HIGH COURT OF AUSTRALIA

GLEESON CJ,
GAUDRON, GUMMOW, HAYNE AND CALLINAN JJ

Matter No S105/1999

AUSTRALIAN SECURITIES AND INVESTMENTS COMMISSION — APPELLANT

AND

DB MANAGEMENT PTY LTD & ORS — RESPONDENTS

Matter No S108/1999

SOUTHCORP WINES PTY LTD — APPELLANT

AND

DB MANAGEMENT PTY LTD & ORS — RESPONDENTS

Australian Securities and Investments Commission v DB Management Pty Ltd
Southcorp Wines Pty Ltd v DB Management Pty Ltd
[2000] HCA 7
10 February 2000
S105/1999 and S108/1999

ORDER

1. *Appeals allowed with costs.*

2. *Set aside the orders made by the Full Court of the Federal Court of Australia on 25 March 1999, and in place thereof, order that the appeal to that Court be dismissed with costs.*

On appeal from the Federal Court of Australia

Representation:

Matter No S105/1999

R S McColl SC with C Francas and R A Pepper for the appellant (instructed by Regional General Counsel, Australian Securities and Investments Commission)

P R Graham QC with K M Connor for the first respondent (instructed by Stephen Blanks & Associates)

R J C Catto in person on behalf of the second respondent

J V Gooley for the third respondent

S D Rares SC with A S Bell for the fourth respondent (instructed by Allen Allen & Hemsley)

Matter No S108/1999

S D Rares SC with A S Bell for the appellant (instructed by Allen Allen & Hemsley)

P R Graham QC with K M Connor for the first respondent (instructed by Stephen Blanks & Associates)

R J C Catto in person on behalf of the second respondent

J V Gooley for the third respondent

R S McColl SC with C Francas and R A Pepper for the fourth respondent (instructed by Regional General Counsel, Australian Securities and Investments Commission)

CATCHWORDS

Australian Securities and Investments Commission v DB Management Pty Ltd
Southcorp Wines Pty Ltd v DB Management Pty Ltd

Corporations – Takeovers – Compulsory acquisition of shares allotted pursuant to exercise of options after offer period – Power of Australian Securities and Investments Commission to modify Ch 6 of the Corporations Law.

Corporations Law, ss 701, 703, 728, 730.

1 GLEESON CJ, GAUDRON, GUMMOW, HAYNE AND CALLINAN JJ. These appeals, which were heard together, concern the extent of the power given to the Australian Securities and Investments Commission ("the Commission") by s 730 of the Corporations Law ("the Law"), to declare that Ch 6 of the Law (ss 602-759), which deals with the acquisition of shares and, in particular, with takeovers, shall apply as if specified provisions of the Chapter were omitted or modified or varied.

2 The appellant Southcorp Wines Pty Limited ("Southcorp"), pursuant to a successful takeover bid, acquired the whole of the then issued shares in the capital of Coldstream Australasia Limited ("Coldstream"). There were also in existence a number of options to acquire Coldstream shares. Southcorp ultimately acquired most of those by agreement. DB Management Pty Limited, Batoka Pty Limited and Winpar Holdings Limited ("the respondent option holders"), who between them held 3,100 options, refused to sell. In circumstances which will be described in more detail below, Southcorp sought and obtained from the Commission a declaration under s 730 which enabled Southcorp, when Coldstream shares were issued pursuant to the exercise of the options, compulsorily to acquire those shares. Those three option holders challenged the Commission's decision by seeking a review in the Administrative Appeals Tribunal ("the Tribunal"). The Tribunal (Deputy President McMahon) affirmed the Commission's decision. The matter then went to the Federal Court of Australia on an "appeal … on a question of law" pursuant to s 44 of the *Administrative Appeals Tribunal Act* 1975 (Cth) ("the AAT Act"). The contention was that the Tribunal had erred in law in its review of the Commission's decision. At first instance in the Federal Court, Whitlam J held that there was no error of law in the Tribunal's decision, and dismissed the appeal[1]. There was a further appeal to the Full Court of the Federal Court. By majority, (O'Connor and Dowsett JJ, Beaumont J dissenting), the Full Court allowed the appeal, holding that the Commission, the Tribunal and Whitlam J had misconstrued s 730, and that the Commission's declaration, which permitted the compulsory acquisition of shares resulting from the exercise of the options, was outside the power given by the section[2].

3 It was also argued in the Federal Court that the Tribunal's decision was "manifestly unreasonable". That argument was rejected by Whitlam J and Beaumont J. The majority in the Full Court found it unnecessary to deal with the point.

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1 *DB Management Pty Ltd v Australian Securities Commission* (1998) 156 ALR 15.

