AUSTRALIAN SENATE

THE ROLE OF PARLIAMENT IN RELATION TO THE NATIONAL COMPANIES SCHEME

REPORT BY

SENATE STANDING COMMITTEE
ON CONSTITUTIONAL AND LEGAL AFFAIRS

THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

THE ROLE OF PARLIAMENT IN RELATION TO THE NATIONAL COMPANIES SCHEME

Report by

Senate Standing Committee on Constitutional and Legal Affairs

April 1987

Australian Government Publishing Service, Canberra 1987

ISBN 0 644 05117 5

Printed in Australia by Canberra Publishing and Printing Co., Fyshwick, A.C.T.

MEMBERS OF THE COMMITTEE

Senator Nick Bolkus (South Australia), Chairman from 19 March 1987
Senator Robert Hill (South Australia), Deputy-Chairman
Senator Richard Alston (Victoria)
Senator Barney Cooney (Victoria)
Senator Christopher Puplick (New South Wales)
Senator Margaret Reynolds (Queensland), appointed 25 February 1987

FORMER MEMBER

Senator Michael Tate (Tasmania)
(Chairman until 25 February 1987)

Secretary: S.J. Gibb
The Senate Parliament House
Canberra

TERMS OF REFERENCE

That the following matters be referred to the Standing Committee on Constitutional and Legal Affairs:

(a) the role of the Parliament in relation to the Ministerial Council for Companies and Securities and the National Companies and Securities Commission; and

(b) The role of the Parliament in relation to the operation and effectiveness of companies and securities legislation.

(Journals of the Senate No. 97, dated 17 April 1986, p. 916.)

RECOMMENDATIOM

The Committee recommends that the Commonwealth Parliament should enact comprehensive legislation covering the field currently regulated by the co-operative scheme. (paragraph 6.7)

TABLE OF CONTENTS

		page
	INTRODUCTION	1
	* Advertising of the inquiry	1
	* Public hearings	1
Chapter 1	**ORIGINS OF THE INQUIRY**	3
	* Background	3
	* Scope of reference	5
Chapter 2	**DEVELOPMENT AND CHARACTERISTICS OF THE CO-OPERATIVE SCHEME**	7
	* Regulation of companies and securities prior to the co-operative scheme	7
	* The formation of the co-operative scheme	11
	* Formal Agreement	11
	* The Ministerial Council	13
	* National Companies and Securities Commission	17
	* Companies and Securities Law Review Committee	18
	* The Accounting Standards Review Board	19
Chapter 3	**CRITICISM OF THE CO-OPERATIVE SCHEME**	21
	* Global market	21
	* Criticism of the co-operative scheme	23
	* Lack of responsibility/accountability	24
	* Amendment of scheme legislation	30
	* Nature of the agreement	33
	* Disallowance of regulations	36
	* 'A unique constitutional creature'	38
	* Administrative inefficiency	39
	* Other problems	44
Chapter 4	**REFORM OF THE CO-OPERATIVE SCHEME**	51
	* Parliamentary tabling of draft bills	52
	* Responsible federal minister	53
	* Increased consultation	54
	* Parliamentary committee	54
	* Reforms suggested by Victorian Government	58
	(i) 'Plain English' drafting	59
	(ii) Investigative and adjudicative branches	59

(iii) Self-funding 59
Attorney-General Department's split scheme 60

		page
Chapter 5	**COMPREHENSIVE COMMONWEALTH LEGISLATION**	65
Chapter 6	**CONCLUSION**	73
	* Recommendation	74
APENDIX I	Individuals and organisations who made written submissions to the Committee	75
APPENDIX II	Witnesses who appeared at public hearings	77
APPENDIX III	Ministerial Statement by the Hon. J.H. Kennan MLC, 16 October 1985	79
APPENDIX IV	Opinion by Sir Maurice Byers, QC	89

INTRODUCTION

Advertising of the inquiry

1. On 6 May 1986 the Committee wrote to the Premiers of all States and the Chief Minister of the Northern Territory Government, inviting them to make submissions to the inquiry. The Committee also advertised the reference in the major newspapers in all States, the Australian Capital Territory and the Northern Territory on 14 May 1986.

2. During the first week of May, the Committee wrote to relevant Federal Government Ministers, academic, business and professional bodies, and individuals and groups known to have an interest in the co-operative scheme, inviting submissions.

3. Thirty-seven written submissions were received. The list of those groups and individuals who made submissions is contained in Appendix I.

Public hearings

4. Six public hearings were held. Three in Melbourne, and one in each of Sydney, Adelaide and Canberra. The list of those who appeared as witnesses before the Committee is contained in Appendix II.

5. The Committee received submissions from the Governments of South Australia, Tasmania and Victoria, as well as a submission from the Western Australian Corporate Affairs Department which was expressly endorsed by the Western Australian Attorney-General, the Hon. J.M. Berinson, MLC.

6. A detailed submission was also received from the Commonwealth Attorney-General's Department.

7. The Committee was particularly pleased to have the Attorneys-General for South Australia and Victoria, the Hon. C.J. Sumner, MLC, and the Hon. J.H. Kennan, MLC, respectively, appear before it in relation to the submissions from their respective governments. The Committee welcomed the opportunity to discuss the operation of the scheme with these members of the Ministerial Council. In the Committee's view, the appearance of the Attorneys reflects an encouraging degree of co-operation amongst the various governments of Australia.

