal currency' in England.[14] The City Code originated from a modest set of 'Queensberry Rules' first published in 1959 entitled 'Notes on Amalgamation of British Business'. The City Code and its predecessor were a response to a perceived need. An amusing description of the prevailing difficulties appears in Gower's *Company Law*:[15]

> … rival bidders badgering each of the target's shareholder's by night and day; telephone calls offering him a special price, because, so it was falsely alleged, only his holding was needed to bring that bidder's acceptance to over fifty percent. In one case the result was that the bidder who eventually succeeded paid prices ranging from £2 to £15 per share.

One might ask, however, whether the far-reaching provisions of the City Code were really needed in order to overcome this problem. A provision making it unacceptable to harass shareholders repeatedly with offers to buy together with regulations limiting unsolicited contact with shareholders in the event of a takeover bid would surely have gone a long way toward eliminating the perceived mischief.[16] As regards the matter of the variation in the price paid, a simple answer is that shares are traded every day at different rates dictated by the market forces of supply and demand. Provided that the shareholder is aware that a takeover is planned, there does not appear to be any overriding concern that arises uniquely in the circumstances of a takeover offer and that dictates that the ordinary negotiations between buyer and seller to reach an agreed price for the shares is unfair to one party and ought to be outlawed.

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13 Morse *et al* 1992: Paragraphs 1.004, 12.302, 12.307-12.314.

14 The introduction to the City Code states: "the Code has not, and does not seek to have, the force of law. It has, however, been acknowledged by both government and other regulatory authorities that those who seek to take advantage of the facilities of the securities markets in the United Kingdom should conduct themselves in matters relating to takeovers in accordance with the best business standards and so according to the Code. Therefore, those who do not so conduct themselves may find that, by way of sanction, the facilities of these markets are withheld." The Takeover Panel may impose sanctions for non-compliance with the City Code. Sanction may take the form of a private reprimand, public censure, or the offender's conduct may be reported to a regulatory body such as the Department of Trade and Industry, the Stock Exchange or the Securities and Investments Board. On this, the note at *Halsbury's Laws of England* Vol.7 (2) 1996: Para 1198-9 is informative: "In this connection it must be borne in mind that reputation in the City of London is, or used to be, highly prized. In a flagrant case the Panel may take action designed to deprive the offender temporarily or, if necessary, permanently of his ability to enjoy the facilities of the securities market."

15 Davies 1997:773 fn. 13.

16 Rule 16.5 of the (South African) Code provides that telephone campaigns in which holders of relevant securities are contacted by telephone may be conducted 'only by staff of the financial advisors who are fully conversant with the requirements of, and their responsibilities under, the Code. Only previously published information, which remains accurate and is not misleading at the time it is stated may be used. Holders of relevant securities must not be put under pressure and must be encouraged to consult their own financial advisors.

5. Modern assessments of the mandatory offer

The current position in England is that acquisition of 30% of a public company's shareholding triggers the requirement of a mandatory bid. All shareholders therefore have the opportunity to exit the company at this stage and to do so on the same terms as have been obtained by the shareholder or shareholders from whom the controlling share block was purchased.

In fact, very few mandatory bids are made in England. Shareholders may content themselves with a 29.99% shareholding in order to avoid the mandatory bid and the vast majority of bids that are made to all shareholders in England are made voluntarily. Of some 166 takeover proposals where formal offer documentation was sent to shareholders in the period 1996-1997, only 9 were mandatory offers.[17]

Our own Code is based upon the City Code. Cameron J (as he then was) recognised in *Haslam*'s case,[18] however, that 'because of the "*quasi*-legal currency" of the City code in the United Kingdom, no clear indication of its enforcement in comparable circumstances seems to exist.' In other words, the learned judge could find little assistance in the English case law when it came to interpreting the provisions of the Code.

