

Dissenting Report

The Labor Party recommends that the Corporations Law not be amended to include a mandatory bid rule similar in terms to that proposed in the Corporate Law Economic Reform Program Bill 1998.

It is acknowledged that there are divergent views as to the advantages and disadvantages of a mandatory bid rule. However, the Labor Party does not believe that the advantages of such a rule outweigh its disadvantages.

Advantages of the mandatory bid rule

Several submissions stated that the mandatory bid rule would harmonise Australia's takeover regime with trends in major international markets and would facilitate a more competitive market for corporate control by encouraging more efficient management and the more efficient allocation of assets. The advantage of the mandatory bid rule was said to be that it would reduce market and bidder uncertainty, thereby encouraging takeover activity and promoting economic efficiency.

However, several submissions were critical of the above views or suggested that the efficiency gains would only be achieved at the cost of transparency, accountability and equity among shareholders.

Mandatory bid rule not necessarily encourage takeover activity

ASIC stated that factors other than the absence of a mandatory bid rule may explain the lower level of takeover activity in Australia. ASIC considered it likely that a wide range of more complex factors have contributed to different relative rates of takeover activity in different jurisdictions in recent times. In particular, ASIC said that it should not be assumed that there is any necessary nexus between the current level of takeover activity in Australia and the absence of a mandatory bid rule as proposed.

ASIC is of the view that the need for the mandatory bid rule is largely anecdotal. The assertion that certain bidders, particularly foreign bidders, are reticent about making bids where they cannot have some previous assurance of success is inconsistent with the significant number of unsuccessful bids which are made and the prominent involvement of foreign bidders in the Australian takeovers market.

It was also confirmed by Mr Peter Lee, the Deputy Director- General of the UK Panel on Takeovers and Mergers that the use of the mandatory bid rule in the UK is relatively infrequent. Mr Lee said that in the last 10 years the percentage of bids that are mandatory bids from the outset has ranged from between 5 per cent to 15 per cent.

It was also submitted by ASIC and the Australian Institute of Company Directors that the mandatory bid rule, as currently proposed, may be of very limited use unless it is extended to conditional offers.

Mandatory bid rule not ensure highest price

Several submissions stated that the mandatory bid rule may not ensure the highest price is received by all shareholders of target companies.

A submission from Mr Rodd Levy, a partner at Freehill Hollingdale & Page, suggested that the mandatory bid rule may, in many cases, lead to lower prices being offered for target companies. Mr Levy said:

“The introduction of a mandatory bid rule would be contrary to the Eggleston principles which underlie Chapter 6. It would permit control of companies to change in situations where the target company directors and shareholders did not have any advance knowledge of the change nor any opportunity to participate in the takeover process. This would lead in many cases to lower prices being offered for target companies.”

Mr Levy also submitted that in cases where the majority shareholder is in financial distress or is controlled by a liquidator, receiver or administrator, the majority shareholder may be prepared to sell at a price which is less than that achievable if an auction developed.

ASIC also expressed concern in this regard and is of the view that most Australian shareholders would prefer the price which they are offered for their shares to have been fully tested by public auction. The Australian Institute of Company Directors also sees benefits in an open auction process.

The mandatory bid rule may also leave the directors of a target company with little flexibility to maximise the bid price for the benefit of all shareholders.

The International Banks & Securities Association of Australia (**IBSA**) also stated that some of their members had concerns that the introduction of a mandatory bid rule would decrease price competition in takeovers and that small shareholders could be particularly disadvantaged, as they are more likely to be presented with *a fait accompli* under the mandatory bid rule.

Interestingly, the IBSA stated there was not uniform support for the mandatory bid rule among their members. They stated:

“It is apparent from our internal discussions that there is a range of views within the industry, with some senior practitioners strongly in favour of the introduction of a mandatory bid rule and other strongly opposed to it. Thus, there is not uniform support in the investment banking industry for the mandatory bid rule. This is in contrast with other recent Government reforms like invigoration of the Companies and Securities Panel and capital gains tax relief and scrip-for-scrip takeovers that had widespread support among IBSA’s member banks.”

Regulatory Concerns

ASIC also expressed some regulatory concerns with the introduction of a mandatory bid rule. ASIC stated in its submission that:

“Public transactions are easiest for the market to understand and to factor into their commercial decisions. Public transactions are also easier for the regulator to monitor and regulate. If a decisive change of control is permitted to take place in private, the level of information available to the market and the regulator is decreased. There will be more opportunity for the acquirer and the vendor to enter into undisclosed “side deals” of a kind that violate the equal opportunity principle. The burden of investigation and proof placed upon ASIC in seeking to uphold that principle would be increased.”

ISBA also stated that some of their members had concerns that the mandatory bid rule could prevent shareholders of a target company from having access to important advice from the company’s directors before control had passed to the bidder.

If control in a company passes in circumstances where the market is not confident about equal treatment for all shareholders, that may have adverse implications for the attractiveness and liquidity of the Australian equity market.

Other changes may facilitate takeovers

ASIC stated that recent changes in the area of takeover law would substantially transform takeovers and facilitate takeover activity. In light of this, ASIC suggested that it may be unnecessary to introduce a mandatory bid rule and recommended that the new regime be observed for a period of 12 months before any decision is made about the introduction of a mandatory bid rule.

Conclusion

The Labor Party agrees with the cautious approach advocated by ASIC. As was indicated when the mandatory bid rule was debated as part of the amendments proposed to the Corporations Law by the Corporate Law Economic Reform Program Bill 1988, it is to be expected that changes to the capital gains tax treatment of scrip for scrip takeovers will encourage greater takeover activity than the introduction of a mandatory bid rule.

The Labor Party is concerned that the introduction of a mandatory bid rule will have significant costs in terms of the transparency, equity and accountability of transactions which result in a change of control in companies. The Labor Party cannot support an amendment to the Corporations Law which may reduce market transparency and lead to a decline in investor confidence.

Accordingly, the Labor Party does not recommend that the Corporations Law be amended to include a mandatory bid rule similar in terms to that proposed in the Corporate Law Economic Reform Program Bill 1998.