2 *DB Management Pty Ltd v Australian Securities and Investment Commission* (1999) 162 ALR 91.

4 The Commission and Southcorp now appeal to this Court.

The facts

5 On 24 May 1996, Southcorp made Part A offers for all shares and employee options in Coldstream, and separate offers to acquire 50 cent and 72 cent listed options in Coldstream. The offers closed on 30 July 1996. The offers for the shares were originally conditional upon acceptances being received for all the options, but that condition was waived during the offer period.

6 The takeover was successful. When the offer closed, Southcorp had acquired 97 per cent of the issued shares in Coldstream. The remaining shares were compulsorily acquired pursuant to s 701 of the Law.

7 The 50 cent options may be disregarded for present purposes. They were virtually all acquired by Southcorp.

8 The present issue arises with respect to the 72 cent options. Those were due to expire on 8 October 1998. After acceptances, 207,750 remained outstanding. Southcorp gave a notice under s 703 of the Law, informing the holders of those outstanding options of their right to require Southcorp to acquire them. Of the outstanding options, 198,900 were held by R E Mews. He sold three small parcels of them, amounting in all to 3,100 options. DB Management, Batoka and Winpar between them acquired those 3,100 options. They are the subject of the present dispute. As to his remaining options, Mr Mews gave Southcorp a notice requiring it to acquire them, and it did so.

9 In August 1996, Southcorp applied to the Commission for a declaration, under s 730, modifying s 701, so that Southcorp would be entitled compulsorily to acquire the shares issued on the exercise of the outstanding options. DB Management, Batoka and Winpar made submissions to the Commission opposing the modification.

10 On 1 October 1996, the Commission made a declaration that Ch 6 of the Law should apply to Southcorp in the case of the compulsory acquisition of shares in Coldstream upon the exercise of the options as if s 701 were modified or varied in several respects by adding, deleting, and substituting words.

11 The details of the modifications and variations are set out in the judgment of Whitlam J, who quoted s 701 as modified and varied[3]. To s 701(1) was added a paragraph which extended the concept of relevant shareholder to include a person who has become the holder of shares in the target company after the end of the offer period. That extension, with consequential variations to other parts of s 701, is said to be beyond what is contemplated by s 730, and *ultra vires* the Commission.

The decision of the Commission and the Tribunal

12 The effect of the Commission's decision was summarised by the Tribunal as follows:

> "The modification of [s] 701 which is the subject of the present review, varied [s] 701 in a detailed manner. The effect of the modification was to bring within the compulsory acquisition provisions of [s] 701, any shares allotted in Coldstream upon the exercise of options after the close of the takeover offers. In exercise of the powers conferred by that modified section, Southcorp was obliged to give notice to the relevant shareholder to the effect that the offeror desired to acquire the shares held by the relevant shareholder. The notice was to set out a cash sum as the proposed acquisition price and was to be accompanied by a copy of a report made by an expert within six months before the date of the notice, setting out the particulars referred to in [s] 703(7) and stating whether, in the expert's opinion, the terms on which the offeror proposed to acquire the shares were fair and reasonable and giving the reasons for forming that opinion. Subsection (6) was left largely intact so that a dissenting offeree retained its right to apply to a court for an order that the obligatory acquisition provisions should not apply to the relevant shareholder."

13 In its reasons for decision, the Commission rejected the argument that it did not have power to grant the modification sought. This goes to the central issue in the present appeals, and will be considered below. The Commission noted that it had no established policy on modifying the Law to allow compulsory acquisition of shares issued after the close of a takeover bid. It went on to consider the merits of the application before it in the light of what it regarded as the relevant considerations, including those identified in s 731 of the Law. It addressed

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3 *DB Management Pty Ltd v Australian Securities Commission* (1998) 156 ALR 15 at 17-18.

equality of treatment of shareholders, efficiency and certainty of takeover markets, market confidence and fairness of consideration. It summarised its conclusions as follows:

"(a) Southcorp, having achieved the tests set by the legislature to gain the benefits of 100% ownership through compulsory acquisition should not have to face uncertainty and difficulty in regaining its position of 100% ownership if shares are issued to option holders.

(b) There was a very high level of acceptance by Coldstream shareholders.

(c) The outstanding options (excluding Mr Mews') represent less than 0.1% of the shares on a fully diluted basis.

(d) Granting the application would make the market for control of companies in Australia both more certain and more efficient.

(e) Granting the application furthered the legislative policy in relation to compulsory acquisition.

(f) Compulsory acquisition of shares in Coldstream which are issued pursuant to exercise of options after the close of Southcorp's bid would reduce the power of those persons to expropriate an unequal share of the control premium compared to the majority of shareholders who accepted Southcorp's takeover bid for Coldstream.

