TAKEOVER BIDS AND TARGET SHAREHOLDER PROTECTION: THE REGULATORY FRAMEWORK IN THE UNITED KINGDOM, UNITED STATES AND AUSTRALIA

Razeen SAPPIDEEN *

This Article examines the phenomenon of corporate acquisitions and regulatory responses in the United Kingdom, the United States, and Australia. Compared to the U.K. and Australia, the U.S. follows a no-holds-barred approach toward tender offers and target defensive actions. The current position of these jurisdictions reflects the existing regulatory framework. The U.K. regulatory system seeks to maximize shareholder decision-making, i.e., shareholders having the final say on a bid. Furthermore, the U.K. system requires any offer to be for all of the targets' outstanding shares unless express approval of the regulatory body has been obtained. The U.S. response aims at ensuring an equal balance of power between the offeror and target. The Australian Code seeks to regulate all acquisitions in excess of twenty percent of targets' shareholding as a means of ensuring equal treatment and equal opportunity amongst target shareholders. The U.K. approach is by far the superior, as it ensures equal treatment of all target shareholders and eliminates the need for counterproductive target management defensive actions.

1. The Basis for Regulation

1.1. Introduction

The acquisition of corporate control through share ownership has always presented the difficult problem of shareholder protection. The problem has become more acute with the increased use of hostile tender offer bids to gain control. Different jurisdictions have adopted varied approaches to the problem. This Article compares the approach adopted in the United Kingdom (U.K.) with that of the United States (U.S.) and Australia. Both the U.S. and Australia are useful referents. The U.S. has a securities market as sophisticated as that of the U.K. The regulatory measures the U.S. adopted with respect to tender offers, although subsequent in time to those of the U.K., have proved to be the most contentious of the three jurisdictions [1]. Australia's securities

* Razeen Sappideen, LL.B (Ceylon), LL.M (Sydney), LL.M (Pennsylvania), LL.M (Columbia), Barrister-at-Law New South Wales, is a Senior Lecturer in Law at Macquarie University Law School, Australia.

Valuable editorial assistance by Ms. Valerie H. Ruttenberg is gratefully acknowledged.

markets are relatively young and dynamic. That nation's regulation of tender offers, which also preceded U.S. regulation, has been climaxed by a 1981 revision of its law [2] enacted after intensive study of the U.S. and U.K. experiences. Australian corporations law is in large measure a replica of U.K. corporations law.

1.2. The Background

A tender offer is an invitation for target shareholders to tender their shares on the terms offered and within the time period laid down by the offeror [3]. Offerors view the tender offer as providing a cheap and efficient form of acquiring corporate control. The tender offeror aims to deal directly with target shareholders to the exclusion of target management. Speed of action is essential to the success of a tender offer.

The announcement of a tender offer is good news for target shareholders, as the offer price will be set in excess of the prevailing market price. Where rival offerors and arbitrageurs enter the scene, target share prices tend to rise still higher. Thus, while tender offers are mutually advantageous to both offeror and target shareholders, competition for target shares confers increased benefits on target shareholders at the expense of the offeror.

Offeror strategy to prevent competition for target shares has consisted of three elements: (1) to stampede target shareholders into accepting the offer; (2) to hold target shareholders bound to the offer; and (3) to ensure that offerors retain maximum leeway with respect to the offer. Offerors are able to stampede target shareholders into acceptance by Skillful use of the partial bid together with acceptances based on a first-come, first-served basis. Under the partial bid only a percentage of the shares is bid for, whereas under the first-come, first-served method acceptances are made in the order tendered. In effect, target shareholders are forced into a prisoner's dilemma. If they do not tender, their fellow shareholders will; but once acceptances are tendered, target shareholders cannot accept an alternative offer by the same offeror or another offeror. In contrast, offerors endeavor to increasingly strengthen their position by making their offer subject to certain conditions [4] which add uncertainties to the bid and weaken further the position of target shareholders. Offerors also make purchases by private negotiation and discrete purchases on the stock exchange outside the tender offer in order to launch a surprise bid. Secrecy is the all important factor, as awareness by the marketplace and consequent activity by target management, rival offerors, and arbitrageurs would result in an increase in target share prices.

To target management, tender offers spell anathema as successful offers displace target management's hold on the target company. For this reason target management resists tender offers made without their consent by such methods as painting the best picture of the company [5] and creating obstacles.
In the U.S., resistance has also taken the form of amendments to the corporation's charter and by-laws. One common technique is the classified board, where only a percentage of the directors retire each year [7] and for whom successors are elected. Total board membership is fixed at any given time to prevent board "packing" time. The power to summon a special meeting is vested exclusively in the board with the proviso that no action be taken except at the annual meeting or at a special meeting of stockholders [8]. The effect is to delay any offeror action until the annual general meeting and to reduce the impact such a meeting could have. Alteration of these provisions is prevented by requiring voting majorities of up to ninety-five percent (supermajorities) [9]. However, the offeror is always allowed to negotiate directly with target management and bypass the supermajority requirements.

Such assumption of power by target management has been variously described as management entrenching, enhancing of self-interest, and contrary to the principles of corporate democracy [10]. Partly as a response to such criticism, there has been a shift in the strategies adopted. The focus now is on the target corporation's shareholders. Target shareholders are now invited to decide in advance whether they want to receive and evaluate tender offer bids, or keep the company independent. A declaration by target shareholders affirming the company's independence considerably enhances management's authority to resist a tender offer [11].

Evidence suggests that target management intervention generally results in an increase in the offer price and in target share prices [12]. Such intervention, therefore, is desirable. However, where target management succeeds in driving away all offerors, target share prices fall back to around the pre-offer price [13]. Identifying a defense threshold that produces optimum results for target shareholders, but which does not unduly entrench target management, is the ideal if not achievable task of the regulatory systems.

1.3. Directors' Duties and Corporate Acquisitions

In traditional Anglo-Australian law, directors are free to engage in defensive tactics because their fiduciary duties are owed to the corporate entity, not directly to shareholders [14]. Some recent cases show a slight shift in stance [15], but fall far short of offering any meaningful protection to target shareholders in the face of a tender offer.

Most jurisdictions in the U.S. regard directors as also owing a fiduciary obligation to their shareholders [16]. Such obligations require directors to be honest and open in their dealings with the company and the shareholders and to provide necessary and relevant information where appropriate; such obligations do not inhibit management's right to resort to defensive tactics in the face of a takeover. On the contrary, case law in the U.S. expressly recognizes the right of target management to adopt defensive strategies to combat tender
offers. The exercise of such power is limited by the standards prescribed by the Business Judgment Rule [17].

Under traditional Anglo-Australian law, an action by shareholders to restrain management excesses must be brought under an exception to the "proper plaintiff" rule and the "internal management" rule [18]. The source of these two rules is the decision in Foss v. Harbottle [19]. According to the "proper plaintiff" rule, actionable breaches of duty are enforceable only by the company, as directors are considered owing duties only to the company. Under the "internal management" rule a company can, by ordinary resolution, authorize any action of its directors so long as the act performed is within the competence of the company [20]. It follows that where management commands voting control, management is able to pursue its own objectives. This position is more difficult to uphold where management itself holds a controlling majority of the shares [21]. The courts may then inspect the motives of management more closely. However, one significant saving grace, remarkably absent in the U.S. [22], is that only the original shareholder body can vote to ratify a defensive share issue made to a "white knight" [23]. The consequence is that the allottees of the new shares are not allowed to vote on the validity of the share issue.

Target shareholders as a body do not benefit as much as they should by the tender offer process. The prisoner's dilemma leaves many target shareholders with no real choice and acts to prevent competing bids by rival offerors that would benefit all shareholders. Where only control by the offeror is sought and the acquisition is made through private negotiations and purchases, a mere handful of shareholders will benefit by the higher price that is offered. Growing dissatisfaction with these features of the marketplace for corporate control led to the introduction of regulatory measures in the U.K., Australia, and finally in the U.S. [24]

2. The Regulatory Framework

The centerpiece of regulatory measures governing tender offers in the U.K. is the City Code on Takeovers and Mergers (City Code) [25]. The City Code, issued by the City Working Party [26], is administered by the Panel [27], which came into existence in March, 1968. In March, 1978, the Panel was made an arm of a newly created supervisory body known as the Council for the Securities Industry (CSI) [28]. The CSI was established to improve the effectiveness and cohesiveness of the existing self-regulatory machinery for securities regulation [29]. The City Code lacks the force of law. Rulings are the result of private hearings before the Panel, with or without a rehearing by the Appeal Committee [30]. The City Code and Panel were attempts to assuage the heavy criticism in the press and Parliament of the tactics of bidders and
defenders in a number of prominent tender offer battles [31]. More importantly, the Code and Panel were attempts to prevent legislative intervention regulating the conduct of takeover and mergers.

The U.K. machinery regulating tender offers includes the 1985 Companies Act, which deals with the acquisition of minority holdings [32]. This Act is administered by the Department of Trade. Members of the Stock Exchange and issuing houses, who handle the bulk of the dealings [33], also voluntarily comply with the rules dealing with circulars relating to a bid made under the Prevention of Fraud (Investments) Act, 1958 [34]. In addition, rules of the Department of Trade require disclosure of certain information with respect to any written offer to acquire or dispose of securities, and with respect to takeover offers [35].

The U.S. and Australia faced the same problems in relation to the takeover marketplace but concluded that legislation was the proper solution. In the U.S., the Williams Act amendments to the Securities Exchange Act of 1934 [36] were enacted in 1968 following extensive Senate hearings [37]. The Securities and Exchange Commission (SEC) Chairman, during the hearings, explained the purpose of the Williams Act [38]:

The bill is designed, first, to provide those who receive a tender offer with information adequate to an informed decision whether or not to accept; and second [39], to eliminate conditions surrounding the offer which discriminate unfairly among those who may desire to tender their shares or unreasonably restrict their freedom of action with respect to deposited shares at a time when there is no assurance that the tender of their shares will be accepted.

In Australia, the first formalized attempt to regulate was made in 1961. This was followed by a comprehensive Act in 1970 [40] which has in turn been superseded by the Companies (Acquisition of Shares) Act (CASA or Australian Act) [41]. In Australia, as in the U.S., an administrative agency created by statute, the National Companies and Securities Commission (NCSC), oversees the functioning of the securities markets and regulates corporate acquisitions. The NCSC and the SEC, the U.S. agency, however, differ greatly both in structure and focus [42].