The European Union has embraced the principle of the mandatory offer without much apparent enthusiasm. A draft EU directive in 1989 sought to ensure minimum guidelines on the conduct of takeovers within the Union. It contained provisions for a full mandatory offer along the lines of the English model. This was opposed by the continental member states where the mandatory offer was unfamiliar. A revised proposal in 1996 dropped the requirement of the mandatory bid entirely. A subsequent version allows for mandatory bids or for member states to provide 'other appropriate and at least equivalent means' to protect minority shareholders. In a later version mandatory bids would be required where a person acquires one-third of the voting rights but it would be for each member state to indicate the level at which the bid must be made.[19] Consequently, a lower price might be offered than that obtained by the seller or sellers of the controlling share block. This is a marked departure from the spirit of the City Code where the overriding principle is that all shareholders in the target company should be treated alike when control of the company changes over into the hands of the offeror and, in the words of one writer, the proposal 'removes the sting' from the requirement of the mandatory offer.[20]

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17 Takeover Panel 1997.

18 *Haslam v Sefalana* 1998 (4) SA 964 (W): 975J.

19 OJC 64/8 14.3.1989; Com (95) 655 final 07.02.1996 and also Davies 1997:775, fn. 21; 793; 793, fn. 18.

20 Davies 1997:793 fn. 18.

6. Application of the provisions in the Courts

It seems astonishing that provisions which make inroads upon our common law and which are inimical to the spirit of free enterprise should have been imported into South African law from such unprepossessing origins. Nor has the application of the provisions of the Code proved to be without difficulty for the courts. In *Haslam*'s case, Cameron J was called upon to decide whether the offeror in a proposed takeover bid was obliged under the provisions of the Code to make an offer to purchase the minority shareholder's shares at the price it had agreed with the holder of the effective controlling shareholding of the offeree company despite the subsequent cancellation of the agreement between the offeror and the holder of the majority shareholding. Cameron J decided the question in the affirmative — the obligation survived the cancelled agreement. He had recourse, *inter alia*, to what he found to be the underlying principles of the Code, which demanded fair and equal treatment of all holders of shares in relation to affected transactions.[21] The learned judge also considered the possible fluctuations in the value of shares that were likely to result where transactions were launched and then subsequently abandoned, and he asked at what time exactly it could be said that the market could fairly determine that a takeover had occurred. He could find no satisfactory answer to this query in the Code or in the existing case law. The learned judge determined that the spirit of the Code required that the offeror be held to the mandatory offer to minority shareholders. But Cameron J recognised that there were drastic consequences to his finding and he cautioned that if the Securities Regulation Panel considered that his interpretation of the provisions of the Code had effects that were not contemplated, or went further than the Panel considered desirable, then the Code should be amended.[22] In the event, it appeared that no amendments would be necessary as the Supreme Court of Appeal disagreed with the interpretation applied in the court below and reversed the decision of the lower court.[23] The appeal court held that:

> The appeal to the principle of equality of treatment ignores the undeniable fact that the only circumstance which led the Legislature to enjoin equality of treatment, namely a change in control, is absent. In short, the provisions of the Act and the Code should not be construed in isolation and without taking sufficient account of the mischief which it was manifestly enacted to combat.[24]

The mischief to which the learned judge of appeal referred was presumably that the minority shareholders would find themselves at the mercy of an unexpected new majority shareholder without their agreement and without the opportunity of selling their shares at the same price as that at which the new majority shareholder bought his shares. This situation did not come to pass in the case at bar because no actual transfer of shares took place and there was no change of control. Consequently, the minority shareholders

21 *Haslam v Sefalana*: 973I.
22 *Haslam v Sefalana*: 975E.
23 *Sefalana v Haslam* 2000 (2) SA 415 (SCA).
24 *Sefalana v Haslam*: 419H per Marais AJA.

could not claim damages. Only the party who had actually contracted to sell the majority shareholding could claim damages arising from the subsequent repudiation. But this only brings one back to the question with which the court below had wrestled — exactly when can it be said that a takeover has occurred, and at what time does the obligation to purchase the shares of the majority shareholders become irrevocable? The appeal court took a common sense view, saving them perhaps from having to ground their decision in the *ipsissima verba* of the provisions. But as one writer has pointed out[25] the appeal court appears to have overlooked the fact that the definition of an affected transaction included circumstances that — although not present in the facts of the case at bar — relate to transactions in which a change of control does not necessarily occur. Transactions where an offeror who already had control of the company acquired outstanding shares or securities in the offeree company[26] and transactions where the offeror acquires in certain circumstances further securities in excess of prescribed limits[27] are affected transactions, but in neither case is a change of control required to trigger the mandatory offer. Subsequent amendments have brought the legislation into line with the appeal court's reasoning.[28] Rule 8.1 of the Code now requires that whenever an affected transaction occurs, the person or persons who have acquired control of the company or who acquire further securities in excess of the limits prescribed by the rules must make mandatory offers, unless the Panel excuses them from doing so. The difference is that an acquisition of securities is no longer required to trigger the mandatory offer. Rather, the question is now whether there is control of the company in the sense of holding sufficient securities to give the holder control of the prescribed percentage of the voting rights in the company, whether or not this has been achieved through the acquisition of securities.