(g) The modification would, as far as practicable, ensure that all shareholders of Coldstream had reasonable and equal opportunities to participate in the benefits accruing to shareholders under Southcorp's takeover bid for Coldstream.

(h) Granting the application would not unreasonably harm the rights of option holders.

(i) Granting the application would not affect the option holders' rights in relation to their options. They would still be able to exercise the options and receive shares, and they would receive a fair price for the shares issued pursuant to the conversion of those options. However, they would not have the right to remain shareholders of the target company.

(j) Concerns as to the price to be paid for the shares could be dealt with by requiring Southcorp to state the purchase price and support it with an independent expert's report that the terms are fair and reasonable. Shareholders would also have the right to apply to a court to seek an order avoiding the acquisition."

14 The respondent option holders then applied for a review of the Commission's decision under the AAT Act. The Tribunal affirmed the decision of the Commission. Deputy President McMahon considered, and rejected, the argument that the power given by s 730 did not extend to the modifications and variations of s 701 made by the Commission. He then addressed the merits of the decision, in the light of submissions made to him, which included an argument that the decision was inconsistent with the policy of the takeover legislation, an argument based on unfairness, and other discretionary considerations. His statement of conclusions included the following:

"59. I am also conscious that there was an overwhelming acceptance of the offer. This is a relevant matter in assessing whether compulsory acquisition should be facilitated, so as to give the offeror 100 per cent ownership of all the securities issued by the company. It is a fundamental principle of section 701 that a successful bidder, who has received overwhelming, informed acceptance, should be permitted to enjoy the benefits of total ownership …

63. In the circumstances, I have concluded that the making of the modification was the correct and preferable decision in the circumstances – correct because it was in accordance with the legality of the powers exercised and preferable because it satisfied all proper considerations in exercising the discretion. Modifications under section 730 are of fundamental importance to the scheme of Chapter 6. The power to declare them is frequently used. Quite possibly the takeover code would be unworkable without them. The present modification is in the mainstream of those created to facilitate the completion of a takeover and is entirely appropriate. Accordingly, I affirm the decision under review."

15 Section 44 of the AAT Act enables a party to a proceeding before the Tribunal to appeal to the Federal Court, on a question of law, from a decision of the Tribunal. Pursuant to s 44, the respondent option holders appealed from the Tribunal's decision. The question for the Federal Court was whether the Tribunal's decision involved an error of law. If that question were answered in the affirmative then the Federal Court had the powers set out in s 44.

"Manifest unreasonableness"

16 In the Federal Court, at first instance, and on appeal, and again in this Court, it was submitted that the decision of the Tribunal was manifestly unreasonable.

17 Whitlam J summarised the submissions put to him in that respect as follows[4]:

> "Two matters were lightly developed on behalf of the applicant: the tribunal's consideration of the question whether the holders of shares issued on the exercise of the options in Coldstream should be entitled to a control premium, and the weight attached by the tribunal to the level of acceptances Southcorp received in respect of its offers for the options."

18 The primary challenge to the decision of the Tribunal was that it erred in law in concluding that the power given by s 730 extended to the making of the declaration made by the Commission. The question of unreasonableness only arose for consideration, if it arose at all, upon the assumption that the primary challenge failed, and that the power was wide enough to comprehend a declaration of the kind made by the Commission. There had already been a merits review of the Commission's decision by the Tribunal. Under the scheme of the AAT Act, such a review was for the Tribunal, not for the Federal Court. The only appeal to the Federal Court, under s 44, is on a question of law.

19 The criticisms of the Tribunal's reasoning, advanced under the rubric of "manifest unreasonableness", do not raise questions of law. They relate to discretionary considerations relevant to the exercise of a power, upon the assumption that the power exists. It is unnecessary for present purposes to examine the relationship between the principles concerning what is sometimes called "*Wednesbury* unreasonableness"[5] and the concept of a question of law where that concept appears in s 44 of the AAT Act[6]. The arguments relied upon

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4 *DB Management Pty Ltd v Australian Securities Commission* (1998) 156 ALR 15 at 28.

5 *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223.

6 See *Minister for Immigration and Multicultural Affairs v Eshetu* (1999) 73 ALJR 746 at 766-767 per Gummow J; 162 ALR 577 at 605-606.

by the respondent option holders in the present case, (leaving to one side the question of the extent of the power given by s 730), amounted only to criticisms based on factual considerations and matters of discretion, and did not even approach a level that could be said to raise questions of law. They were rightly rejected by Whitlam J and Beaumont J. Complaints about discretionary judgments are not transformed into questions of law simply by embellishing an assertion of unreasonableness with a claim that it is manifest.