Regulation in the U.K. is commonly described as self-regulation, in contrast to indirect regulation by government bodies in Australia and the U.S [43]. Advocates of self-regulation contend that it can set standards of fairness and reach conduct falling into the grey areas which generally escapes the scope of any detailed direct regulation. Self-regulation also permits rulings to be obtained promptly, in advance of and during a bid, with the speed and informality which a court or statutory body such as the SEC cannot match. The Panel regards itself as the authority designated to interpret the City Code, and as such, requires its executive to be consulted and ruling obtained on doubtful issues [44]. Proponents of self-regulation also point to shortcomings of the SEC’s direct regulation and the SEC’s inability to prevent abuses [45].
Proponents also underscore the low cost of self-regulation [46]. Such comparisons, however, are meaningless unless the environment which bred the different approaches and the different functions these bodies perform is also appreciated. In Australia, as in the U.S., state and federal powers are divided, and corporation law is regarded as falling within the province of state regulation [47]. The U.K., by contrast, is spared this aspect of federalism. Even more significant and absent from the U.S. and Australia, the idea of "self-regulation" in the U.K. was self-motivated and received as part of the industry's culture. The Stock Exchange in London voluntarily regulated abusive practices and thereby minimized the need for statutory regulation. This result is partly due to the geography of the market, as the jurisdiction of the City Code and Panel are centered around the trading markets in London. Additionally, over the years a closely knit financial community has emerged in London. Thus, except for an odd instance [48], the Panel has successfully exercised influence over the financial community even though it lacks investigatory and enforcement powers and relies almost exclusively on professional censure [49].

U.K. self-regulation has resulted in a remarkable absence of litigation and case law, a notable contrast with the U.S. In Australia, CASA has not generated much case law because it is relatively new. In the past, Australian courts have tended to be very restrictive in their interpretation of statutory language [50]. What constitutes a "tender offer" and a "defensive share issue" by offeree managements – two fruitful sources of litigation in the U.S. – do not present legal issues under the Australian Act [51], which helps reduce the amount of litigation in this area.

3. The Scheme of Regulation

Though they differ in their overall objectives, all three jurisdictions adopt a common regulatory approach. They provide for the auction of target shares, equal opportunity to sell, and equal treatment of all target shareholders accepting the bid. To enable target shareholders to accept the best offer, the Codes of each jurisdiction require the offeror and target company to provide specified information to each other and to target shareholders. The Codes also require the offer(s) to be kept open for a prescribed length of time to enable the offeror and target company to respond to each other's information dissemination and to enable target shareholders to decide in the light of such information. More importantly, all three Codes require notification of acquisitions and changes in a company's substantial shareholding. The aim is to provide an early warning signal and to alert the marketplace of actual and potential changes in a company's control structure. These disclosure requirements are of particular importance as they may apply much earlier in time than do the tender offer Codes.
3.1. Disclosure of Substantial Interests

All three jurisdictions require notification of changes in substantial holdings with a view to regulating creeping acquisitions, "dawn raids" [52], and "warehousing" [53]. Such notification is intended to alert the marketplace to potential shifts in corporate control and to let market forces take effect thereafter. This is considered desirable because it: helps to maintain the balance between the management and the offeror; indicates to the investing public the likelihood of any distortion from special buying or selling; indicates to the shareholders a likely increase in the price of their shares; and reveals the identity of substantial shareholders [54].

The strategy of the Acts in each jurisdiction is to require continuous disclosure of acquisitions made beyond a minimum threshold and of further acquisitions, transfers, and disposals of shares through nominees and associates. The threshold in the U.K. and the U.S. is five percent [55], and in Australia ten percent [56]. Disclosure in the U.K. [57] and Australia [58] is made to the company and in the U.S. to the SEC [59]. There is considerable divergence in the details required to be disclosed, although the frameworks are essentially the same [60].

In the U.S. the obligation to disclose is imposed on the "person" acquiring the beneficial ownership [61]. Where the acquirer is a corporation, disclosure is required by each officer director, and controlling person. Where the acquisition is made by a "group", disclosure is required by each member and by each "person" controlling such member [62]. "Person" is defined to include two or more persons acting "as a partnership, limited partnership, syndicate or other group for the purpose of acquiring, holding or disposing of securities of an issuer" [63]. In GAF Corp. v. Milstein [64] the court held that an agreement by a group of security holders to act in concert, without more, was sufficient to require the filing of a disclosure statement [65]. The court observed [66]:

The history and language of section 13(d) make it clear that the statute was primarily concerned with disclosure of potential changes in control resulting from new aggregations of stockholdings and was not intended to be restricted to only individual stockholders who made future purchases and whose actions were restricted to only individual stockholders who made future purchases and whose actions were, therefore, more apparent..... It can hardly be questioned that a group holding sufficient shares can effect a takeover without purchasing a single additional share of stock [67].

The Australian Act uses the phrase "associated person" [68]. The phrase is extensively defined to include related corporations and persons, and corporations accustomed to act in accordance with the instructions of the first corporation, their directors, and secretary. The section also applies to persons proposing to enter into arrangements, understandings, or undertakings, whether formal or informal, express or implied, and to persons proposing to become
associated formally or informally [69]. Thus, the Australian and similar U.K. provisions go further than the U.S. position stated in Milstein [70].

The required information must be furnished in the U.S. within ten days [71], in Australia within two days [72], and in the U.K. within five business days of the acquisition [73]. So long as the purchases do not constitute a tender offer in the U.S., or exceed the prescribed limits in Australia (twenty percent) and the U.K. (thirty percent), they fall outside the regulatory ambit of the tender offer provisions.

The U.K. Act contains a unique provision which empowers the company to seek information about share ownership from any person the company has reason to believe is interested in its shares, or has been interested in its shares during the past three years [74]. By this means the company is given full power to seek for itself the information which the shareholders should have provided the company under the provisions discussed earlier [75]. These backup measures empowering companies to seek information are broader than those provisions requiring holders of interests to make initial disclosure to the company. Furthermore, members holding at least ten percent of the paid-up share capital can request that the company conduct such an enquiry. This provision is intended to protect the company's larger interests against persons in control [76].

3.2. Definition of a Tender Offer

The Acts use different terminology. The City Code refers to "offer," the Williams Act to "tender offer," and the Australian Act to "takeover scheme" and "takeover announcement." The definition of what constitutes a tender offer is linked inextricably to two fundamental issues: (1) the operational threshold, and (2) the scope or sweep of the Act. The former has a significant bearing on the effectiveness of the latter, a point which is elaborated below.

An offer is treated in the City Code as including:

...wherever appropriate, takeover and merger transactions howsoever effected, including reverse take-overs, partial offers and also offers by a parent company for shares in its subsidiary, but offers for non-voting non-equity capital do not come within the Code [77].

The definition of a "takeover scheme" (scheme) under the Australian Act resembles the ordinary takeover offer except that the offer must be addressed, in the manner prescribed, to all shareholders. A "takeover announcement" (announcement) is a special procedure whereby the offeror announces to the stock exchange a willingness to accept all shares tendered pursuant to the announcement at the announced price for one month from the announcement date. More significant than the definitions is the approach of the Australian legislation. It provides that acquisitions which result in a person holding twenty percent or more of the offeree's shares, or which add to a twenty
percent holding [78], must be made by takeover offer under a scheme or an announcement. Imposition of this absolute obligation eliminates questions of interpretation as to what constitutes a tender offer.

Unlike the U.K. and Australian Acts, the U.S. Act neither defines tender offer, nor prescribes a threshold point for its operation. In theory, the U.S. Act could apply to any acquisition which falls within what is generally regarded as a tender offer under U.S. practice. But since privately negotiated or open market acquisitions are not regarded as tender offers, the actual operational threshold of the U.S. Act tends to be higher. The exclusion of these acquisitions is justified on the ground that they impose no pressure on tendering target shareholders. By comparison, the U.K. adopts an operational threshold of thirty percent, and Australia twenty percent.

The absence of a definition of tender offer in the U.S. Code has caused a great deal of uncertainty. The SEC has over a period of time released several draft proposals for discussion [79]. The SEC has also urged the courts to apply guidelines adopted by it to determine the existence of a tender offer [80]. These guidelines have their origins in litigated cases and focus primarily on acquisitions by privately negotiated transactions [81] and on the stock exchanges [82]. Case law reflects some inconsistency [83] though the courts have generally been reluctant to treat negotiated acquisitions as tender offers. The SEC's guidelines do not seem to have eased the difficulty as judges in the different jurisdictions have differed on the question [8] and manner [85] of their applicability.

Determining the appropriate operational threshold point is of crucial importance because of its effects on the whole tender offer process. Because the effect of the threshold point is to free acquisitions from the demands of the regulatory requirements, a threshold permits and encourages privately negotiated bids up to that particular level. Thus, the higher the threshold point, the greater it benefits substantial shareholders who conclude private sales. Higher thresholds also enable greater use of partial bids. At first glance, therefore, a twenty percent threshold, as under the Australian Act, would seem preferable to the thirty percent required under the City Code. But this ignores the different strategies behind the Acts. The City Code generally compels the offeror to bid for the remaining shareholders of target once the threshold point is passed. The City Code attempts to entice offerors into acquiring just less than statutory control, mainly by way of private negotiations, and then forces offerors to convert their holdings to statutory control or to sell out. On the other hand, the strategy also forces offerors to think carefully before acquiring a strategic position in a target corporation. Unlike the City Code, the Australian Act has no such strategy and simply becomes operational at an earlier stage. The U.S. Act is similar to the Australian Act in that they both miss the crucial thrusts of the City Code – enticement and compulsion. A low threshold level, while achieving fairness at an earlier stage, may fail to achieve any worthwhile
result where the overall legislation permits partial bids. More important than the actual threshold level, therefore, is the requirement that a bid be made for all of the target’s shares once the threshold point is reached.

3.3. The Mechanics of an Offer

3.3.1. Adequate Information

All three jurisdictions require target company information in response to the opening statement by the offeror. The City Code requires issuance of an advisory document by the board of the offeree company in response to the offer document [86]. The Australian Act requires an offeree’s reply to the offeror’s statement in either a takeover scheme or a takeover announcement [87]. The offeror’s statement and one of the offers must be registered with the NCSC within twenty-one days before service on the offeree company [88]. The U.S. follows a similar pattern. The offeror, in addition to filing a Schedule 13D disclosure statement, must file an even more detailed Schedule 14D-1 statement [89]. Within ten business days of announcement of the offer, the target company is required to publish or send a statement indicating acceptance, rejection, a neutral stand, or its inability to take a position on the offer. The company must state the reasons for its position [90]. In addition, notice must be given to the offeror of any defensive strategies undertaken by the target company management [91].

The statements required by the offeror and offeree in all three jurisdictions provide for substantially the same coverage. The offeror statement basically requires the offeror to provide information about itself, its officers, its financial sources, and the extent of its holdings in the offeree company. The offeree company statement requires target management to disclose their shareholdings, any compensation they may receive as a result of the offer, a statement of target management’s position with respect to the offer, and whether management intends to accept or reject the offer with respect to their own holdings. They must also disclose their position with respect to the offer [92]. The statements may also include sales prices of the stock [93]; where it is sold on the exchange, the purpose of the tender offer [94]; the offeror’s intentions with regard to the continued employment of the employees of the offeree company [95]; and profit forecasts [96].