CHAPTER 1

ORIGINS OF THE INQUIRY

Background

1.1 The co-operative scheme which regulates the formation and internal management of companies and the securities industry was established by the Formal Agreement between the Federal Government and each of the State Governments which was signed on 22 December 1978. The Northern Territory became a party to the scheme on 28 January 1986.

1.2 The Agreement provides the basis for the Commonwealth legislation regulating companies, company takeovers and the futures and securities industries. The Commonwealth legislation is applied in the States and the Northern Territory by their respective Application of Laws Acts. The key elements of the scheme are the Ministerial Council for Companies and Securities (the Ministerial Council), the National Companies and Securities Commission, and the State and Territory Corporate Affairs Commissions.

1.3 The co-operative scheme has attracted considerable criticism, from practitioners, business groups and parliamentarians. In a 1985 submission to the Federal Government, the Confederation of Australian Industry asserted that the scheme had 'failed' in that it had not introduced commercial certainty, and had not brought about any significant reduction in business costs.[1]

1.4 The Confederation of Australian Industry also alleged that the scheme undermined ministerial responsibility, that the procedure for amendment retarded the legislative process, and resulted in 'common denominator' proposals. The Australian Financial Review noted at the time that these criticisms were symptomatic of a general dissatisfaction' with the scheme.[2]

1.5 Parliamentarians from a range of political parties have raised concerns about the scheme. Senator Durack, QC, commented that the Parliament was being asked to act as a 'rubber stamp' in the legislative process.[3] This concern has been echoed by Senator Hill[4] and Senator Messner,[5] to name but two.

1.6 In 1983, Senator Jack Evans commented that 'there is a very real hazard in the delegation of such powers to a ministerial committee which has no responsibility to any parliament in this country'.[6] In 1984, the then Attorney-General, Senator Gareth Evans, QC, described the co-operative scheme as being 'an almost wholly unsatisfactory way of responding to the very real needs of the Australian business community' .[7]

1.7 In the House of Representatives, the Attorney-General, Mr Lionel Bowen, noted that:

the Ministerial Council virtually puts us, as the national Parliament, in a position of legislating in accordance with its wishes.

He also referred to:

…the nonsense that has been thrust on us, in that we have to sit back and wait for six State Attorneys - I am not criticising them to come to some agreement, with all the delay, the excess administration and the burden that imposes ... [8]

Scope of reference

1.8 On 17 April 1986, the Senate resolved that the Committee should examine the role of Parliament in relation to the Ministerial Council and the National Companies and Securities Commission and in relation to the operation and effectiveness of companies and securities legislation.

1.9 In his statement accompanying the Terms of Reference the Deputy-Chairman of the Committee, Senator Hill, indicated the scope of the inquiry:

The object is not to review the efficiency or desirability of any particular provision enacted under the co-operative scheme. It is to examine the constitutionality in the broadest sense of that term of the scheme itself: to examine the structure of the scheme and to determine whether or not the operation of such a co-operative scheme is compatible with the notion of parliamentary control, ministerial responsibility and ministerial accountability to the Parliament. [9]

1.10 In the 'notes for the guidance of persons making submissions' the Committee invited persons making submissions to address a series questions, including:

* the consequences of the effective absence of any legislative review of proposals amending the scheme;

* the effect of the lack of parliamentary scrutiny;

* the possibility/desirability of the Federal Government enacting legislation to 'cover the field';

* the possibility/desirability of a split scheme, with the Federal Government assuming responsibility for one area and the State and Territory Governments assuming responsibility for the remainder.

Endnotes

1. Confederation of Australian Industry, 'Business Regulation - Areas for Reform', April 1985.

2. 'There could be a Joh in Bowen's woodpile', Australian Financial Review, 30 April 1985.

3. Senate, Hansard, 16 November 1983, at p. 2683.

4. Senate, Hansard, 5 June 1986, at p. 3508.

5. Senate, Hansard, 16 November 1983, at p. 2683.

6. ibid., at p. 26 87 .

7. Senate, Hansard, 3 April 1984, at p. 1113.

8. House of Representatives, Hansard, 28 February 1985, at pp. 385-386.

9. Senate, Hansard, 17 April 1986, at p. 1848.

CHAPTER 2

DEVELOPMENT AND CHARACTERISTICS OF THE CO-OPERATIVE SCHEME

Regulation of companies and securities prior to the co-operative scheme

2.1 In the late nineteenth century most of the Australian colonies passed legislation based on the English Companies Act 1862. After Federation, company law remained a State matter, and amendments to the English Act were generally reproduced in the various State Acts. The only exceptions to this rule occurred in Victoria, where the Companies Acts of 1928 and 1958 introduced amendments which preceded their respective equivalents in the British legislation.

2.2 The separate development of company law in the various States was unsatisfactory. Despite having their basis in the one source (English law), the various States' legislation differed significantly.

2.3 By the late 1950's the problems caused by this inconsistency were so serious that the administrators of the several Companies Acts, the Federal and State Attorneys-General and the various Registrars of Companies, sought a means of bringing the various Acts into uniformity.

2.4 The result of these efforts was the enactment in each State of the so-called Uniform Companies Act, which was based on the Victorian Companies Act 1958. These were enacted in 1961 and 1962 by the State Parliaments, and by the Commonweal the Parliament in respect of the Australian Capital Territory, the Northern Territory and Papua New Guinea.