Section 730: legislative history and context

20 Read literally, the words of s 730 are wide enough to empower the modifications and variations to s 701 which were made in the present case. However, the majority in the Full Court of the Federal Court upheld a submission that the power given by s 730 is confined by the statutory context in which the section appears, and by the subject matter, scope and purpose of the statutory provisions of which it forms a part[7]. It is necessary, therefore, to examine the scheme of Ch 6 of the Law, and the place of s 730 in that scheme.

21 The relevant aspect of the scheme of the takeover provisions with which the argument is concerned is that relating to compulsory acquisition, by a successful bidder, of shares belonging to those who have not accepted a takeover offer. Provisions for such compulsory acquisition have a long history in company legislation. In 1926 the Company Law Amendment Committee recommended to the United Kingdom Parliament that where a scheme of amalgamation involving the transfer of shares or a class of shares has been sanctioned by the holders of at least 90 per cent of the shares involved, the purchasing concern should be entitled as of right to acquire the shares of non-assenting holders on the same terms as those accepted by the assenting shareholders, with a right of appeal to a court on any question of value or oppression[8]. The Committee said[9]:

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7 *R v Australian Broadcasting Tribunal; Ex parte 2HD Pty Ltd* (1979) 144 CLR 45 at 50; *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24 at 40; *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at 384.

8 Company Law Amendment Committee Report (1925-1926) ("the Greene Report"), par 85.

9 The Greene Report, par 84.

> "It has been represented to us that holders of a small number of shares of the company which is being taken over (either from a desire to exact better terms than their fellow shareholders are content to accept or from lack of real interest in the matter) frequently fail to come into an arrangement which commends itself to the vast majority of their fellow shareholders, with the result that the transaction fails to materialise.
>
> In our opinion this position – which is in effect an oppression of the majority by a minority – should be met."

22 The recommendation was taken up in s 50 of the *Companies Act* 1928 (UK), which was reflected in legislation in all the Australian States[10]. The subject was further considered in the United Kingdom in the Report of the Committee on Company Law Amendment (1945) ("the Cohen Report")[11] and the Report of the Company Law Committee (1962) ("the Jenkins Report")[12]. It was dealt with in s 209 of the *Companies Act* 1948 (UK) and s 185 of the various Companies Acts enacted in 1961 in all the States and known as the Uniform Companies Acts. Section 185 of the *Companies Act* 1961 (NSW) was considered by the Privy Council in *Blue Metal Industries Ltd v Dilley*[13].

23 From 1971 to 1980, takeovers in most Australian States were regulated by the provisions of Pt VIB (ss 180A-180Y) of the Uniform Companies Acts. Those provisions were more elaborate than those of earlier legislation. They followed the recommendations of the Company Law Advisory Committee, chaired by Sir Richard Eggleston, in its Second Interim Report to the Standing Committee of Attorneys-General (1969) ("the Eggleston Report"). Section 180X provided for compulsory acquisition. Section 180V gave the relevant Minister power to exempt persons from compliance with the Act. There was no power of modification as later provided for.

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10 *Companies Act* 1936 (NSW), s 135; *Companies Act* 1938 (Vic), s 155; *Companies Act* 1931 (Q), s 163; *Companies Act* 1934 (SA), s 173; *Companies Act* 1943 (WA), s 160; *Companies Act* 1920 (Tas), s 130B (as inserted by *Companies Act* 1957 (Tas), s 6).

11 Par 141.

12 Pars 283-294.

13 (1969) 117 CLR 651; [1970] AC 827.

24 From 1981, takeovers were regulated by the Companies (Acquisition of Shares) Code ("CASA"), which was established by the *Companies (Acquisition of Shares) Act* 1980 (Cth) and the laws of participating States and the Northern Territory. Sections 57 and 58 of CASA contained provisions corresponding to ss 728 and 730 of the Law. Section 57 empowered the National Companies and Securities Commission ("the NCSC") to exempt a person from compliance with all or any of the requirements of the Code. Section 58 empowered the NCSC to declare that the Code should have effect in its application to or in relation to a particular person or persons in a particular case as if a provision or provisions of the Code was or were omitted or varied or modified as specified, and "where such a declaration is made, this Code has effect accordingly." This represented a legislative response to a problem of policy concerning regulation of takeovers. It involved a compromise between the technique of general legislative prescription applying inflexibly to all cases, and that of administrative discretion addressing issues on a case by case basis. The NCSC was given power, not merely to determine that, in certain cases, the legislative scheme would not apply, but also to modify or vary the operation of the scheme. Assuming a declaration under s 58 to be effective, it operated to bind a court administering the Code by requiring that court to apply the Code, as varied, to a particular person or case. It created a new set of rights and obligations[14].