7. Arguments against the retention of the mandatory offer

None of this has brought the difficulties associated with the mandatory offer provisions to a satisfactory end. Neither the decision of the Supreme Court of Appeal nor the recent amendments to the definition of an affected transaction have conclusively answered the problems raised by Cameron J in *Haslam*'s

25 Luiz 2000:392f.

26 *Companies Act*, 61/1973 sec. 440A(1)(a)(i) — '… any transaction (including a transaction which forms part of a series of transactions or scheme, whatever form it may take, which — (a) taking into account any securities held before such transaction or scheme has or will have the effect of — (i) vesting control of any company (excluding a close corporation) in any person, or two or more persons acting in concert, in whom control did not vest prior to such transaction or scheme...'

27 *Companies Act*, 61/1973 sec. 440A(1)(b) — '…any transaction (including a transaction which forms part of a series of transactions or scheme, whatever form it may take, which — (b) involves the acquisition by any person, or two or more persons acting in concert, in whom control of any company (excluding a close corporation) vests on or after the date of commencement of section 1(c) of the Companies Second Amendment Act, 1990, of further securities of that companying excess of the limits prescribed by the rules.'

28 The changes are comprehensively summarized by Larkin and Boltar 1999:430-431.

case. The following is a summary of the points raised by Luiz[29] in a valuable article published in 2000 where the author restated the problem that Cameron J wrested with in *Haslam* and sought the answer by applying the reasoning of the Supreme Court of Appeal in that case to the amended provisions, namely — what would the position be if an agreement in terms of which the person who is to acquire further securities in excess of the limits is cancelled before the mandatory offers are made?

7.1 In following the reasoning of the Supreme Court of Appeal one should first ask what mischief the provisions were designed to curtail. Since change of control had already occurred, he determined that that could not itself be the mischief. It therefore had to be the acquisition of further securities in excess of the prescribed limits.

7.2 Regrettably, there is no definition or agreed meaning of the phrase ‘acquire further securities’ in the case law or in the definitions section of the Code.

7.3 One returns inevitably to Cameron J’s question in *Haslam*’s case — at what stage can a person be said to have acquired securities?

7.4 In the absence of a change of control it becomes important to know when an acquisition of securities occurs as that is the moment that will trigger the mandatory offer.

7.5 Since the Supreme Court of Appeal placed its emphasis squarely upon change of control in *Haslam*’s case that decision provides no guidance in this crucial matter.

7.6 Accordingly, no satisfactory answer to the query can be found.

The point is that the Code is a highly unsatisfactory piece of legislation as it gives rise to difficulties in its interpretation and there is an unacceptably high level of uncertainty in matters of its application. The economy of any country thrives upon certainty and it is reasonable to expect legislation that makes inroads upon free market principles to be succinct and clear in its application. Lawyers and business people need to be able to determine the outcome and cost of transactions before going into them, failing which there will be a chilling effect upon takeovers and the takeover industry.

8. Can the economy afford the Code?

Ultimately, one must ask whether the mischief that the Code seeks to avoid is so egregious that it warrants the cost to our economy that this unhappy set of rules (and its unpredictable application) brings. In recent years this question has been considered by a number of writers[30] none of whom has seen fit to go further than merely to raise the question. Government has studied the matter. In 1997 the Department of Trade and Industry issued a statement to the press from the Chairperson of the Standing Advisory Committee on

29 Luiz 2000:401-3.

30 See Katz: 37; Henning and Du Toit: 232; Luiz: 396.

Company Law (hereafter 'the Committee') calling for comment on the mandatory offer provisions. The Committee has determined a number of arguments that it considers 'persuasive' against maintaining the mandatory offer. They are:[31]

8.1 The protection afforded to the minority shareholder by means of the mandatory offer is not absolute. There is nothing to prohibit the controlling shareholder from selling shares in such a manner as to preclude the application of the Code and therefore the mandatory offer;

8.2 The mandatory offer makes financing of a takeover extremely expensive;

8.3 The high cost of takeovers hampers the move toward black empowerment;

8.4 The current holders of economic power are in a position to further entrench that power as only they have the financial means to implement a mandatory offer; and

8.5 Company 'looters' will not necessarily be discouraged, as they will base their decision on the inherent value of the offeree company (if that value is higher than the cost of the takeover, the takeover, even with the mandatory offer, will be viable).