2.5 The Uniform Companies Act did not bring uniformity. The States and the Commonwealth continued to amend their legislation independently of each other.

2.6 In 1967, the Standing Committee of Attorneys-General appointed a committee, chaired by Sir Richard Eggleston, to enquire into and report upon the efficacy of certain aspects of the uniform legislation.[1] There were several significant amendments made to the legislation as a result of the committee's reports and recommendations. In 1971 and 1972 a series of Acts, dealing with matters such as takeovers, insider trading2 and accounts and audits were enacted in all States except New South Wales. The takeovers legislation remained in force until 30 June 1981, when it was replaced by the Commonwealth Companies (Acquisition of Shares) Act 1980 and the State Acts which applied it, pursuant to the Formal Agreement.

2.7 In 1970, in response to widespread allegations that improper practices had developed during the mineral boom of the late 1960's, the Senate established the Select Committee on Securities and Exchange to inquire into and report upon the securities industry. The Committee was initially chaired by Senator Sir Magnus Cormack. Sir Magnus was elected President of the Senate on 17 August 1971. He was succeeded as Chairman by Senator Peter Rae.

2.8 The Senat Select Committee produced an interim report on 9 December 1971. According to the Chairman, Senator Peter Rae:

the Committee [was] ... of the view that there must be, f or the whole of Australia, a Commonwealth regulatory body which will have a broad responsibility to oversee the securities industry.[3]

2.9 In 1973, the newly elected Labor Government announced its intention to enact comprehensive companies legislation. According to the then Attorney-General, Senator Lionel Murphy, QC, the Government intended to wait for the Senate Select Committee's report before introducing the legislation, although the Government would not necessarily be bound by the recommendations.[4] It was evident from the then Attorney-General's announcement that the Commonwealth Government intended to override the State companies and securities legislation.[5]

2.10 The Select Committee expanded upon its 1971 views in the interim report which was tabled in 1974.[6] Its principal recommendation was for the establishment of a national commission to regulate securities and exchange, similar to the Securities and Exchange Commission in the United States. This national commission was intended to eliminate and prevent the types of abuses which the Committee had identified in the course of investigating the business practices surrounding the mineral boom.

2.11 The Corporations and Securities Industry Bill was introduced in 1975. It embodied the Senate Select Committee's principal recommendation for the establishment of a Securities and Exchange Commission.

2.12 The Corporations and Securities Industry Bill 1975 lapsed with the dismissal of the Labor Government in November 1975. However, it did provide the stimulus for a further attempt to achieve uniformity in the regulation of companies and the securities industry.

2.13 Concerned by the possibility that the Federal Government would enact companies and securities legislation without their endorsement, the non-Labor governments of New South Wales, Queensland and Victoria, concluded the Interstate Corporate Affairs Agreement on 18 February 1974.

2.14 This agreement established the Interstate Corporate Affairs Commission, constituted by representatives of each participating State. The Commission was intended to introduce uniformity into the administration of company law and to eliminate duplication of registration procedures by establishing reciprocal arrangements between the States.

2.15 Western Australia entered into the agreement in 1975, following a change of government in that State.

2.16 In accordance with the agreement, each of the participating States amended its version of the Uniform Companies Act in order to restore substantial uniformity to the legislation in the four jurisdictions.

2.17 In addition, a uniform Securities Industry Act was drafted. This incorporated some of the features of the Corporations and Securities Industry Bill and adopted some of the of the Senate Select Committee's recommendations. The Securities Industry Acts came into force in the four States on 1 March 1976.

2.18 Despite reducing the inconsistencies which had developed since the enactment of the uniform Companies Acts the establishment of the Interstate Corporate Affairs Commission was only a limited improvement. It was not a national arrangement.

2.19 Further, the agreement required that amendments to the legislation should be enacted in each participating State (a problem which has only been partially ameliorated by the existing arrangement). In addition, the administration of the legislation by independent Corporate Affairs Offices in each of the States resulted in different interpretations being adopted in different States.

2.20 Administrative inconsistencies remain a problem under the co-operative scheme. They are discussed at some length in chapter 3.

The formation of the co-operative scheme

2.21 In 1976, the Liberal and National Country Party Federal Government foreshadowed the introduction of a co-operative scheme. The Government announced that the new scheme would involve two steps. First, the Federal Government would enact comprehensive companies and securities legislation applying in the Australian Capital Territory, under the Territories power (Constitution, s. 122). Secondly, the States would adopt the Commonwealth legislation by enacting State legislation to give effect to the Commonwealth legislation within their respective jurisdictions.

2.22 In the next two years, the State and Federal Governments conducted detailed negotiations over this proposal. On 22 December 1978 the Federal Government and the six State Governments executed the Formal Agreement. The Agreement made provision for the Northern Territory and the external Territories to join the scheme.

2.23 The Northern Territory became a party to the scheme on 28 January 1986, and its implementing legislation came into effect on 1 July 1986.

Formal Agreement

2.24 The objectives of the co-operative scheme are set out in the recitals to the Formal Agreement. These objectives are:

* to provide and maintain uniform scheme legislation throughout Australia;

* to administer the legislation on a uniform basis;

* to ensure that the Commonwealth, the States and the Territories co-operate in deciding what matters the legislation should cover and how it should be administered;

* to provide legislation with minimal procedural requirements that is amenable to effective administration throughout Australia; and

* to provide a mechanism for proposing, considering and effecting amendments to the legislation as the need arises.