25 Reliance was placed by the respondent option holders upon the relatively modest explanation of the purpose of such a provision when it was originally foreshadowed in proposed legislation in 1979. The Explanatory Memorandum accompanying the Bill introduced in the Commonwealth Parliament in that year said[15]:

> "To cover a situation where the proposed code expressly prohibits the action in respect of which exemption is sought, the NCSC will also be able to declare that provisions of the code apply in a particular case as if varied or modified as set out in the declaration."

26 However, in the Explanatory Memorandum which accompanied the Bill which later became the foundation for CASA, that was merely given as one example of the way the power would operate[16]. When the legislation (s 730 of

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14 *Precision Data Holdings Ltd v Wills* (1991) 173 CLR 167 at 190.

15 Company Take-Overs Bill 1979, Explanatory Memorandum, par 157.

16 Companies (Acquisition of Shares) Bill 1980, Explanatory Memorandum, par 165.

the Law) with which we are presently concerned was before the Commonwealth Parliament in 1988, the Explanatory Memorandum said[17]:

> "This clause represents a significant extension of the modification powers under CASA s 58. Under that provision, the NCSC could modify or vary the provisions of CASA in their application to a particular person in a particular case. The [Australian Securities Commission], under sub-cl 730(1) will also be able, so far as the Commonwealth Constitution permits, to modify or vary the provisions in their application to classes of persons either generally or in particular cases or classes of case."

27 Chapter 6 of the Law, which contains the takeover provisions, is headed "Acquisition of Shares". Although in a number of its provisions it adverts to the existence of interests such as options, or convertible notes, which may give an entitlement to a future allotment of shares, it operates primarily in relation to acquisition of shares. A key provision is s 615, which prohibits the acquisition of shares in a company by a person, where such acquisition would result in entitlement to more than a certain percentage of the voting shares in the company, otherwise than in accordance with the scheme of the Chapter. The way in which the Chapter regulates company takeovers need not be examined in detail. What is of particular significance is the way in which the Law deals with dissenting shareholders where an offeror has become entitled to not less than 90 per cent of the shares the subject of the bid.

28 The takeover offeror is given rights of compulsory acquisition by s 701, which provides, so far as relevant:

> "701 (2) Where:
>
> (a) takeover offers have been made under a full takeover scheme, or a takeover announcement has been made, in respect of a class of shares;
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> (b) during the takeover period the number of shares in that class to which the offeror is entitled has become not less than 90% of the shares in that class (notwithstanding that that number of shares may subsequently become less than that

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17 Corporations Bill 1988, Explanatory Memorandum, par 2243.

percentage as a result of the issue of further shares in that class); and

(c) if the shares subject to acquisition constitute less than 90% of the shares in that class:

(i) three-quarters of the offerees have disposed of to the offeror (whether under the takeover scheme or by acceptance of offers made by the takeover announcement, as the case may be, or otherwise) the shares subject to acquisition that were held by them; or

(ii) at least three-quarters of the persons who were registered as the holders of shares in that class immediately before the day on which the Part A statement was served on the target company or the takeover announcement was made are not so registered at the end of one month after the end of the offer period;

the offeror may, before the end of 2 months after the end of the offer period, give notice, as prescribed, to a dissenting offeree to the effect that the offeror desires to acquire the outstanding shares held by the dissenting offeree.

…

(5) Where a notice is given under subsection (2), the offeror is entitled and bound, subject to this section, to acquire the shares to which the notice relates on the terms that were applicable in relation to the acquisition of shares under the takeover scheme or pursuant to the takeover announcement immediately before the end of the offer period.

(6) Subsection (5) does not apply in relation to a dissenting offeree where, on an application made by the dissenting offeree:

(a) before the end of one month after the day on which the notice was given under subsection (2); or

(b) before the end of 14 days after the day on which the dissenting offeree was given a statement under subsection (9);

whichever is the later, the Court orders that subsection (5) is not to apply in relation to the dissenting offeree."

29 Corresponding rights are given to remaining shareholders and holders of options and notes by s 703, which provides, so far as relevant:

"703 (1) Where:

(a) a Part A statement has been served, or a takeover announcement has been made, in respect of a class of shares in a company; and

(b) during the takeover period the number of shares in that class to which the offeror is entitled becomes not less than 90% of the shares in that class (notwithstanding that that number of shares may subsequently become less than that percentage as a result of the issue of further shares in that class);

the offeror shall, before the end of one month after the end of the offer period, give notice, as prescribed, to the holders of remaining shares in that class who, when the notice is given, had not been given notice under subsection 701(2) stating that the offeror became entitled to shares as mentioned in paragraph (b) and containing such other information (if any) as is prescribed.