3.3.2. Adequate Time

The City Code requires an offer to be open for at least twenty-one days after it is posted, and at least fourteen days after the posting of a revision. The offer should be open to all shareholders and communicated to the board of the offeree company before shareholders are informed [97]. The board of the offeree company is required to obtain “competent independent advice” on the offer and to make known the substance of such advice to its shareholders [98].
The City Code stresses both the need to keep the whole negotiating process secret before shareholders are informed [99] and the need to keep shareholders informed once an offer is firm. This obligation to inform is imposed no less on the offeror than on the offeree company. Joint statements are desirable wherever possible, provided that agreement on a statement does not lead to undue delay [100].

The U.S. Act requires an offer to be left open for a minimum of twenty business days [101] after it is first published or sent to security holders [102]. The Australian Act requires a takeover offer served on a target company, unless withdrawn, to be left open for a period of between one to six months "after the date that the offer bears" [103]. The offer must be left open to all shareholders [104], and must provide for consideration to be paid within thirty days of the offer [105]. The U.S. Act requires registration of its offer document on the same day that it is served on the offeree company, to safeguard against the possibility of leakage of information between the time of registration and actual dispatch of the offer [106]. The Australian compromise is to make optional the inclusion of the name and address of the offeree, the date that the offer will bear, and details of the offeror's holdings in the offeree company [107]. There is no provision under the U.S. or Australian Acts for joint statements. The offeree in these countries is required to make a formal, structured response to an offer document [108].

As observed earlier, acquisitions under the Australian Act are also possible by way of a "takeover announcement" [109]. This arrangement permits the offeror to announce to the target's home exchange that it will purchase during one month all shares tendered at or above the specified "minimum price" [110]. The takeover announcement resembles, to some extent, the practice known as a "special bid" in the U.S. The special bid is described as "a device ... whereby a fixed price bid is made by one or more members or member organizations for the purchase of a block of a listed security through the facilities of a national securities exchange" [111]. The SEC has declared that a special bid will ordinarily "constitute a 'tender offer' or 'request or invitation for offer' within the meaning of Sections 14(d) and (e) of the Act" [112]. The special bid differs from a takeover announcement in that the latter requires the offeror to buy all shares offered to him in accordance with the announcement; the offeror cannot simply buy a block unless the block represents less than twenty percent of the shares [113].

3.3.3. Equal Treatment and Equal Opportunity

3.3.3.1. Equal Treatment. Equal treatment, strictly interpreted, requires: that shareholders received the same price for each share tendered; that subsequent acceptors receive the same terms; and that any subsequent increase in price be made available to those shareholders who accepted the offer earlier. The City
Code and the Australian Act respond affirmatively to all three of these requirements, while the U.S. legislation achieves these same results in an indirect manner. Thus, the City Code requires that “all shareholders of the same class of an offeree company shall be treated similarly by an offeror” [114]. This has been described as “the core of the code” [115]. Except with the consent of the Panel, the offeror may not deal in shares of the offeree company, either during an offer or when one is reasonably in contemplation, if there are favorable conditions attached which are not being extended to all shareholders [116]. The Panel apparently frowns on offers of higher prices even if the offeror expresses willingness to offer the same price to subsequent acceptances [117]. Additionally, where an offer is revised, all shareholders who accepted the original offer must receive the revised consideration [118].

The Australian Act requires that the same price be offered for all shares pursuant to the takeover offer or takeover announcement, though in some instances differential offers are allowed. Regarding takeover offers, differential offers “attributable only to the fact that the offers relate to shares having different accrued dividend entitlements or relate to shares on which different amounts are paid up” are permitted [119]. With respect to takeover announcements, the on-market offeror can, with the approval of the NCSC, reduce his offer where: the offeree company makes an allotment of, or grants an option to subscribe for any of its shares; the offeree company issues, or agrees to issue convertible notes; or the target company declares a dividend [120]. Furthermore, under a takeover announcement, unlike the case of a takeover offer [121], subsequent increased offers are not required to be made available to earlier acceptors [122].

The U.S. legislation contains no specific provision requiring that the same price be paid to all shareholders under the initial offer. The only restriction requires that any increase in price offered during a tender offer be given to earlier acceptors [123]. In Unocal Corp. v. Mesa Petroleum Co. [124], the Delaware Supreme Court, on appeal, refused to enjoin a selective repurchase by a target corporation of its own shares in exchange for debt securities. The exchange offer was not open to the offeror corporation.

Following this case, the SEC released two proposals. The first proposal — later withdrawn — would have required that a third party tender offer to be open to all holders of the class of securities subject to the tender offer (“all holders” rule), and that all security holders must be paid the highest consideration offered to any security holder [125]. The proposal would have brought the U.S. into conformity with the U.K. and Australian practice. The second proposal seeks to amend present Rule 13e-4 to bring the provisions governing issuer tender offers into conformity with those governing third party tender offers [126]. The second also seeks to eliminate the advantages afforded defensive issuer tender offers [127].
3.3.3.2. Equal Opportunity. Full disclosure and a guarantee of equal treatment are in themselves inadequate to ensure fairness where the offer does not allow all shareholders to tender their shares. This is particularly true under a partial bid, where an immediate response is essential. In an attempt to minimize unfairness among shareholders in such bids, the U.S. Act [128] and the Australian Act [129] require the offeror to prorate the acquisitions. The City Code goes much further and calls for prior approval of a partial bid by the Panel [130]. The latter requirement, though it may appear restrictive, reflects a significant departure from earlier versions of the City Code which prohibited partial bids altogether. The City Code views partial bids as undesirable on the ground that effective control of the company is a matter for decision by all shareholders [131].

The Australian Act [132] and the U.K. Companies Act of 1948 [133] also provide for compulsory acquisition of minority shareholdings remaining after a takeover. Acquisition of the minority shareholdings is required when the offeror becomes entitled to ninety percent of the shares in the company, and in certain circumstances when the offeror is already a shareholder of the company [134]. The requirement is enforceable at the request of either the offeror or the offeree shareholder [135]. In the U.S. neither the state acts nor the federal legislation provide for the compulsory acquisition of such minority interests.

3.3.3.3. The Right to Withdraw Acceptance of an Offer. The right to withdraw acceptance during a takeover offer enables the shareholder to accept the best offer among rival bidders. The aim is not to let the shareholder escape his contractual obligations but to prevent him from being locked into an unfair bargain. The problem arises when the offer is conditional upon minimum acceptance or upon clearance by a regulatory authority, or where the offeror extends the duration of his offer. In each of these circumstances, the offeree shareholder, through no fault of his own, is deprived of the opportunity to accept an alternative offer unless given the right to withdraw an earlier acceptance.

For this reason, the City Code requires an offer to be initially left open for twenty-one days [136]. A shareholder can withdraw his acceptance at any time after the expiration of a twenty-on day period until the offer becomes or is declared unconditional [137]. An offer may be extended beyond this period with the permission of the Panel, which will normally only be granted if no competing offer has been announced [138]. Furthermore, an offer cannot be declared unconditional unless holders of at least fifty percent of the outstanding stock accept it.

In the U.S., the offeree is given withdrawal rights until fifteen business days after the date of commencement of the tender offer [139]. Withdrawal rights are also available for up to ten business days after commencement of a
competing offer by a rival bidder, provided that the original offeror is given notice of such offer and the withdrawal is limited to securities which have not been accepted for payment by the original tender offeror [140].

In the U.S. and in Australia, the offeror can make the offer contingent on a minimum level of acceptance. The U.K. provision is restricted on the theory that an offer failing to attract a fifty percent level of acceptance has been pitched at too low a price [141]. The Australian and the U.S. Acts thus permit total ownership of the offeree company at bargain prices that do not adequately compensate the offeree’s shareholders, by the skillful use of a two-or three-tiered offer. Also, the Australian Act, unlike the U.K. and U.S. Acts, grants the offeror unrestricted power to withdraw his offer for shares that have not yet been tendered, after the first fourteen days following an offer [142]. This undesirable feature has the effect of forcing target shareholders to tender all their shares, as does the provision for partial bids.

4. Transactions Outside the Tender Offer

4.1. Purchases on the Stock Exchange during a Tender Offer

The question of whether a tender offeror should be allowed to buy shares on the stock exchange while a tender offer is in progress is very closely linked with the question of equal treatment of all shareholders. Accepting shareholders who are unable to withdraw their acceptances are locked into the tender offer. Most importantly, allowing the tender offeror to buy shares outside the tender offer would prejudice the rights of persons accepting under a partial offer and whose acceptances are subject to the proration requirement.

The problem can be approached in several different ways. One way is to prohibit all acquisitions outside the tender offer. A second is to permit the shareholder to rescind the prior acceptance of the tender offer. A third is to require the offeror to make available to accepting shareholders the same price offered to others. A mixed approach has been adopted by each of the three jurisdictions.

The existence of the high minimum threshold levels of thirty percent in the U.K. and twenty percent in Australia permit unrestricted purchases on the exchange up to these levels. Subsequent acquisitions which do not increase the extent of ownership by more than two percent during a twelve month period in the U.K. [143] or three percent over a six month period in Australia [144] are allowed without meeting the requirements for tender offers. U.S. law also permits acquisitions of up to two percent during a twelve month period where a tender offer has been announced [145].

The City Code and the Australian Act permit the offeror to acquire shares on the exchange during a tender offer but require the offeror to make available
the same higher price or additional benefits to all accepting shareholders [146]. There are two main advantages in this approach. First, it permits the offeror to continue trading on the exchange; second, and perhaps more importantly, it does not disadvantage the offeror as against other persons acquiring shares on the exchange during the tender offer. The Australian Act and the City Code impose certain other limitation on the purchase of shares outside the tender offer [147] to protect shareholders who may wish to accept the increased offer during the final days, but are unable to do so because of geographical and other limitations. Concomitantly, both laws also seek to ensure that the offeror does not withdraw his formal tender offer as a result of the acquisitions on the stock exchange [148]. The offeror is required to keep the home exchange of the offeree company informed on a daily basis of dealings in shares of the offeree company [149]. The Australian Act also requires persons holding a minimum of five percent of the offeree companys shares during this period to update information concerning variations in their holdings [150]. Finally, in Australia, the offeror and the on-market offeror are prohibited from selling their shares during the period of the offer, except in the face of a counterbid by a person not associated with the offeror [151].

Both the City Code and the U.S. Act differ from the Australian Act in one major respect. They do not permit acquisitions on the exchange of shares in the offeree company during the period of a partial bid. This removes the possibility of any unfair consequences that may result from the application of the proration requirements.

As stated earlier, U.S. law also provides for a safe harbor acquisition, which, like the U.K., is limited to two percent over a twelve month period [152]. Unlike the other two jurisdictions, however, the U.S. Act prohibits acquisitions outside the tender offer (either on the exchange or by private negotiation) during the period of the tender offer [153].