2.25 The Formal Agreement provides for the enactment of Federal legislation to be adopted by State Governments, as had been foreshadowed in the 1976 announcement.

2.26 Part X of the Agreement provides for the establishment and operation of the National Companies and Securities Commission, which is intended to discharge the role of a national regulatory commission, which had been recommended by the Senate Select Committee.

2.27 The Agreement also provides for the establishment and operation of a Ministerial Council, to consider and approve legislation, and to oversee the implementation and operation of the scheme and the activities and policies of the National Companies and Securities Commission.

2.28 In addition, the Agreement provides for the establishment of the Companies and Securities Law Review Committee. The Committee conducts research and provides advice upon the scheme legislation and proposals for reform.

2.29 The Formal Agreement preserves the existing State and Territory Corporate Affairs offices and their respective jurisdictions. However, these offices are required to comply with directions and policy guidelines issued by the National Companies and Securities Commission.

The Ministerial Council

2.30 The Formal Agreement provides:

19. For the purposes of the scheme there shall be a Council of Commonwealth and State Ministers to be known as the Ministerial Council for Companies and Securities.

20.(1) The Ministerial Council shall consist of a member representing each party for the time being to this agreement who, subject to sub-clause (2), shall be the Minister of State of that party who is for the time being responsible for administering the law relating to companies and the regulation of the securities industry.

2.31 Sub-clause 20 (2) provides for the appointment of substitutes for, or delegates of, the relevant Minister. All Governments are currently represented by their Attorneys-General.

2.32 The functions of the Ministerial Council are set out in sub-clause 21(1). They are:

(a) to consider and to keep under review the formulation and operation of the legislationand regulations provided for by this agreement; and

(b) to exercise general oversight and control over the implementation and operation of the scheme.

2.33 Sub-clause 22 (1) provides details about these functions. The Ministerial Council's functions include the examination and approval of all proposed legislation and regulations, Commonwealth, State or Territory, which affect the scheme. In addition, and within this framework, numerous additional powers and duties have been conferred upon the Ministerial Council under various statutes.

2.34 The Ministerial Council is intended to supervise and control the National Companies and Securities Commission (cl. 22(1)(e)-(f)), the Companies and Securities Law Review Committee (cl. 21(2)) and the Accounting Standards Review Board which is discussed in paragraphs 2.50 to 2.52 below.

2.35 The Ministerial Council is required to meet not less than four times each year (cl. 26). If all members agree, meetings may be held by electronic means, such as telephone or television link-up (cl. 26(4)). Clause 30 provides for absentee voting. Five members constitute a quorum (cl. 27).

2.36 Clause 28 of the Agreement provides for the appointment of a Chairman. The Chairman has no powers to represent the Council. However, the Chairman has, on occasions, assumed a high profile in dealing with the media.

2.37 On most matters, a resolution of the Council may be passed by a simple majority of those voting (cl. 29(l)). However, sub-clause 29(2) provides that:

A unanimous vote of all members of Council shall be required for the passage of a resolution which:

(a) nominates a person for appointment as a member of the National [Companies and Securities] Commission;

(b) approves amendments of the Commonwealth Acts which will change the number of members of the National Commission; or

(c) cancels the approval of any stock exchange in Australia.

2.38 The Ministerial Council is not required to present an annual report to any parliament and it does not do so. However, a practice has developed whereby the Chairman of the Ministerial Council periodically reports to the Council, summarising and commenting upon the Council's activities.

2.39 These ad hoc reports are not public documents. However, the substance of these reports is occasionally publicised in the form of a press release, or a ministerial statement, or in a response to a parliamentary question, etc. One example of this is Mr Kennan's Ministerial Statement to the Victorian Parliament on 16 October 1985. This statement is reproduced as Appendix III to this report.[7]

2.40 The National Companies and Securities Commission is required to present annual reports to the Commonwealth Parliament. These are a further source of information on some aspects of the operations of the Ministerial Council.

2.41 Two other bodies are supervised by the Ministerial Council: the Companies and Securities Law Review Committee and the Accounting Standards Review Board. Both of these bodies also present annual reports to the Commonwealth Parliament, although the Companies and Securities Law Review Committee is not required to do so. Its annual report is tabled at the request of the Federal Attorney-General, and in accordance with a resolution of the Ministerial Council.

2.42 Section 44A of the Commonwealth National Companies and Securities Commission Act 1979 provides:

For the purpose of the performance of the functions of the Ministerial Council the Commission shall provide to the Ministerial Council such staff and facilities as the Ministerial Council requires.

2.43 The National Companies and Securities Commission initially entered into an agreement with the New South Wales Public Service Board and New South Wales Corporate Affairs Commission under which the latter provided staff and facilities for the exclusive use of the Ministerial Council as its Secretariat. The New South Wales Corporate Affairs Commission did this upon the condition that it would be reimbursed by the National Companies and Securities Commission.