It is submitted that these points are apposite. Indeed, the very rationale of the mandatory offer is open to question. If minority shareholders Y and Z hold between themselves 10% of Alpha Co and majority shareholders A and B each own 45% can it really be said that Y and Z are in a worse position if A and B sell their shares to C and D, or even to C alone? What if the sole majority shareholder holds 90% alone and then sells to another? — all that has happened is the substitution of one shareholder for another. How then may the minority be said to have been oppressed or disadvantaged? The assumption is that somehow the minority shareholders are in a better position if they are subject to the wishes of a majority that they are familiar with or which they knew about when they purchased their shareholding. But the benefits of this are illusory. If the majority shareholder is a corporation and the board of that corporation changes suddenly, perhaps due to a takeover or some other type of corporate shake-up, the policies and interests of the majority shareholder may change radically although the shareholding remains unaltered. There are many possible scenarios where the majority shareholder may make decisions that the minority considers against their interests. That the shareholder remains unchanged does not guarantee anything. Why then should the minority become entitled to be bought out at a premium price? After all, the majority shareholders could decide to sell off the assets of the company or even apply to have it wound-up if its debts exceed the value of its assets. They could do so in the face of opposition of the minority who would be hard pressed to resist these changes.

31 Larkin and Boltar 1998:431.

9. Conclusion

The case for the abolition of the mandatory offer is strong. Support for its abolition is growing and vocal. By contrast, the case for its retention is weak and has been stated rarely in recent years. There can be no question that minority shareholders require access to recourse against delinquent actions of a company's board or in many other situations. The second report of the King Commission on Corporate Governance has suggested that minority shareholders be permitted to finance litigation in such circumstances on a contingency fee basis. Our law provides remedies that are available to the minority shareholder. Whether the available remedies are adequate is an issue that falls outside the scope of this paper. Rather, what is suggested is that in the limited instance of the provisions regarding the mandatory take over offer, the good intentions of the legislature have provided for a form of protection that is costly, unwieldy and unnecessary and whilst international investors appreciate certainty and prefer company law systems and rules that are familiar to those of the major international markets where those rules themselves creates uncertainty and operate against the interest of the market those investors could welcome a change. It is suggested therefore that the mandatory takeover offer be abolished and the relevant legislation repealed forthwith.

Bibliography

COFFEE JC
1984. Regulating the market for corporate control. *Columbia Law Review* 84:1145-1296.

DAVIES PL
1997. *Gower's principles of modern company law*. 6th ed. London: Sweet & Maxwell.

DE TOCQUEVILLE A
1988. *Democracy in America*. Transl by G. Lawrence. New York: Harper Collins.

HENNING JJ AND DU TOIT S
1998. Die gelyke behandelingsbeginsel by oornames: 'n oproep tot hervorming? *Tydskrif vir Regswetenskap* 23(1):224-233.

HOEXTER C *et al* (eds)
1999. *Annual survey of South African law*. Cape Town: Juta.

KATZ MM
1997. Developments in corporate law. *Journal for Juridical Science* 22(2): 28-37.

LARKIN MP AND BOLTAR J
1998. Company law (including close corporations). Hoexter *et al* (eds.) 1998:403-458.

LARKIN MP AND CASSIM FHI
1999. Company law (including close corporations). Lewis *et al* (eds.) 2000: 396-437.

LEWIS C *et al* (eds)
1998. *Annual survey of South African law*. Cape Town: Juta.

LUIZ S
2000. Mandatory offers. *South African Mercantile Law Journal* 12:382-393.

MORSE G *et al* (eds)
1992. *Palmer's company law*. 25th ed. London: Sweet & Maxwell.