4.2. Pre- and Post-Tender Offer Acquisitions

Another question is whether acquisitions made immediately prior to, or following a tender offer should be regarded as part of the tender offer itself. In the U.S. the treatment of pre-tender acquisitions as part of the tender offer, it is argued, will result in all stockholders being treated equally as required by Rule 10b-13 [154] and the Williams Act [155], and prevent the offeror from enjoying a free ride at the expense of the offeree shareholders on the initial accumulations. But so far the courts have rejected this contention. In *Gulf and Western Indus. v. Great Atlantic and Pacific Tea Co.* [156], the offeror had acquired approximately 4.1 percent of the shareholdings by on-market purchases prior to making a tender offer. The offeree company, in alleging a violation of the Williams Act, argued that the offeror had failed to give the sellers in the marketplace the information disclosed to the tender offerees even
though both groups were faced with basically the same decision. The court, however, noted: “the 5 percent limit included in section 14(d) permits that amount to be purchased in the open market without regard to any subsequent tender offer” [157].

Where more favorable terms are offered on the initial accumulations than is subsequently offered under the tender offer, it may be argued that no injustice results because it is always open to the offerees to reject the offer and force a higher offer. Such a choice is often illusory, however, at least with respect to non-controlling shareholders. Thus, in Sunshine Mining Co. v. Great Western United Co. [158], the defendant, after having disclosed to the New York Stock Exchange that it planned to make a tender offer on the next business day, proceeded to acquire by private arrangement at a higher price nearly six percent of the offeree’s stock. The court’s finding that the negotiated purchases were separate and independent from the proposed tender offer avoided the issue of aggregation.

Arguably the offeror should not be allowed to take advantage of the slump in prices in the after math of a tender offer to acquire more stock. This slump is caused mainly by the stabilization of the marketplace and by the sale of arbitrageurs’ stock that has not been accepted in the tender offer. In addition, unlike a pre-tender offer where the offeror may not possess any special knowledge — except his intent to request tender — in post-tender offers the offeror may act as a corporate insider. To reduce exploitation of any special insider advantages, the SEC has proposed a rule requiring a cooling-off period to preclude the offeror from capitalizing on any “unsettling market condition” caused by the tender offer [159].

The proposed SEC rule does not consider pre-tender offers, primarily because they are inextricably linked with the question of intent. A way to overcome this difficulty would be to impute the necessary intent to make a tender offer if a tender offer is in fact made during the three month period following the last acquisition under the five percent threshold. Three months is sufficiently close to the earlier acquisitions to give it the character of a unified transaction leading to the tender offer.

4.3. The Impact of Risk Arbitrageurs

Offeree shareholders in a tender offer can often find a market for their shares by selling to securities professionals known as risk arbitrageurs. The arbitrageurs buy shares in the market when a tender offer is announced with a view to reselling them to the offeror in a cash tender offer, or exchanging them for the offeror’s shares or notes in an exchange tender offer. In the exchange tender offer, the arbitrageur will, in addition to buying target shares, sell short an equivalent amount of the offeror’s notes or stock [160]. This short position will be covered by the offeror’s securities which the arbitrageur will receive in
exchange for target shares. In each of these transactions, the arbitrageur expects to realize a gain on the difference between the acquisition cost and the proceeds of the transaction [161].

Arbitrageurs determine whether to take a risk position and, if so, how much to pay by taking into account such factors as book value, earnings, and liquidation value. In an exchange tender offer, there is the additional risk that the offeror's securities may not hold their value after consummation of the offer. Where the arbitrageur views the tender offer as being risk-free, he may offer a price almost equivalent to the tender offer price [162].

Arbitraging confers several benefits on the shareholders. It permits an immediate sale at a price close to the tender offer price regardless of whether the tender offer is ever consummated. It also helps avoid the proration requirements. The shareholder, in return, foregoes the possibility of receiving a higher price from the tender offer or a rival tender offer, or from a rise in market prices when several arbitrageurs are engaged in acquiring shares in the same corporation [163].

Arbitrageurs appear to play a more active role in the U.S. than in the U.K. [164] for two main reasons. First, as noted earlier, is the absence of a definition of tender offer in the U.S. Code. Under existing guidelines [165], arbitraging does not amount to a tender offer. Second, and more importantly, target defensive tactics in the U.S. are much more intense, costly, and time-consuming. The uncertainty such actions generate as to the outcome of a tender offer permits greater arbitrage activity, although it must be queried whether the use of "shark repellent," "scorched earth," and "poison pill" defensive actions in recent times is conducive to arbitraging at all [166].

The obvious question is whether the price paid to arbitrageurs exceeds the benefits they confer. First, arbitrageurs set their own limits as to price and quantity. This negates the important safeguards of equal treatment and equal opportunity provided under the tender offer regulatory codes. Secondly, arbitrageurs are not required to provide any information about their activity, save that required under the provisions governing the acquisition of substantial shareholdings [167]. Finally, arbitraging adds to the pressure placed on shareholders through a tender offer by claims, counterclaims, and competing bids. Rather than await the best price, target shareholders are swayed to accept the arbitrageur's offer. In summary, even though tender offer rules promote competition and require Tender offerors to provide information, arbitrageurs operate outsider those rules. The arbitrageurs profit by the tensions they have helped create.

There are other more compelling reasons why tender offer arbitrage may require close examination. The arbitrageur is not an investor as such [168], and has no interest in the welfare of either the target company or the offeror [169]. The very nature of arbitraging requires the arbitrageur to ultimately ensure the success of an offer. Such action clearly tilts the balance in favor of the offeror,
a consequence intentionally avoided by the regulatory Codes. Also, to the extent that arbitraging favors the offeror [170], it may facilitate acquisitions that are not productive. The problem is magnified in a jurisdiction such as the U.S. where negotiated acquisitions fall outside the definition of a tender offer [171]. Arbitraging enable larger shareholders to get a higher price than they would under the terms of a tender offer. Arbitrageurs, too, can negotiate to receive this higher price outside the tender offer. These two factors — initial purchase by arbitrageurs from pressured shareholders and the subsequent sale through private negotiations — are not consistent with the general purposes of the regulatory Codes.

5. The Problem of Partial Bids

There are significant differences in the U.K., U.S., and Australian approaches to the treatment of partial bids and target defensive actions. The U.K. Approach to these two issues explains to a large extent the success of its system of self-regulation.

Partial bids are permitted under the U.S. and Australian Acts. The City Code permits partial bids only if Panel consent has been obtained. The City Code differentiates between partial bids where the acquisition will result in a holding of less than thirty percent, between thirty and forty percent, and in excess of fifty percent. Generally, all partial bids must seek statutory control (holdings in excess of fifty percent) and must carry the warning that if the offer succeeds, the offeror can exercise actual voting control and acquire further shares without incurring any obligation to make a Rule 9 bid [172].

Partial bids, by their nature, place target shareholders in an uncomfortable position both during and after the bid. Proration avoids one aspect of unfairness flowing from partial bids because it prevents acquisition from only selected persons. But proration results in another problem as target shareholders are forced to compete among themselves [173]. Target shareholders are subjected to the prisoner’s dilemma [174], as are shareholders under the unregulated tender offer. Failure to accept will result in the other shareholders’ being even better off than the rejecting shareholders [175] and in a forced buy out by a takeout merger or a going private transaction at a much lower price than offered under the first part of the offer. Faced with this choice, it would be unwise for a target shareholder not to accept such a bid. Placing shareholders in such a predicament is contrary to the objectives contemplated by the regulatory Codes.

Several methods of remedying the target shareholders’ situation have been suggested, from a prohibition of partial bids altogether to a discretionary approach requiring consent, as under the City Code. A proposed method between the two extremes would impose a disincentive on partial bidders by
requiring a longer minimum offering period for partial bids than that required for full bids [176]. The difficulty with this intermediate position is that it may add to market uncertainty [177]. Still, another proposed method would require a partial bid to be made for a specified proportion of each shareholder's holding instead of the current open partial bid. The latter recommendation identifies correctly the effects of prorating, which are responsible for the coercion [178]. While this last method has considerable merit, the goals of the regulatory Codes are best achieved by prohibiting partial bids altogether.

A successful partial bid not only gives the offeror a head start, but may also ensure the ultimate success of an offer. The successful partial bid at least places the offeror in a very strong position compared to the bidder's rival. For these reasons, a partial bid is often the first stage of an offeror's plan. Further acquisitions can be made either by way of a second-tier offer or a squeeze-out merger [179]. Partial bids adversely affect the position of target management, which in turn results in a mutuality of interests among target management and shareholders to thwart such an offer. This mutuality of interests has nurtured the very interesting recent developments in target management defensive techniques in the U.S.

6. Target Management Defensive Actions

What partial bids are to the offeror, defensive actions are to target management. The U.K. and U.S. have adopted significantly different approaches to these two matters, while the Australian approach falls midway between them. U.K. practice prohibits the use of defensive tactics [180] while the U.S. perceives a need for such defenses. The U.K. approach, which combines restrictions on target management defensive tactics with a prohibition on partial bids, neither hinders offerors nor forces target shareholders into a prisoner's dilemma. The U.K. approach also prevents target management entrenchment, which results from the use of defensive tactics.

U.S. practice recognizes target defensive actions as a necessary management response to tender offers [181], subject to the requirements of the Business Judgment Rule [182]. Defensive measures include self-tenders and share repurchases, sale of assets, counter tender offers for the offeror (Pac-Man), share allotments to white knights, shark repellents such as the "poison pill" preferred stock, and a combination of "supermajority," "fair price," and "right of redemption" provision [183].

Both self-tender offers [184] and ordinary share repurchases [185] involve the target company buying back its own shares to increase the price [186]. A form of share repurchase is the management buy out or the leveraged buy out [187], under which target management purchases all of its shares or assets and goes private. The acquisition is made from borrowed funds secured by the
assets of the target corporation. Ordinary share repurchases of this type are not regulated so that unequal treatment of target shareholders can easily result [188].

The sale of assets or "crown jewels" by the target is an attempt to neutralize the offeror's underlying reason for making the offer by selling off those assets which are most attractive to the offeror. Like all other defensive actions, the appropriateness of this tactic is assessed in terms of the Business Judgment Rule [189]. In Whittaker Corp. v. Edgar [190], the court expressed the view that "a sale of substantial asset by a [target] corporation in the face of a hostile tender offer standing alone is not a violation of section 14(3)" [191]. The tactic, however, has not proved to be altogether successful. For example, Liggett's sale of a subsidiary in the face of Grand Metropolitan's bid for the Liggett Group was not sufficient to stop Grand Metropolitan from going ahead with the bid [192]. However, Grand Metropolitan was forced to raise its bid to prevent a white knight bid for Liggett [193].