2.44 In his statement on 16 October 1985, Mr Kennan commented:

The complex nature of the business to be conducted by the Ministerial Council and the relatively high turnover of Ministers has meant that the Ministerial Council is singularly vulnerable to the Yes Minister process. Until recent changes, which I shall outline in more detail shortly, Ministers were presented with a huge amount of paper prior to every Ministerial Council meeting. Ministerial advisers met frequently between Ministerial Council meetings and often fought out their battles by the circulation of lengthy papers arguing differing viewpoints. Ministerial advisers would then meet the day before the Ministerial Council meeting. Ministers would be met not only with a huge amount of paper but also a list of decisions which had been made by the advisers in respect of every item on the agenda culminating in the recommendations to the Ministerial Council. The process was certainly such that it was difficult for Ministers unless they had taken a singularly close interest in developments in the ensuing weeks and months to get control of the agenda.[8]

Accordingly, at its meeting in July 1985, the Ministerial Council resolved to disband the Sydney Secretariat and decided that the National Companies and Securities Commission should discharge the functions of the Secretariat from Melbourne.

2.45 The cost of the Secretariat is initially borne by the National Companies and Securities Commission. Ultimately the costs are apportioned between the parties - one half being borne by the Commonwealth and the other half by the States and Northern Territory, distributed between them on a per capita basis (cl. 41 of Formal Agreement).

National Companies and Securities Commission

2.46 The National Companies and Securities Commission was established by the National Companies and Securities Commission Act 1979 (Cth) s. 5(1). The Act gives to the Ministerial Council a wide range of powers over the National Companies and Securities Commission. For instance:

* The National Companies and Securities Commission must comply with directions of the Council issued pursuant to the scheme (s.7);

* The National Companies and Securities Commission must report on its performance and any policy it is pursuing or proposing to pursue, as required by the Ministerial Council (s. 8);

* The Ministerial Council nominates persons for appointment to the National Companies and Securities Commission, determines appointees' salaries and allowances, approves leave of absence, and controls the advice which may be given to the Governor-General regarding dismissals of Commissioners (ss. 11, 13, 14, 15, 17, 18);

* The Ministerial Council must approve of the way in which the National Companies and Securities Commission invests surplus funds (s. 29(2)) and of any large or long-term contracts entered into by the National Companies and Securities Commission (s. 33);

* The National Companies and Securities Commission may only spend its money in ways approved by the Ministerial Council (s. 31); and

* The power of the Governor-General to make regulations under the Act 'shall be exercised only in accordance with advice that is consistent with resolutions of the Ministerial Council' (s. 53(4)).

2.47 The National Companies and Securities Commission is based in Melbourne. According to the 1985-86 Annual Report by the National Companies and Securities Commission, it has 3 full-time Commissioners and 5 part-time Commissioners, and has a staff of approximately 82. In 1985-86, it had an annual budget of approximately $5.4 million.[9]

Companies and Securities Law Review Committee

2.48 Sub-clause 21(2) of the Formal Agreement provides that there shall be a Companies and Securities Law Review Committee to assist the Ministerial Council in the performance of its functions. According to that sub-clause:

(a) [the Committee shall] ... carry out research into and advise on law reform in relation to the legislation and regulations referred to in that paragraph [see para. 2.32 above];

(b) the number of the members of [the Committee shall] ... be determined from time to time by the Ministerial Council;

(c) the members of [the Committee] are to be appointed and may be removed by the Ministerial Council and will be engaged on terms and conditions determined by the Ministerial Council.

2.49 The Companies and Securities Law Review Committee was formally constituted by the Ministerial Council in December 1983. All of its five members are part-time. It is based in Sydney. According to the 1985-86 Annual Report of the Companies and Securities Law Review Committee, it has two full-time staff members, and spent approximately $200 000 during that year. As was noted in paragraph 2.41 above, this Annual Report is tabled in the Federal Parliament in accordance with a resolution of the Ministerial Council.

The Accounting Standards Review Board

2.50 The Companies Act 1981 (Cth) was amended in 1983 to establish a system for the development of approved accounting standards. The system is administered by 'the body known as the Accounting Standards Review Board established by the Ministerial Council' (Companies Act 1981 (Cth) s. 266(1)).

2.51 The Board was appointed in January 1984 and endowed with extensive powers to conduct and sponsor research, conduct hearings, etc. in order to develop accounting standards. Its 7 members are all part-time. The Board has 2 full-time staff and, according to its 1985-86 Annual Report, had an annual budget of some $210 000.

2.52 The Board is empowered to set and promulgate 'accounting standards' which are then required to be used in producing accounts by bodies which are regulated by the Companies Act 1981 (ss. 266C, 269). Within 60 days after the Board has approved any given accounting standard, the Ministerial Council may disallow that standard (s. 266B(3)). Similarly, the Ministerial Council may disallow a decision by the Board to revoke an accounting standard (s. 266B(5)).

Endnotes

1. Company Law Advisory Committee.

2. According to the National Companies and Securities Commission issues paper by Dr Philip Anisman, 'Insider Trading Legislation For Australia: An Outline of the Issues and Alternatives' [1986. AGPS. Canberra], 'Although "insider trading" may conote all trading in securities of a company by its insiders, the phrase is more often intended to mean only "improper" trading by such persons, that is, purchasing or selling securities in order to make a profit or avoid a loss when in possession of confidential information that will affect their value once it became public' (page 1).