(2) A holder of remaining shares referred to in subsection (1) may, before the end of 3 months after the day on which notice to that holder was given under that subsection, require the offeror to acquire shares in the class concerned of which that holder is the holder and where, in the case of a takeover offer, alternative terms were offered in respect of shares in that class to which the takeover offer related, elect which of those terms that holder will accept.

(3) Where a shareholder gives notice under subsection (2) with respect to shares, the offeror is entitled and bound to acquire those shares:

(a) if a Part A statement was served – on the terms that were applicable in relation to the acquisition of shares under the takeover scheme immediately before the end of the offer period and, where alternative terms were applicable, on the

terms for which the shareholder has elected or, where the shareholder has not elected, on whichever of the terms the offeror determines; or

(b) if a takeover announcement was made – on the terms that were applicable in relation to the acquisition of shares pursuant to the takeover announcement immediately before the end of the offer period;

or on such other terms as are agreed or as the Court, on the application of the offeror or shareholder, thinks fit to order.

(4) Where:

(a) a Part A statement has been served, or a takeover announcement has been made, as mentioned in paragraph (1)(a); and

(b) during the takeover period the number of voting shares in the company to which the offeror is entitled becomes not less than 90% of the voting shares in the company;

the offeror shall, before the end of one month after the offer period, give, as prescribed, a notice to the holders of non-voting shares in the company and to the holders of renounceable options or convertible notes granted or issued by the company stating that the offeror became entitled to shares as mentioned in paragraph (b) and containing such other information (if any) as is prescribed.

(5) A notice given under subsection (4) shall not propose terms for the acquisition by the offeror of the shares, renounceable option or convertible note to which the notice relates unless the notice is accompanied by a copy of a report made by an expert (other than an associate of the offeror or of the company that issued the shares, granted the option or issued the note) setting out the particulars referred to in subsection (7), stating whether, in the expert's opinion, the terms proposed in the notice are fair and reasonable and giving the reasons for forming that opinion.

…

(8) Where a notice is given under subsection (4) to the holder of any non-voting shares, renounceable option or convertible note:

(a) the holder of the shares, option or note may, before the end of 3 months after the day on which the notice was given, require the offeror to acquire the shares, option or note; and

(b) if a holder of shares or of an option or note so gives notice with respect to the shares, option or note, the offeror is entitled and bound to acquire the shares, option or note on such terms as are agreed or as the Court, on the application of the offeror or holder, determines."

30 The respondent option holders point out that, although s 703 recognises, and addresses the position of, holders of notes and options, there is nothing in s 701 which empowers compulsory acquisition of such interests, or of shares resulting from an exercise, after the expiration of an offer period, of rights to acquire shares. In answer, the appellants acknowledge that is so, and say that this is why, in an appropriate case, and on appropriate terms, s 701 may need to be modified or varied.

31 Sections 728, 730 and 731 provide, so far as relevant, as follows:

"728 (1) The Commission may, on application by the person or persons concerned or by a person or persons included in the class or classes of persons concerned, by writing, exempt a specified person or persons, or a specified class or classes of persons, subject to such conditions (if any) as are specified in the exemption, from compliance, either generally or in a particular case or classes of cases, with this Chapter or a specified provision or provisions of this Chapter.

(2) The Commission shall cause a copy of the instrument by which an exemption was given under subsection (1) to be published in the *Gazette*.

…

730 (1) The Commission may on application by the person or persons concerned or by a person or persons included in the class or classes of persons concerned, declare, in writing, that this Chapter shall apply in relation to a specified person or

persons, or a specified class or classes of persons, either generally or in a particular case or classes of cases, as if a specified provision or provisions of this Chapter were omitted or were modified or varied in a specified manner, and, when such a declaration is made, this Chapter applies accordingly.

(2) The Commission shall cause a copy of an instrument by which a declaration was made under subsection (1) to be published in the *Gazette*.

731 In exercising any of its powers under section 728 or 730, the Commission shall take account of the desirability of ensuring that the acquisition of shares in companies takes place in an efficient, competitive and informed market and, without limiting the generality of the foregoing, shall have regard to the need to ensure:

(a) that the shareholders and directors of a company know the identity of any person who proposes to acquire a substantial interest in the company;

(b) that the shareholders and directors of a company have a reasonable time in which to consider any proposal under which a person would acquire a substantial interest in the company;

(c) that the shareholders and directors of a company are supplied with sufficient information to enable them to assess the merits of any proposal under which a person would acquire a substantial interest in the company; and

(d) that, as far as practicable, all shareholders of a company have reasonable and equal opportunities to participate in any benefits accruing to shareholders under any proposal under which a person would acquire a substantial interest in the company;

but nothing in this section requires the Commission to exercise any of its powers in a particular way in a particular case."