In the Pac-Man or counter tender offer defense, the target responds by making a tender offer for the would-be acquirer [194]. Variants of this practice have been developed. In the Martin Marietta Corp. v. Bendix Corp. [195] bid, each company sought to acquire control over the other through open market purchase programs. In Jacobs v. G. Heileman Brewing Co. [196], Heileman tendered for Pabst to defend Pabst against a hostile offer by a third party. The object of the Pac-Man defense is to enable the target to retain its independence by either merging into the offeror on its own terms or forcing the offeror to back away. In cases where target companies failed to retain their independence, target shareholders still received a much higher average price for their shares as a result of the defense [197].

The combination of "supermajority," "fair price," and "right of redemption" provisions requires a supermajority vote of target shareholders for the second stage of a two-tiered bid unless the transaction is approved by the continuing directors of the target, or the offeror pays the equivalent of the highest price paid during the first stage of the offer. Right of redemption provisions typically entitle the shareholders of the target to require redemption of their shares by the target where an offeror acquired at least fifty percent of the target's shares in a tender offer opposed by target management [198]. Thus, while the fair price provisions have the effect of ensuring equal treatment of accepting shareholders under the second tier of a two-tiered bid, the right of redemption provisions deter bids which only attempt to obtain control. The combined effect of both provisions forces the offeror to make a one-price bid for all of the target's outstanding shares.

A more recent practice is the "poison pill" preferred stock. As utilized in the bid for control of ASARCO Inc. by Weeks Petroleum Ltd. [199], the strategy involves the allotment of "supercharged" bonus preference shares, each having many times the voting power of normal shares. The supercharged
votes come into effect only in the event of a tender offer bid and carry special redemption and conversion privileges. The redemption privilege discourages the making of partial tender offers by giving its holders the power to deplete target company's assets, while the conversion privilege discourages two-tiered tender offers by equalizing the prices of the tiers [200]. The strategy is to effectively disenfranchise hostile offerors, who must either obtain approval from target management or bid for all of the target's outstanding shares. In either event the "supercharged" provisions do not apply. Legitimacy for this approach is founded on Board approval. Despite criticism [201], the poison pill defense, like the "supermajority", "fair price", and "right of redemption" combination, results in equal treatment of target shareholders.

Another practice is "greenmailing," where arbitrageurs sell back to the company, at substantial profit, shares they have acquired in it. The practice of greenmail or selective stock repurchases emerged because U.S. law enables corporations to buy back their own shares [202]. Greenmail has the obvious effects of depleting the target's assets, reducing its profitability, and substantially increasing its debt load. Greenmail may also result in target management entrenchment. For these reasons, the abolition of greenmail has been suggested unless prior shareholder approval is obtained [203].

Target defensive actions are a necessary factor to ensure target shareholder welfare in the U.S. context of hostile tender offers. However, the use of certain practices such as greenmailing, creation of antitrust obstacles, sale of crown jewels, and counter tender offers is of debatable value, as such defenses are primarily obstructive with only incidental benefits to target shareholders. In contrast, defensive measures such as the "poison pill" preferred stock and the combination of "supermajority", "fair price", and "right of redemption" provisions should be permitted as they compel offerors to bid for all of the target's shares at the same price, ensuring equal treatment of all shareholders.

The Australian regulations prohibit golden parachutes [204], share repurchases [205], and issuance of poison pills [206]. Share allotments are permissible if they are pari passu [207], or where the allotment has been approved by shareholders at a general meeting, not including the votes attached to allotted shares [208]. Sale of assets are regulated [209]. The Australian Associated Stock Exchanges refuse to allow charter amendments even though there exists no specific prohibition against the practice [210]. Not regulated are the Pac-Man defense, antitrust obstacles, and front-end loaded two-tier bids. Clearly this approach lacks necessary controls.

The U.K. approach currently offers the best solution. The U.S. position is both uncertain and wasteful in terms of the resources expended on litigation, while the Australian position is uncertain and potentially wasteful. The strength of the U.K. approach lies not only in prohibiting defensive tactics but also in regulating partial bids, thereby prohibiting two-tier bids. Absent a move to adopt the U.K. approach toward all defenses, charter amendments
and poison pills should be abolished in the U.S. along with two-tier bids and partial bids in general.

7. Conclusion

Despite identifiable common threads, the Codes of the U.K., U.S., and Australia differ in terms of overall philosophy and structure. The philosophy of the U.K. City Code is to ensure that target shareholders make the final decision between claims of offerors and incumbent target management. The Code achieves this by requiring target management to apprise shareholders of the merits of a tender offer, to solicit alternative bids, and to obtain consent of the Panel on all bids for less than total control. The U.S. Act professes neutrality as between offeror and target management, but the indicated high level of arbitrage activity seems to have largely destroyed neutrality. The Australian Act seeks to regulate initial and subsequent acquisitions that result in a single holding between twenty and ninety percent of total shares. The basic premise is that control ought not to pass without the safeguards provided under the Australian Act, or alternatively, that it pass slowly enough for informed decision-making [211]. As partial bids are a recognized feature under the Australian Act, however, there is little to commend the approach in terms of either strategy or shareholder fairness.

Jurisdiction in the U.K. is vested at the national level [212], in the U.S. at the federal level [213], and in Australia at the state level [214]. Moves in the U.K. to set up a statutory regulatory body have been vigorously attacked on grounds of cost, flexibility, effectiveness, and efficiency. Voluntary bodies under the U.K. self-regulatory system, it is argued, can and do act swiftly, emphasize compliance beyond the letter of the law, provide ethical standards of conduct and behavior, help initiate regulation, and, where necessary, enlist the help of high-powered industry executives. Such an evolutionary approach, it is contended, increases the likelihood of compliance with the “spirit” of the law rather than the “letter” only. But these very claims embody drawbacks. There is the possibility of self-serving, anti-competitive regulation, non-enforcement of rules, and activities and organizations developing outside the jurisdictional power of the self-regulatory body. Informal means, non-statutory methods, and part-time committees of a system based on voluntary acceptance are unable to handle so complex a task [215]. The need for a body possessing investigatory and enforcement powers is apparent [216]. The need, however, is not for an SEC-type body, but rather for a body with some SEC-type powers.

In the U.S., critics of the Williams Act point to the additional costs that such legislation imposes. It is argued that the number of acquisitions is reduced under the Act, with a consequent loss of the benefits of market

https://scholarship.law.upenn.edu/jil/vol8/iss3/3
regulation of corporation control. Such claims are exaggerated and are premised on the simple assumption that the greater the number of acquisitions, the greater the benefits that will flow.

The SEC is criticized for its great costs compared to its benefits [217], its "backward looking" image [218] and its failure to orient itself toward determining future values of investors, and its mission in general [219]. The SEC has at the same time been charged with being overzealous in prosecuting and in demanding compliance with its requirements [220]. These criticisms, which are directed principally at the specific actions of the SEC rather than the role of the SEC itself, have been made with much force. They have also been challenged and refuted with equal force [221].

These viewpoints have been taken into account by the U.K.'s proposed Financial services Bill [222], which recommends a system of "self regulation within a statutory framework" [223]. The Bill seeks to offer both a structural and legislative framework for investor protection. Structurally, it recommends the setting up of an Agency to oversee the functioning of recognized Self Regulating Organizations (SROs) (e.g., the Stock Exchange and the City Code Panel), recognized professional bodies (e.g., accountants and solicitors), and other such groups. The Agency is to be vested with rule-making and administrative powers. Membership of its governing body is to include experienced investment practitioners and user's representatives, whose appointment and removal is to be made jointly by the Secretary of State and the Governor of the Bank of England. The Agency is required to have satisfactory systems for monitoring and enforcing observance of its rules and to have effective arrangements for investigation of complaints. It must keep records and be able and willing to promote and maintain high standards of integrity and of fair dealing in the financial sector [224]. The Agency is also required to have rules relating to the "conduct of business" which are to apply to persons who are authorized directly by the Board to carry on investment business, and are to act as a model set of rules for each of the SROs [225]. As a legislative framework for investor protection, the Bill contains provisions dealing with, for example, the Official Listing of Securities (§§ 118–131), Offers of Unlisted Securities (§§ 132–141), Takeover Offers (§ 142 and Schedule 10), and Insider Dealing (§§ 143–147) [226]. This framework is to be expanded upon by bodies such as the SROs [227].

The U.S. approach differs from the U.K. and Australian approaches in several additional respects. One difference is the view that privately negotiated acquisitions are not part of a tender offer. This view eases the offeror's task, although at the price of equal treatment of ordinary shareholders. Another difference is the practice of greenmailing, where arbitrageurs and others sell back to the target company the shares they have acquired. A third difference is the application of the Business Judgment Rule to determine the appropriateness of target management's defensive actions, while a fourth difference deals
with the handling of partial bids. Still another difference is the treatment of defensive share allotments to white knights. These contrasts in the regulation of key aspects of tender offers underscore the serious deficiencies of the U.S. and Australian approaches. The contrasts also point to a failure to address directly important problems.

Notes

[3] Black’s Law Dictionary 1316 (5th ed. 1979); see also Loss, supra note 1, at 582 (Securities and Exchange Commission (SEC) position on what constitutes a tender offer).
[4] These conditions include the right: not to proceed with the bid unless a minimum percentage was received; to proceed with the bid regardless of the percentage received; to make subsequent bids at the original or a different price; to make differential offers; and to require favorable time frameworks.
[6] For example, purchases of its own stock, purchases of the offeror’s stock, golden parachutes, antitrust and other regulatory obstacles, and litigation with a vengeance. Id. at 2455–56.
[8] Smith, supra note 7, at 5.
[9] Id.
[11] Steinbrink, Management’s Response to the Takeover Attempt, 28 Case W. Res. L. Rev. 882, 906 (1978). In return, shareholders are given the same types of rights and remedies as are available in connection with statutory mergers, sales of substantially all of a company’s assets, and similar transactions. Fundamental changes in corporate ownership and control should not be accomplished without broadly based shareholder approval. Charter amendments adopted pursuant to these objectives take two forms, fair price provisions and right of redemption provisions. Both are directed primarily at the more recent phenomenon of two-tier bids. See Smith, supra note 7, at 13–22.

The two-tiered bid involves a single offer to acquire all of the target’s outstanding shares in two steps. In the first step, the offeror acquires — usually for cash — around 51 percent of the target’s shares. In the second step, the offeror acquires the remainder of the target’s shares in exchange for its own securities — the offer being less than the cash paid in the first step. See Comment, Front-End Loaded Tender Offers: The Application of Federal and State Law to an Innovative Corporate Acquisitions Technique, 131 U. Pa. L. Rev. 389, 389 (1982).

[15] See, e.g., Gething v. Kelner [1972] 1 All E.R. 1166. In Gething, a takeover case, Judge Brightman held that directors of an offeree company have a duty towards their own shareholders,
which includes a duty to be honest and a duty not to mislead. Id. at 1170. His Lordship found the offeror directors to be in breach of that duty when they permitted the offer to go out with their expressed recommendation but without disclosure of a recommendation to the contrary by the company's stockbrokers. Id. In Coleman v. Myers [1977] 2 N.Z.L.R. 225, another takeover case, the New Zealand Court of Appeals held that whether or not a fiduciary duty of directors to shareholders exists depends upon "all the circumstances and nature of the responsibility which in a real and practical sense the director has assumed towards the shareholders." Id. at 324-25.