3. Senate, Hansard, 9 December 1971, at p. 2616.

4. Australian Financial Review, 21 August 1973.

5. The then Attorney-General's legislation appears to have been drafted in the light of the 'Comments from the American experience on proposed Australian Companies and Securities legislation' by Professor Louis Loss dated 13 July 1973, Parliamentary Paper 190/73.

6. Report of the Senate Select Committee on Securities and Exchange, on Australian Securities Markets and their Regulation, Parliamentary Paper 98/1974. See especially chapter 16, 'The Need for an Australian Securities Commission'.

7. Ministerial Statement by Victorian Attorney-General, the Hon. J.H. Kennan, MLC; Victorian Legislative Council, Debates, 16 October 1985, at p. 316. Reproduced as Appendix III to this report (pp. 79-88 below).

8. ibid., at p. 80 below.

9. This report was tabled in the New South Wales Legislative Assembly on Wednesday 1 April 1987 by the Chairman of the Ministerial Council, the Hon. T.W. Sheahan, MLA. The Committee understands that the report will be tabled in the Commonwealth Parliament some time after 28 April 1987.

CHAPTER 3

CRITICISM OF THE CO-OPERATIVE SCHEME

Global market

3.1 On 1 April 1987, the six State stock exchanges amalgamated to form the Australian Stock Exchange Ltd. According to the Chairman of the Australian Stock Exchange Ltd, Mr Ian Roach:

There is only one market for securities in Australia and it is part of the global market ... it is essential that we pool our resources as one united stock exchange ... [1]

3.2 Recognition of the development of the so-called 'global market' is not peculiar to the stock exchanges. Mr Henry Bosch, the Chairman of the National Companies and Securities Commission drew particular attention to this 'internationalisation' in the 1985-1986 Annual Report of the National Companies and Securities Commission. The 'Chairman's Review' contained the following passage:

1985/86 saw a number of striking developments. Perhaps the most remarkable were the steps towards the internationalisation of the financial community. Links between stock markets and futures markets were created and strengthened, Australian shares and financial instruments were traded in increasing volumes on foreign markets. Many financial institutions established or developed branches or c6nnexions overseas. Flows of information and funds have become almost instantaneous and financial markets are becoming increasingly interdependent.[2]

3.3 This view was also reflected in many of the responses from members of the Confederation of Australian Industry to the survey conducted by the Confederation in 1985. The letters were tabled by Mr Robert Gardini, who represented the Confederation of Australian Industry at the public hearings. One of the letters commented:

[I]t should be accepted that the regulation of companies whose businesses transcend state borders can only be satisfactorily achieved through Commonwealth legislation ... [3]

3.4 In an address to a Law Council of Australia symposium on international law and practice in Sydney in 1986, Mr Robert Herzstein, a former Under-Secretary of International Trade in the United States Commerce Department, remarked upon the trend towards the internationalisation of business activity. Mr Herzstein also discussed the special need to strengthen and harmonise the national laws which were designed to preserve the integrity of the market-place against distortions caused by bribery and political favouritism.[4]

3.5 Mr Ray Schoer, the Executive Director of the National Companies and Securities Commission also shares this concern.

According to an article in the February 1986 supplement to Euromoney entitled 'Birth of the Australian Stock Exchange', Mr Schoer 'is concerned about adapting to the growing internationalization of the securities markets'.[5]

3.6 Similarly, in an article in the Australian Financial Review published on 5 March 1987, Mr Leigh Masel, the inaugural chairman of the National Companies and Securities Commission (from 11 March 1980 to 10 March 1985) stated:

In a global market which has been the product of relaxation of exchange control in several countries, there is a greater realisation that regulation of the national securities markets must harmonise with markets in other

countries. Inevitably, this has led to collaboration between national governments concerning regulation of what is now recognised as an international market.

Whether agreements for mutual co-operation and harmonisation are entered into on a multilateral or bilateral basis, it means recourse to the external affairs power and treaty making which is a prerogative of the Commonwealth under the Constitution.[6]

3.7 This point was also noted by the Hon. T.W. Sheahan MLA, the Attorney-General of New South Wales and the current Chairman of the Ministerial Council. In a speech on 26 March 1987, he commented that 'globalisation' has already been reflected in the establishment of a national stock exchange. In Mr Sheahan's view, the 'world ha[s] passed by the present Australian system of corporate regulation'.[7]

Criticism of the co-operative scheme

3.8 There are essentially three bodies of criticism of the co-operative scheme. First, there is criticism of the way in which the scheme's collegiate decision-making structure disperses Ministers' and officials' responsibility and accountability to Parliament. A primary characteristic of the scheme is its diffusion of responsibility via the Ministerial Council to the various governments in Australia so that no single government accepts responsibility for any given decision.

3.9 The second body of criticism focuses upon the distribution of functions between the National Companies and Securities Commission and its State and Territory delegates and the resulting administrative duplication and general inefficiency.

