MEMO

To: Board of Directors

From: Company Secretary

Subject: **TAKEOVERS**

The takeover provisions set out in Chapter 6 of the Corporations Act are rather complex, but I have attempted a brief summary below.

The basic tenet – as enunciated in CA Section 602 – is to ensure control of a company does not pass or increase other than in a way that is fair to all other shareholders.

PROHIBITION

Basically, the Act [Sec 606] prohibits the acquisition by any entity/group – company, trust, individual, etc ("bidder") of a relevant interest in shares/securities in a company ("target") where it would:

- take the bidder's holding (voting power) over 20%; or
- increase the holding between 20% and 90%

if the target:

- is stock exchange listed; or
- if unlisted – has more than 50 shareholders (regardless of whether it is a Public or Pty Ltd company)

unless it makes a takeover bid.

The relevant interest threshold(s) could be breached in various ways – such as through purchase (from another holder) or allotment (of a new issue by the board). Alternative ways include conversion of non-voting preference shares into ordinary (voting) shares or increased voting rights on existing shares [Sec 606(6)].

A "relevant interest" is defined [Sec 608] as including shares held by the bidder plus those over which he has power to control in any way "… directly or indirectly … express or implied, formal or informal, exercisable alone or jointly …" or which are held by another entity in which his voting power is greater than 20%.

The 20% threshold level – in Sec 606 – is seen as where a shareholder may be able to control/ block the decision of a general meeting. The 90% level is seen as effectively having total control of a company.

EXCEPTIONS

There are, however, some exceptions [Sec 611] to which the above does not apply, including acquisitions:

- of no more than 3% each 6 months
- approved by the shareholders in general meeting
- resulting from rights not taken up by others under a pro rata issue
- from underwriting
- effectively caused by not accepting a buy-back
- with ASIC's consent.

TAKEOVER BID

If a bidder is to exceed the above limits and cannot take advantage of an exception then generally he is obliged to make a takeover bid – either for all other, or a proportional number of, shares.

The various processes available, conditions and requirements are set out in Chapter 6 of the CA. These usually include preparation and dissemination of bidder's and target's written statements which must also be lodged with and approved by ASIC.

Once a bidder controls 90% of the shares it may compulsorily acquire the balance.

OTHER MEANS TO GAIN CONTROL

Notwithstanding the specific provisions relating to takeovers, there are other ways that a shareholder can gain/increase control such as:

- transactions which involve the cancellation of shares [held by others] under a buy-back or other reduction in capital

- a scheme of arrangement approved by the court in compliance with Sec 411(17).