[19] Foss v. Harbottle [1843] 2 Hare 461 (a minority shareholder may sue to enforce a right vested in the company only in exceptional circumstances).

[20] Until recently, the question of whether an action was *ultra vires* or within the powers conferred by the Memorandum (Charter) and Articles (By-Laws) was a significant issue in Anglo-Australian law. It is no longer of any importance. See Companies (Comp.) Act, 1985, § 35; Australian Companies Code, 1986, §§ 67-68.


[22] See, e.g., Treadway Co. v. Care Corp., 638 F. 2d 357, 384 (2d Cir. 1980) (voting of shares issued to "white knight" permitted at shareholder meeting, even if management control is thereby maintained).


[25] Panel on Takeovers and Mergers, City Code on Takeovers and Mergers (1985) [hereinafter cited as City Code]. The City Code consists of 10 General Principles (GPs), and 37 Rules. In addition, there are five rules governing the substantial acquisition of shares. The GPs are a codification of "good standards of commercial behavior" intended to have an obvious and universal application, while the Rules are intended to be examples of the application of the GPs or are rules of procedure to govern takeovers and mergers. As such, the Rules are to be interpreted in the light of the GPs and the broad expression of intention in the GPs. Furthermore, the City Code imposes the spirit as well as the precise wording of the GPs and Rules to be observed, extending to areas and circumstances not explicitly covered by any rule. See id., at Introduction and General Principle 1. The City Code itself has been amended and revised on several occasions, most recently in April, 1985. Id.

[26] The City Working Party is an ad hoc group of individuals representing various sectional interests such as the accepting houses, investment trust companies, the insurance industry, and the Issuing Houses Association. See N. Weinberg & M. Blank, supra note 5, §§ 2701, 2707.

[27] The Panel consists of the chairman of the various sponsoring organizations. It also includes the President of the Institute of Chartered Accountants, a representative of the Confederation of British Industry, and a representative of the Governor of the Bank of England who is Deputy Chairman of the Panel. The Chairman is an independent outsider. Id. §§ 2705, 2707. The day-to-day work is delegated to a Director General, two Deputies, a Secretary, and six other executives. Id. § 1203. From rulings on these provisions there can be a reference to the Panel and,
from there, an appeal against disciplinary penalties to a committee presided over by a former High Court Judge. *Id.* §§ 2708–2820.


[29] The membership of the Panel is similar to, but somewhat larger than that of the Panel. In addition to being a coordinating body, CSI’s stated objectives are to supervise and maintain ethical standards, resolve differences between, and initiate new codes of conduct in relation to the various parts of the Securities Industry, and consider an examine proposals for new legislation. See Gower, Review of Investor Protection, A Discussion Document 38 (HMSO London) (1982).


[34] Prevention of Fraud (Investments) Act, 1958, 6 & 7 Eliz. 2, ch. 45, § 14.

[35] A takeover offer is defined as an offer “calculated to result in any person acquiring or becoming entitled to acquire control,” i.e., “the exercise of a majority of the voting power.” See Licensed Dealers (Conduct of Business) Rules, Rule 18(1) (1960). This same body of rules imposes the following additional requirements: that the offer be kept open for at least 21 days (Sched. 1, Part 11, paras 1(1)(ii), 2(2)); that minimum conditions be stipulated where the offer is conditional (Sched. 1, Part 11, para. 1(3)); that the offer not be conditional upon acceptors agreeing to compensate directors for loss of office (Sched. 1, Part 11, paras 2(6), (7)); and that all shareholders be treated alike on a partial bid (Sched. 1, Part 11, para. 1(4)).


[38] *Id.* at 17 (statement of SEC Chairman Manuel Cohen).

[39] Author’s Note: The second of the reasons given by Mr. Cohen really involves two aspects: i.e., equal treatment in the face of a takeover offer through the proration rule, and equal opportunity by preventing acceptances being tied indefinitely. The above reasons – adequate information, equal treatment, and equal opportunity – coupled with the requirement of adequate time to enable information to be provided and decisions to be made, provide the cornerstones for present day takeover legislation. This statement is equally applicable to U.S., U.K., and Australian legislation.


[42] The NCSC, composed of three full-time members, is directly responsible to and obliged by law to obey the directors of the Ministerial Council, which consists of seven members: a Ministerial representative of each of the six states and of the federal government. All powers under companies and securities law are vested in the NCSC, which can delegate its power to the State Corporate Affairs Commissions and direct those commissions in the exercise of their powers. The States’ (six) and Territories’ (two) Corporate Affairs Commissions administer the lodging and registration of incorporation documents, winding up, financial statements, and the day-to-day aspects of companies and securities legislation. The division of responsibilities does not contemplate any form of separate federal and state corporation law as is the case in the U.S. See Fleischer, *Federal Corporation Law: An Assessment*, 78 Harv. L. Rev. 1146 (1965).


[45] Id. at 173–74.

[46] It costs £300,000 to administer the U.K. regulatory body as against £30,000,000 to maintain the SEC. Id. at 176.


[48] The exception concerned overseas companies violating the requirements of the Code. This happened when De Beers Consolidated Mines of South Africa made a takeover bid for Consolidated Gold Fields Ltd., a U.K. company, in 1980. This case highlights the Panel's inability to enforce its jurisdiction extraterritorially. See Report by a Special Committee of the Stock Exchange on Dealings in Shares of Consolidated Gold Fields Ltd. 38 (July 1980).

[49] See Demott, supra note 31, at 955–56. The Panel can, of course, resort to such draconian measures as depriving the offender of his licence to practice, delisting, or calling for the appointment of inspectors under the Companies Act to investigate the affairs of the company. See also City Code at Introduction.

[50] See, e.g., Ogden Indus. Pty Ltd. v. Lucas, 118 C.L.R. 32, 39 (P.C. 1968) (The court states, "[I]t is quite clear that judicial statements as to the construction and intention of an act must never be allowed to supplant or supersede its proper construction... "). But see Acts Interpretation Act 1901–1973, 1984, § 15AB.


[52] Dawn raids are surreptitious acquisitions over a short period of time of a controlling or influential block of shares in circumstances where the identity or change in percentage control is unknown to the company or the other shareholders.

[53] Warehousing is "the practice whereby a person or company (or a group of persons and/or companies) accumulates, without public disclosure, a substantial block of shares in a company with a view either to making a takeover bid or to selling the block to someone else who then makes a bid." Quoted from the Panel in its answers to questions contained in Inquiry of the Department of Trade (July 1974), cited in N. Weinberg & M. Blank, supra note 5, at 2373.


[Di]rectors, other shareholders, and indeed the employees of a company, all of whom may be materially affected, ought to be able to ascertain the identity of any substantial shareholder of the Company's share.... Even where a holder of a substantial number of shares is not actually buying with ... [the intention of control] ... it may be of interest to the others concerned to know whether, for example, someone is in a position to veto a special resolution of the company, and who that person is ... .


[60] All three jurisdictions (City Code, Rule 8; CASA, Austl. Acts P. No. 89. §§ 134–146; Securities Exchange Act of 1934, § 13(d)–1. 15 U.S.C. § 78m(d)(1) (1982), 17 C.F.R. § 240.13(d)–1 (1985), and Rule 13d–1) require disclosure of the name and address of the holder, nature of the interest, and details of any arrangements connected with the acquisition of such interests. In the U.S., disclosure is also required of the source and amount of the funds to be used and the name of the lender. Where control of the offeree is sought, disclosure of the plans and proposal of the offeror is required, especially if a liquidation, merger, or sale of assets of the offeree is contemplated. 17 C.F.R. 240.13(d)–101 (1985) (Schedule 13D, Item 4(b)). The U.K. Companies Act, 1985, § 324 requires registers showing all disclosed interests (including interests held by directors) to be kept open for inspection by the public. Comp. Act, 1985, §324. There is a similar requirement in Australia, but the requirement is not limited to listed companies. CASA, 1981, Austl. Acts P. No. 89, § 143. Additionally, in the U.K., all companies are required to maintain a register disclosing interests held by directors of the company. Comp. Act, 1985, § 325.


[62] Id. § 240.13(d)–101 (Schedule 13D, General Instructions, Note C).


[64] 453 F.2d 709 (2d Cir. 1971).

[65] Id. at 715.

[66] Id. at 718.

[67] This decision has been followed in SEC v. Savoy Indus., 587 F. 2d 1149 (D.C. Cir. 1978). According to the Savoy court: (1) the requirement of an agreement to acquire additional shares was unnecessary; (2) group activity under Section 13(d)(3) involved “a combination in support of a common objective;” and (3) the existence of a group within the section could be demonstrated circumstantially. Id. at 1162–63.


[69] The terms “beneficial owner” and “relevant interest” used in the U.S. and Australian Acts, respectively, further assist in strengthening the applicability of the provisions.

[70] 453 F.2d 709 (2d Cir. 1971); see also supra notes 51–69 and accompanying text.


[72] Sections 136–139 of the Australian Companies Code require the substantial shareholder to notify the company of his holding and of any net changes of one percent in such holding (upwards or downwards) or of his ceasing to be a substantial shareholder within two days of his being obliged to do so. CASA, 1981, Austl. Acts P. No. 89, §§ 136–139.


[74] Id § 212. This measure, as pointed out by Weinberg, enables the company to pursue an inquiry: where it believes that a party might be acquiring a holding of less than five percent as a preliminary step to mounting a bid; or where it believes that a party has accumulated a holding of more than five percent and has not disclosed it; or where it is seeking to identify two parties who might be cooperating together and accumulating holdings individually of less than five percent, with a view in the future to mounting some form of bid. N. Weinberg & M. Blank, supra note 5, at 573.

[75] Comp. Act, 1985, § 212. For this purpose, the provisions exempting certain interests from being reported are excluded.

[76] Reasonable grounds and the manner in which the power is to be exercised have to be given for the request. If the investigation into the company’s share ownership is not completed within three months, the company must make an interim report. Such interim reports must be made for each successive three month period. The purpose is to prevent the company from resorting to dilatory tactics. On completion of the investigations, a final report has to be made and kept open for inspection. See id. § 215.

[77] City Code at Definitions.

[79] The SEC proposed a definition of "tender offer" in its Proposed Rule 14d–1(b)(1) of May, 1979, which excludes privately negotiated acquisitions, whether on or off the exchange. SEC Release No. 33–6159, Sec. Reg. & L. Rep. (BNA) No. 531, at F-1 (Dec. 5, 1979). A second proposal was released in February, 1980. Exhibit B of the Memorandum of the SEC to the Senate Comm., Sec. Reg. & L. Rep. (BNA) No. 542 (Special Supplement) at 5 (Feb. 27, 1980). Under the second proposal, further acquisitions of stock by persons holding in excess of 10 percent must be by way of "statutory offer" only, and acquisitions of stock of up to 10 percent by persons holding in excess of five percent are subjected only to the reporting requirements under Section 13(d). More recently, it has been proposed that no investor, other than an institutional investor, may acquire more than five percent except pursuant to a formal tender offer for all of the target's shares. With Committee Report: Tender Reform Act 1984, H.R. Rep. No. 5693. The proposal, sweeping as it is, does away with the need for a technical definition of tender offer except for accumulations below the statutory threshold limit.