3.10 The third body of criticism contains elements of the first two and addresses itself to the quality of the regulation produced under the scheme. Thus, for instance, the Chairman of the Ministerial Council suggested that the scheme has had a tendency to produce 'lowest common denominator decision-making.[8]

Lack of responsibility/accountability

3.11 The lack of responsibility/accountability criticism is represented by the following extracts from submissions:

* Under the Co-operative Scheme the National Companies and Securities Commission (NCSC) is not accountable to any one Minister for its actions but to the Ministerial Council as a whole and thus is -not responsible to the electorate through an identifiable individual Minister. It is responsible to a collegiate body of seven [now eight] Ministers who only meet quarterly and who have other Ministerial commitments pursuant to their high profile portfolios. Accordingly, the line of responsibility is somewhat diffused.[9]

* [T]he doctrine of Ministerial responsibility is surely attenuated or excluded by the Agreement. The Ministerial Council's decisions are corporate decisions for which no individual Minister can be held directly responsible.[10]

* We have the situation where no Minister can be charged with absolute responsibility with respect to the legislation.[11]

* It is foreign to our democratic system and the Westminster parliamentary structure which is the lynchpin of this democratic system, for important institutions (the Ministerial Council and the NCSC) not to be accountable to the people in some fashion, through accountability to a parliament.[12]

3.12 The problems which arise from the perspective of the Commonwealth Parliament are represented by the following extract from the submission of the Senate Standing Committee for the Scrutiny of Bills:

[T]he effect of the scheme is to diminish severely the ability of the Commonweal Parliament to perform its legislative functions. If it rejects legislation forming part of the national scheme which has previously been agreed to by the Ministerial Council then individual States may legislate in terms of the agreed Bill and uniformity will have broken down. If it amends legislation forming part of the national scheme and either the Commonweal Attorney-General declines to take the amendments back to the Ministerial Council or the Ministerial Council fails to agree to the amendments by the required majority then passage into law of the legislation as amended would give the States a right to withdraw from the national uniform scheme. Failure by the Parliament to pass the legislation without its proposed amendments would, once again, leave the individual States free to legislate in the terms agreed to by the Ministerial Council with a consequent breakdown in uniformity. It should perhaps also be noted that the Commonwealth Parliament has lost, under this scheme, the power to initiate changes to the legislation forming part of the scheme: in order to move it must carry the Ministerial Council (or at least a majority of that Council's members) with it or, once again, by legislating otherwise than in accordance with the wishes of the Ministerial Council, give the States a right to withdraw from the scheme.

The Committee commented in its Eighth Report of 1986 that the operation of the national uniform scheme places the Parliament in an invidious position. If it amends a piece of legislation forming part of the scheme or rejects such a piece of legislation it may bring the scheme to an end. If, on the other hand, it fails to amend or reject such legislation, however compelling the grounds for action, it may be said, in effect, to

have delegated its legislative power to the Ministerial Council without even retaining the equivalent of a power of disallowance. Indeed, to the extent that it is possible for parliamentary amendments to be taken back to the Ministerial Council for approval, it may be said that it is the Ministerial Council which has a power of veto over the legislative action of the Parliament.[13]

3.13 However, there were some suggestions that the National Companies and Securities Commission and the Ministerial Council are accountable to the various Australian parliaments. The South Australian Government's submission stated:

The Ministerial Council and the NCSC are not operating in an environment where they are not subject to criticism, public censure and debate in any of the Australian Parliaments. The National Companies and Securities Commission is required to account for its expenditure to the Commonwealth Parliament Accounts Committee and in that context has its affairs examined publicly.

The State Corporate Affairs Commissions (with the exception of Queensland) are required to account to their respective Parliamentary Accounts Committees. The Queensland Corporate Affairs Commission does have its estimates considered by Parliament whenever the Justice Department estimates are debated. The Queensland Corporate Affairs Commission is a sub-department of Justice. Each of the Corporate Affairs Commissions (with the exception of the Queensland Corporate Affairs Commission) is required to submit an annual report to its respective Parliament.[14]

3.14 Similarly, the Northern Territory Corporate Affairs Office's submission stated:

In the Northern Territory Corporate Affairs Office's case there is considerable accountability to Government. The Commissioner for Corporate Affairs, is like most of her fellow Commissioners required to submit an Annual Report to the Northern Territory Legislative Assembly and the

Corporate Affairs Office's subject to audit. The Ministerial Council and NCSC are continually subject to public scrutiny. in fact the focus is continually on them. Those affected by decisions of [the] Ministerial Council and the NCSC or its delegates do not hesitate to have their say, and make their views known. Sometimes criticism arises from the fact that the NCSC or a Corporate Affairs Office has done something against "their" interests.[15]

3.15 Some of the submissions attempted to counter the criticism that the scheme requires the Federal Parliament to 'rubber stamp' legislation. The Western Australian Corporate Affairs Department's submission stated:

Contrary to some recently published comments on this issue the Department is of the view that the Formal Agreement establishing the Co-operative Scheme does not restrict the powers of the Federal Parliament to debate, amend, or reject a Co-operative Scheme Bill.

Under Part XIV of the Agreement the Federal Government agrees to submit to the Parliament and take such steps as are appropriate to secure passage, of any Bill to amend the substantive Co-operative Scheme laws which has been approved by the Ministerial Council. The resultant position is in practice, very little different from other occasions where the government of the day is committed at a political level to introducing and securing passage of a particular Bill.[16]

3.16 The Committee accepts the point that Federal Government is legally free to amend or reject legislation. However, the political consequences of a decision to amend or reject legislation in the Federal Parliament may be that one or more of the States may decide to withdraw from the scheme and thus defeat its operation. This possibility is discussed in paragraphs 3.34-3.43 below.