32 As was observed in *Sagasco Amadeus Pty Ltd v Magellan Petroleum Australia Ltd*[18], s 731 embodies what are commonly known as the Eggleston principles, propounded in par 16 of the Eggleston Report.

33 The issue in the present appeals is whether, even though s 701 does not give a power of compulsory acquisition of shares allotted, after an offer period, pursuant to the exercise of an option, s 730 can be used to modify or vary s 701 in such a manner as to confer such a power.

The meaning of s 730

34 In *Project Blue Sky Inc v Australian Broadcasting Authority*, after pointing out that the duty of a court is to give the words of a statutory provision the meaning that the legislature is taken to have intended them to have, the majority said[19]:

> "Ordinarily, that meaning (the legal meaning) will correspond with the grammatical meaning of the provision. But not always. The context of the words, the consequences of a literal or grammatical construction, the purpose of the statute or the canons of construction may require the words of a legislative provision to be read in a way that does not correspond with the literal or grammatical meaning."

35 It may be added that, if a party contends that a provision, by reason of such considerations, should not be given its literal meaning, then such a contention may lack force unless accompanied by some plausible formulation of an alternative legal meaning. Until the decision of the Full Court of the Federal Court in the present case, most judicial commentary on s 730 had emphasised the apparent width of its terms, and the difficulty of pointing to any basis upon which their operation could be confined.

36 Gobbo J, speaking of s 58 of CASA, said in *TNT Ltd v National Companies and Securities Commission*, with reference to a submission that variation of the

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18 (1993) 177 CLR 508 at 516.

19 (1998) 194 CLR 355 at 384 per McHugh, Gummow, Kirby and Hayne JJ.

takeover provisions in relation to "fundamental matters" was beyond the scope of a power of modification[20]:

> "Section 58 is in very wide terms and its language offers no support for the limitations suggested. …
>
> The major difficulty with the submission is that it would be virtually impossible to delineate what were said to be fundamental matters and what were properly matters for modification. It would be productive of much uncertainty as to the question of jurisdiction. Moreover, all of the matters relied upon are capable of being adequately considered and, if thought appropriate, recognised in the course of a proper exercise of discretion."

37 In *Otter Gold Mines Ltd v Australian Securities Commission*[21] Merkel J said:

> "The power of modification conferred by s 730 … is expressed in wide terms and in language that offers little support for any implied limitation on the scope of the power conferred under it."

38 It is true that in *ANZ Executors and Trustees Ltd v Humes Ltd*[22], Brooking J commented that it appeared to be the case that s 58 of CASA would not empower a modification of the Code so as to make it authorise a compulsory acquisition of convertible notes, and the same may, perhaps, be said of s 730. This, however, is in a statutory context which is dealing with acquisition of shares, and in which the focus of most of the operative provisions is shares. That may explain why, in the present case, the power was exercised, not directly in relation to the options, but in relation to shares resulting from the exercise of the options.

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20 (1986) 4 ACLC 624 at 627.

21 (1997) 25 ACSR 382.

22 [1990] VR 615 at 638.

39 The majority in the Full Court of the Federal Court concluded that the provisions of s 730 do not authorise the abrogation of the property rights of third parties[23].

40 This conclusion was said to be supported by a number of considerations: a presumption that legislation is not intended to interfere with vested proprietary interests; the absence of any provision enabling persons whose property rights might be affected by a declaration under s 730 to be heard on an application for a declaration; and a construction of s 730 that would confine any effect it might have to an effect upon the applicant for a declaration. To an extent those considerations are interrelated.

41 In argument in this Court, counsel for the respondent option holders sought to support the Full Court's conclusion by an additional argument based upon the relationship between ss 728 and 730. The example given in the Explanatory Memorandum concerning CASA, referred to above, was used in aid of this argument. It was said that s 730 served a relatively modest purpose, supplementary to s 728. It was intended to apply to cases where what was sought was an exemption from some provision of Ch 6, but where, in order to give full effect to the proposed exemption, it was necessary also to modify or vary some other provision of Ch 6.

42 The majority in the Full Court also found support for their conclusion in the principle of interpretation that "an express reference to one matter indicates that other matters are excluded"[24]. It has often been pointed out that the principle is not of universal application and the assistance to be gained from it varies widely[25]. It is of least assistance when a question arises concerning the meaning of a statutory power to modify or vary the legislation in which the absence of reference to a particular matter is relied upon. Whatever the precise scope of the

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23 *DB Management Pty Ltd v Australian Securities and Investment Commission* (1999) 162 ALR 91 at 103-104.