[80] The guidelines describe the characteristics of a tender offer:

1. Whether there is an 'active and widespread solicitation of public shareholders' for shares of an issuer;
2. Whether the solicitation is made for a substantial percentage of the issuer's stock
3. Whether the offer to purchase is made at a premium over the prevailing market price;
4. Whether the terms of the offer are firm rather than negotiable;
5. Whether the offer is contingent on the tender of a fixed minimum number of shares, and, perhaps, subject to the ceiling of a fixed maximum number to be purchased;
6. Whether the offer is open for only a limited period of time;
7. Whether the offerees are subjected to pressure to sell their stock; and
8. Whether public announcements of a purchasing program concerning the target company precede or accompany a rapid accumulation of large amounts of target company securities.


[82] Decisions with respect to open market acquisitions seem to indicate fairly clearly that such purchases, if made without widespread public knowledge of the purchaser's intention, do not constitute a tender offer. More recently, the SEC's eight-part guideline was turned against it by a court which found that large-scale open market purchases did not fall within the Williams Act. SEC v. Carter Hawley Hale Stores, Inc., 760 F. 2d 945 (9th Cir. 1985).

[83] See supra note 81.


[86] City Code at Rule 25.1.

[88] Id § 18(1). The phrase used is "not earlier than 21 days before that Part A statement is served." The Part A statement and other relevant documents must be served on the offerer company 14–28 days before the offers are dispatched. Id. § 16(1)(d). The offeror must, on the day on which the Part A statement is served, lodge a copy of such statement with the Commission on the Home Exchange. Id. § 16(2)(e).


[90] Id. § 240.14(e)–2(a) (1985).

[91] Id. § 240.14(d)–9.

[92] CASA, 1981, Austl. Acts P. No. 2, Schedule Part B Statement, Item 1(a); City Code, at Rule 25; 17 C.F.R. § 240.14(d)–9, Schedule 14D–9, Item 4. The instructions to item 4 state: "Conclusory statements such as 'the tender offer is in the best interests of shareholders' will not be considered sufficient disclosure in response to Item 4(b)." 17 C.F.R. § 240.14(d)–101, Schedule 14D–9, item 4. The Australian Act contains major exclusions to the requirement that directors disclose their position with respect to the offer. CASA, 1981, Austl. Acts P. No. 2, Schedule Part B Statement, Item 1(a). There is also no obligation on target management to disclose the course of action they intend to adopt with respect to their own holdings in the offeree company. Id; see also City Code at Rule 25; 17 C.F.R. § 240.14(d)–100 (1985), Schedule 14D–1, Item 10(f); 17 C.F.R. § 240.14(d)–101 (1985), Schedule 14D–9, Item 8 (imposing additional general obligations on offeree management).

[93] In Australia, this reporting is required of transactions conducted in the preceding three months. CASA, 1981, Austl. Acts P. No. 2, Schedule Part A Statement, Item 7. In the U.K., the most recent middle market quotation together with at least six other such quotations over the last six months must be included. Licensed Dealers (Conduct of Business) Rules (1960), Schedule 1, Part 1, para. 1(1).


[95] City Code at Rule 24.1(d). Neither the U.S. nor the Australian Act requires disclosure of such plans.


[97] City Code, at Introduction to the General Principles.

[98] See id. at Rule 3.1.

[99] Id. at General Principles No. 4 & Rule 2.

[100] Id. at Rule 6.


[102] Id.


[104] Id. § 16(2)(a) (i.e., the offer must be to acquire all the shares of all shareholders in a relevant class of shares or a proportion of the shares of all shareholders in a relevant class of shares).

[105] Id. § 16(2)(f)(vii)(A). In the case of a conditional offer, consideration is to be paid within 30 days of the offer being accepted or becoming unconditional, whichever is later. Id. § 16(2)(f)(vii)(B).

R. Sappideen / Takeover bids and target shareholder protection 311

[108] See supra notes 86–96 and accompanying text.
[109] See supra notes 77–78 and accompanying text.
[110] A “minimum price” is defined as the highest price paid by the on-market offeror or his associates in the four months preceding the announcement. CASA, 1981, Austl. Acts P. No. 2, § 17(2).

A “special offer” or “special bid” is a technique devised by the Exchanges in an attempt to lure back some of the block trades lost to the third market. It permits the buyer to offer an extra commission to the brokers who find the other side of the market, and it must remain open for a minimum of 15 minutes.

[113] The on-market offer, available only in Australia, is undesirable from the standpoint of adequate time and equal treatment. CASA, 1981, Austl. Acts P. No. 2, § 17. An on-market offer cannot be made by persons whose shareholdings exceed 30 percent so that possible collusion with management is prevented. The offeror must provide certain required information and accept all shares tendered. The offeror is not required to make available any subsequent increase in the original offer to shareholders who have already accepted. In certain circumstances, an offer can be withdrawn before the expiration of the one-month period. Shareholders, however, cannot withdraw. Id. The resulting effect is to pressure shareholders.
[116] City Code at Rule 16.
[117] There are reasons for the Panel's disapproval of an offeror subsequently increasing the consideration offered:

Even if the arrangement purports to be given to all shareholders, this cannot in fact happen since there would be other vendors selling shares at the same time or later without the benefit of the condition. Not only are these other vendors being treated unfairly, but the removal of a block of shares on special terms could discourage a potential competitive offeror who might make a better offer.

Johnstone, supra note 44, at 283.
[118] City Code at Rule 32.
[120] Id. § 17(11).
[121] Id. § 27.
[122] Id. § 17(8).
[123] This would not, however, prevent the making of a two-tiered offer as evidenced by the recent Mobil Corp. v. Marathon Oil Co., 669 F.2d 366, 367 (6th Cir. 1981), cert denied, 455 U.S. 982 (1982). In that case, U.S. Steel, having acquired 51% of Marathon Oil shares at $125 per share, made a subsequent offer of $75 per share for the rest – approximately $3 above the then prevailing market price. Mobil was unsuccessful in its own two-tiered offer.

It is possible to make a two-tier bid in Australia but not in the U.K. In the U.K. the bid must be for all the shares unless the Panel permits a partial bid. The Panel could act to prevent a subsequent lower bid for the rest of the shares. City Code at Rule 36.1.
[126] SEC Release No. 33–6596, 50 Fed. Reg. 28,210 (1985). The rule also provides that a tender offer must remain open for 10 business days upon the announcement of an increase in the amount of securities sought by the bidder. *Id.*

[127] *Id.* Thus, the proposed amendments to Rule 13e–4 require: (1) an issuer tender offer to remain open for a minimum period of 20 business days; (2) securities to be accepted on a pro rata basis; (3) an initial minimum 15 business day period during which tendered securities can be withdrawn and exercisable until the expiration of 10 business days following the date of commencement by a third party tender offer; (4) issuer tender offers to remain open for a period of 10 business days following the date of increase in the consideration offered, in the price paid to dealers to solicit shareholders to tender, or in the number of shares sought. The requirements are similar to those of third party tender offers under Rules 14e–1 (17 C.F.R. § 240.14(e)(1) (1985)), 14d–7 (17 C.F.R. § 240.14(d)(7)), and 14e–1(b) (17 C.F.R. § 240.14(e)–1(b)). See SEC Release No. 33–6596, *supra* note 125, at 28,210–11.


[130] City Code at Rule 36. The Panel’s consent will not normally be given if an offer for the whole of the equity has already been announced (even if by a rival offeror) or if the applicant or persons acting in concert with the applicant have acquired, in the previous 12 months, shares in the offeree company selectively, as from controlling shareholders, or in significant amounts. *Id.* at Rule 36.2. Approval to acquire up to 30% is freely given, while approval to acquire more than 30% but less than 50% is rarely given and, in any event, will not be given unless the board of the offeree company recommends it.

[131] City Code at Rules 36.4–36.6. *But see* Financial Services Bill (Bill 122), Parliament (1986), § 142 & Schedule 10 (requiring a takeover bid to be for all of target’s shares or for all of a particular class of target’s shares).


[133] Comp. Act, 1985, §§ 428, 430; *see also* Financial Services Bill, § 142 & Schedule 10.

[134] The acquisition is also required when the shares available for acquisition are less than 90% of the total shares outstanding and at least 75% of the offerees tender at least 90% of the available outstanding stock. *See* Comp. Act, 1985, §§ 429–430; CASA, 1981, Austl. Acts P. No. 2, § 42(1), (2); *see also* Financial Services Bill, § 142 & Schedule 10.


[137] *Id.* at Rule 34. An offer is not capable of being declared unconditional after 3:30 p.m. on the sixtieth day after the day on which the offer was initially posted unless it has previously been declared unconditional. *Id.* at Rule 31.6.

[138] The offeror can extend the offer for a further 21 days. *Id.* at Rules 31.1–31.2.


[140] *Id.* at § 240.14(d)–7(a)(2). The Australian Act does not provide for withdrawal by the shareholder. This is particularly unfair to the acceptor since offers under a takeover scheme can be left open for a period of one to six months.

[141] Johnstone, *supra* note 44, at 244–47; *see also infra* notes 171–79 and accompanying text (Section 5 – problem of partial bids).


[143] City Code at Rule 9.1(b).


[147] *See*, e.g., City Code at Rules 6, 7 (an offeror may generally not purchase on the Exchange after the forthy-sixth day, as no revision is permitted after that time except for a single
purchase which takes the offeror over the 50% level); CASA, 1981, Austl. Acts P. No. 2, § 17(9) (purchase at a price higher than that specified in a takeover announcement cannot be made during the last five trading days of the acquisition program).


[152] See supra note 145 and accompanying text.

[153] 17 C.F.R. § 240.10(b)-13 (1985). The purpose of the prohibition is to protect public investors who, if the tender offer was prorated, might have lost the opportunity to tender all their shares, whereas those whose shares were purchased outside the tender offer would not be prorated. See SEC Release No. 34-9395, 36 Fed. Reg. 23,359 (1971) (proposed Nov. 24, 1971) (interpretation of Rule 10b-13-Payment of Solicitation Fees in Tender Offers), reprinted in [1973] Fed. Sec. L. Rep. (CCH) ¶ 22,763.


[157] Id. at 1074.

[158] 308 U.S. 66 (1939). See also infra note 174 (the problem of the prisoner's dilemma).


[161] In addition to the price differential, arbitrageurs also receive a solicitation fee equivalent to a double commission. See Hayes & Taussig, Tactics of Cash Takeover Bids -- For Bidders, Incumbent Managements and Shareholders, in Senate Hearings, supra note 37, at 229. According to SEC Release No. 34-9395, the "anticipation of receipt of the soliciting dealer's fee may induce the arbitrageur to purchase the stock to be tendered at prices up to, and possibly even in excess of, the tender price." SEC Release No. 34-9395, supra note 153.


[164] It would appear that the higher threshold levels in the U.K. and Australia would favor greater arbitraging activities in these two countries. The converse, however, is true. In the U.K. and Australia, the offeror, upon reaching the minimum threshold level, can acquire further shares only by way of a tender offer. By contrast, in the U.S., the privately negotiated exemption to the definition of tender offer enables the offeror to acquire unlimited shares from arbitrageurs. Risk-arbitrage is less developed in Australia, Institutional investors, as a rule, sell directly to the offeror through their brokers. This has not prevented tender offers from being highly contested events as considerable purchases are made by rival offerors and third parties seeking to obtain strategic holdings in the target company. See Henry, Activities of Arbitrageurs in Tender Offers, 119 U. Pa. L. Rev. 466 (1971).

In the U.S., the arbitrageur's strategy is to obtain, as cheaply as possible in the market place, an amount close to five percent and to make further acquisitions thereafter by private negotiation. Care must be taken to prevent any ties between the initial acquisitions of up to five percent and the negotiated acquisitions thereafter. Wellman, 475 F. Supp. at 828–31.

[165] See supra notes 78–85 and accompanying text.

[166] It could be argued that arbitraging will continue to flourish because arbitrageurs will take into account the increased uncertainty and discount their purchase price accordingly.
[167] See supra notes 52–76 and accompanying text.


[169] The arbitrageur has no loyalty to either the offeror or the target, regardless of which securities the arbitrageur is eventually selling. See supra notes 160–61 and accompanying text.


[171] See supra notes 78–85 and accompanying text.

[172] City Code, at Rule 36.6. Partial bids seeking statutory control must be conditional upon acceptances of over 50% of the voting rights attributable to such equity shares and be approved by over 50% of the holders of total voting rights (including non-equity shares) in the target. Id.; see also N. Weinberg & M. Blank, supra note 5, at 988. Panel consent is obtainable without difficulty for acquisitions under 30% as the control wielded from such a holding is precarious. Consent for acquisitions between 30% and 50%, however, is given sparingly. City Code at Rule 36. The Panel feels acquirers of control should assume certain special obligations. See Report by the Special Comm. of the Stock Exch. On Dealing in the Shares of Consolidated Gold Fields Ltd. 49 (July 1980) [hereinafter cited as Consolidated Gold Fields Ltd. Report].


[174] The “prisoner’s dilemma” represents a situation where an inability to coordinate decisions leads to less than optimal results for the persons affected. See Samuelson, Economics 1969-07 (1976). To illustrate, assume target shares currently selling at $30 per share are held by A and B (50 each). A two-tiered offer has been received: $40 per share for half the outstanding stock and a second round take out merger (forced acquisition) of $30 for the remaining shares. Assume also that if the offer fails, the price will stabilize at $37 per share. The inherent dilemma is that maximum gains flow to A and B only if they can adopt a common strategy, in this case reject the offer. According to the example, outright rejection will send the value of shares owned by A or B up to $1850 ($37 X 50). Failure to adopt a common strategy means that A will have to live with the fear that B will tender at $40 per share (and vice versa). If A does not tender but B does, B will receive $2000 ($40 X 50) while A will receive $1500 ($30 X 50). If both tender, they will each receive $1000 ($40 X 25) plus $750 ($30 X 25) for a total of $1750. See Beatty, Shareholder Coordination Costs, Shark Repellents and Takeout Mergers: The Case Against Fiduciary Duties, 1983 Am. B. Foundation Research J. 341, 350–51.

[175] The other shareholders will gladly make up for the percentage not tendered by the rejecting shareholder.


[180] See City Code at General Principles 7, 9 & Rule 21. These provisions prohibit target management actions which are intended to or would thwart a prospective tender offer unless consent of target shareholders has been obtained.

[182] The rule presumes that the directors of a corporation, in making a business decision, acted on an informed basis, in good faith and in the honest belief that the action taken was in the best interests of the company. Zapata Corp. v. Maldonado, 430 A.2d 779 (Del. 1981). The rule evolved as a corollary to the principle that a board of directors stands in a fiduciary relationship to the shareholders it represents. Because the role of a fiduciary ordinarily does not admit of any conflicting interests or conduct, the Business Judgment Rule seeks to accommodate that status to the realities of the business world. Moran v. Household Int'l Inc., 490 A.2d 1059, 1074 (Del. Ch.), aff'd, 500 A.2d 1346 (Del. Super. Ct. 1983).

The rule recognizes the corporation as a risk taker and management as providing the necessary leadership. The rule seeks, in this context, to relieve directors from liability for honest decisions made in the course of carrying out their functions. The benefit of the rule is not available in situations of fraud or bad faith, or if the decision has been based on inadequate information. Mere evidence of benefits to management flowing from tender offer defensive tactics is not suggestive of bad faith or improper conduct. See Panter, 646 F.2d at 295. The courts view each situation in the light of its own facts. Generally, it is safer to take defensive measures in advance of rather than in the face of an offer. Also, any excessive management response may prove indefensible. The difficulty is in delineating the threshold point.


[184] For a recent example see the self-tender by General American Oil against the tender offer bid by Mesa. The acquisition was to be financed by a loan. Shares in General American were eventually acquired by a white knight, Phillips Petroleum Co., for a higher price. Another self-tender offer by Pogo Producing Co., financed by the issue of convertible preferred stock to a friendly third party, was able to defeat a hostile bid by Northwest Industries Inc. and Sedco Inc. Houston Natural Gas Corp. combined a self tender offer with a counter tender offer for Coastal Corp. The matter was ultimately resolved by greenmailing Coastal Corp. See generally Lipton & Vlahakis, Takeover Responses — 1984 Developments, 2 U.C. San Diego Sec. Reg. Inst. 21, 22 (1984).

[185] A recent example is Carter Hawley Hale Stores' response to the bid by The Limited. Carter Hawley (a) sold 1,000,000 shares of convertible preferred stock to General Cinema Corp. for $300 million, (b) granted General Cinema a six month option to buy its Walden Books operation for approximately $285 million, and (c) allocated up to $500 million for a share repurchase program in the open market and in privately negotiated transactions. See Lipton & Vlahakis, supra note 184, at 22–23.

[186] Two differences with respect to self-tender offers and ordinary share repurchases should be noted: (1) self-tenders are open to all target shareholders (though subject to the percentage prescribed) while share repurchases tend to be selective; (2) self-tenders are governed by Rule 13e–4, 17 C.F.R. § 240.13(e)–4 (1985). There is no such provision governing ordinary share repurchases.


[188] The U.S. legislature's concern for fairness on this matter is evidenced in recent proposals seeking uniformity in the requirements governing self-tender offers and third party offers. The existing requirements favor issuer self-tenders as against third party tenders and at the expense of target shareholders. The proposed uniformity will benefit target shareholders. See supra notes 126–27 and accompanying text.

[189] Various U.S. jurisdictions have applied the Business Judgment Rule to the takeover defense strategies of management, including the sale of “crown jewels.” Moran, 500 A.2d at 1350; see also supra note 123 and accompanying text.


[191] Id. at 949.


[194] See Acquisitions and Mergers: Tactics and Techniques 1983, Practising Law Institute 115 (No. 419); see also, e.g., Martin Marietta Corp. v. Bendix Corp. 549 F. Supp. 623, 625 (D. Md. 1982) ("Bendix and Marietta have engaged in a fierce PAC-MAN ... struggle.").


[203] See G. Jarrell & M. Ryngaert, The Impact of Targeted Share Repurchases (Greenmail) on Stock Prices (1984); Macey & Mcchesney, A Theoretical Analysis of Corporate Greenmail, 95 Yale L.J. 13, 14–15 (1985). Recently, in Heckmann v. Ahmanson & Steinberg, 168 Cal. App. 3d 199, 214 Cal. Rptr. 1 (1985), the California Court of Appeal upheld the granting of an injunction by the lower court against greenmailing. In addition, the recipient of greenmail was held accountable as a constructive trustee. It must be noted, however, that the court found the directors of the target in this particular case not to have satisfied the Business Judgment Rule. Id.


[208] Id. § 12(g); see also AASE Listing Requirement 3R(3).

[209] AASE Listing Requirement 3S(1) states: "Any sale or disposal of the company's main undertaking shall be conditional upon ratification by shareholders in general meeting" (emphasis added).

[210] Comp. Act, 1981, Austl. Acts P. No. 890, § 76(2), authorizes Charter amendments that take effect on the occurrence of a later event, while section 76(3) reads:

> Without limiting the generality of sub-section (2), the further requirement referred to in that sub-section may be a requirement –
>
> (a) that the relevant special resolution be passed by a majority consisting of a greater number of members than is required to constitute the resolution as a special resolution;
>
> (b) that the consent or approval of a particular person be obtained; or
>
> (c) that a particular condition be fulfilled.

Id. § 76(3). Companies are allowed to include shareholder plebiscite provisions in their constituent documents. Such provisions, however, cease to have effect after three years or such lesser time as the constituent documents provide. CASA, 1981, Austl. Acts P. No. 2, § 31A,31B.

[214] In Australia, there exists uniform interstate legislation. See supra notes 42 & 47.
[218] For example, the SEC’s continued acceptance of historical cost; its failure to develop accounting standards; and its failure to develop other needed guidelines, such as the definition of “tender offer.”
[219] See H. Kripke, The SEC and Corporate Disclosure; Regulation in Search of a Purpose (1979). Because the SEC is dominated “by lawyers to the exclusion of economic thinkers”, it “shows a tendency to treat disclosure as a moral issue” rather than a pragmatic one. Id. at 18. For this reason, Kripke notes, there has been a marked tendency for the SEC to adopt voluminous and detailed regulations with little regard for their impact upon the regulated. The SEC has also overstretched its actual powers and is obsessed with punishment. He questions whether the elaborate mandatory disclosure requirements continue to be necessary in the face of natural forces within the capital markets (which protect sophisticated investors) and the efficient markets theory (which protect unsophisticated investors). Id.
[221] See, e.g., Fiflis, supra note 217.
[224] Id.
[225] See Financial Services Bill, § 96. Initially, however, all power is to be vested in the Secretary of State who, if satisfied that certain conditions are met, may transfer such powers to the Agency with Parliamentary approval. Id.
[226] To give meaning to this framework, the Bill repeals the Prevention of Fraud (Investments) Act, 1958; Administration of Justice Act, 1965 (Schedule 1); and Companies Act, 1985 (§§ 81–83 & 86, giving effect to the Prevention of Fraud (Investments) Act, 1958). See Financial Services Bill, at Schedule 13.