24 *DB Management Pty Ltd v Australian Securities and Investment Commission* (1999) 162 ALR 91 at 104.

25 See *Houssein v Under Secretary of Industrial Relations and Technology (NSW)* (1982) 148 CLR 88 at 94; *O'Sullivan v Farrer* (1989) 168 CLR 210 at 215; *Ainsworth v Criminal Justice Commission* (1992) 175 CLR 564 at 575.

power given by s 730, its existence assumes that there is something about the express provisions of Ch 6 that may require modification or variation.

43 As to the presumption that legislation is not intended to interfere with vested proprietary rights, the relevant provisions of the legislation in question have, as their primary concern, interference with vested proprietary rights. That is what compulsory acquisition is about. As the legislative history referred to above shows, the object of the legislation is to provide a regulatory scheme which enables a takeover offeror, who has achieved a prescribed level of acceptances, to compel people who have not accepted the offer to transfer shares, subject to appropriate safeguards to protect their interests. It is of little assistance, in endeavouring to work out the meaning of parts of that scheme, to invoke a general presumption against the very thing which the legislation sets out to achieve. Furthermore, for the reasons given in the preceding paragraph, it does not help to say that legislation enabling abrogation of property rights should be strictly confined according to its terms, when the legislation confers a power upon a regulatory authority (subject to procedures of review) to alter those terms.

44 The suggestion that persons whose property rights might be affected by a declaration under s 730 have no right to be heard is not well founded. In the present case, the respondent option holders made submissions to the Commission opposing the declaration sought, and were heard before the Tribunal. Part 9.4A of the Law, which provides for review by the Tribunal of a decision by the Commission, requires, in s 1317D, that a person whose interests are affected by a decision must be informed of that person's right to have the decision reviewed by the Tribunal. The requirements of procedural fairness are not displaced by the statute[26]. On the contrary, they are reinforced by the provisions of Pt 9.4A.

45 The language of s 730 does not support a construction which would confine an exercise of the power there given to one which affects only the person or persons making an application for a declaration. In most takeover situations, the rights of third parties will be potentially affected, even by what might be regarded as a relatively straightforward modification of Ch 6. To take an example referred to in argument, a declaration varying the time for the taking of some step by an offeror may ultimately affect the offeror's capacity compulsorily to acquire shares of third parties. A declaration under s 730 is one that Ch 6 "shall apply in relation to a specified person or persons, or a specified class or classes of persons" as if provisions of the Chapter were omitted, or modified, or

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26 *FAI Insurances Ltd v Winneke* (1982) 151 CLR 342 at 360.

varied. The new rights and liabilities created by such a declaration cannot be confined in their operation so as to affect no person other than the applicant for the declaration. It is difficult to understand how, in practice, the power could be limited so that its exercise did not affect, directly or indirectly, the rights of third parties. It may be added that an examination of the cases in which s 730, or its legislative predecessor, has been held to apply reveals that it has commonly been invoked, successfully, in circumstances where the rights of third parties were necessarily affected[27].

46 The legislature, by not including in s 701 a right of compulsory acquisition of options, or shares resulting from an exercise of options in circumstances of the kind presently in question, has not manifested an intention to exclude the creation of such a right from the operation of s 730. Rather, the effect of giving the words of s 730 a literal meaning is that, although there is no such right which may be invoked by an offeror without need for further justification, the Commission has a discretionary power to create such a right, to be exercised in the light of the Eggleston principles and any other relevant considerations, having regard to the individual circumstances of a particular case, and subject to the possibility of judicial review. That is a much more restricted right than the right conferred by s 701, but it is within the purview of the legislation.

47 There is no warrant for giving the words of s 730 a meaning other than their literal meaning. The wide discretionary power which they confer, which operates in the context of legislation regulating acquisition of property, and conferring, subject to certain safeguards, rights of compulsory acquisition, cannot be limited in the manner determined by the majority in the Full Court. Whitlam J and Beaumont J were correct in their view of the amplitude of the power.

Conclusion

48 In each case the appeal should be allowed with costs. The orders made by the Full Court of the Federal Court of Australia should be set aside and in place thereof it should be ordered that the appeal to that Court be dismissed with costs.

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27 eg *TNT Ltd v National Companies and Securities Commission* (1986) 4 ACLC 624; *Peninsula Gold Pty Ltd v Australian Securities Commission* (1996) 134 FLR 457; 21 ACSR 246; *Brierley Investments Ltd v Australian Securities Commission* (1997) 78 FCR 255; *Otter Gold Mines Ltd v Australian Securities Commission* (1997) 25 ACSR 382. See also *Elkington v Shell Australia Ltd* (1993) 32 NSWLR 11.