3.17 Other submissions questioned the need for Parliamentary accountability. For instance, the Institute of Affiliate Accountants' submission asserted:

Closer Parliamentary scrutiny of the National Companies and Securities scheme is undesirable. Closer scrutiny could very well be viewed as a mechanism for slowing down the effective and efficient operation of the scheme. That is, it may work against the objectives of the scheme which, inter alia, include 'that it is capable of effective administration with the minimum procedural requirements and is so administered and that changes are proposed for consideration where appropriate.[17]

3.18 Similarly, the Australian Society of Accountants' submission suggested that parliamentary scrutiny would not necessarily improve technically deficient legislation.[18] Professor Baxt made the same point, but in more definite terms, stating:

It is my view that no amount of parliamentary scrutiny will eradicate some of the basic problems that we have with the legislative scheme now in operational

3.19 The Committee recognises that some people and organisations may not share its commitment to ministerial accountability and parliamentary review of legislation. However, it is the Committee's view that parliamentary review and ministerial accountability are fundamental to the Australian democratic system.

3.20 In this context, the Committee notes that the submission from the Victorian Government suggested that draft scheme legislation could be tabled in various parliaments.[20] According to the Victorian Government, the benefit of this consultation would offset any resulting delays.

3.21 Some of the submissions defended the scheme against the criticisms discussed in this chapter. Most of the defences suggested that the scheme 'performs adequately in the circumstances' or 'its defects are only a small price to pay for uniformity'. These views were reflected in the submissions from the National Standards Commission and the Institute of Directors.

3.22 Similarly, the submission from the Tasmanian Government stated:

Participating in such a scheme of necessity will involve some cost to the ability of an individual Parliament to scrutinise and control the operation of the scheme. In the view of the Tasmanian Government, this is simply the price of participating in a Federal system. It may be that this represents a cost, but the Tasmanian Government considers that there are countervailing benefits in continued existence of an effective Federal system. It takes the view that Parliament will always retain ultimate control because it retains the ability to decide whether or not to participate in such a scheme. In the case of the Companies and Securities Scheme, any Parliament could, if it felt the situation had reached that stage, terminate its participation in the formal agreement.

Further, the Tasmanian Government believes that criticism of the perceived structural weakness of the scheme fails to adequately recognise the status of the body which controls the scheme. The Ministerial Council is representative of all Australian Governments, and as such incorporates Ministers with a broad range of political views. It is not as if any Parliament, either Commonwealth or State, is delegating authority to an organisation which lacks expertise or a balanced view in relation to the subject matter of the delegation.

In summary, the Tasmanian Government believes that the ultimate sanction of withdrawal from the formal agreement represents sufficient Parliamentary Control of the operation of the scheme.[21]

Amendment of scheme legislation

3.23 There is disagreement as to what would be the effect if the Commonwealth Parliament were to amend scheme legislation unilaterally. The Senate Standing Committee for the Scrutiny of Bills stated:

The Committee understands that it is the view of the Attorney-General's Department that, once a Bill has been agreed to by the Ministerial Council, acceptance by the Commonwealth Government of an amendment to that Bill without going back to the Ministerial Council to seek approval of the amendment would amount to a breach of the formal Agreement entitling the States to withdraw from the scheme.[22]

3.24 The Formal Agreement does not expressly deal with the possibility that the Commonwealth Parliament may amend legislation which has been submitted in accordance with clause 46 of the Formal Agreement. Strictly speaking, the Commonwealth Government satisfies its obligations by submitting amending legislation to the Commonwealth Parliament in the form approved by the Ministerial Council and taking 'such steps as are appropriate to secure the passage of the Bill'.[23] As is discussed below in paragraph 3.32, the Agreement contemplates only the failure of the Commonwealth Parliament to pass a Bill.

3.25 The Attorney-General's Department's submission noted that the Formal Agreement does not expressly prohibit the Commonwealth Government from accepting amendments moved on the floor of the Parliament. However, the submission commented that '... it could not do so consistently with the spirit of the Agreement.' [24]

3.26 When pressed on this point during the public hearings, Mr Peter Levy of the Attorney-General's Department said:

I think that our view would probably be that the legislation [as amended on the floor of the Parliament] would apply in the State.

There is a possibility that it would be open to a State to make a translator regulation which would provide that the Commonwealth amendment would not apply in the State.[25]

3.27 In his evidence to the Committee, the Western Australian Commissioner for Corporate Affairs, Mr A.D. Smith, took a similar view. It was his opinion that legislation passed by the Commonwealth Parliament automatically applied in the States and Territories by virtue of its adoption, pursuant to the relevant State or Territory Companies (Application of Laws) Act. As to the options then available to the States and Territories, Mr Smith said:

It would then be up to the States themselves to enact separate legislation if they so wished.[26]

3.28 Mr Masel took a different view. In his view, the validity of legislation rests upon the prior consent of the Ministerial Council. In other words, if the Commonwealth Parliament amended any scheme legislation, the amendment would not apply in the States and Territories automatically because it would lack the consent of the Ministerial Council which, in Mr Masells view, is necessary to satisfy the applications of Laws Acts.

3.29 In his evidence Mr Masel stated:

I would take the view that clearly it is in breach of the agreement. The agreement is quite explicit that the State could bring the agreement to an end simply by giving notice

of withdrawal, but I think it is implicit that the amendments, in order to have an application in a State, need to have the consent of the Ministerial Council.[27]

3.30 Part IV of the Formal Agreement provides for the enactment of the legislation establishing the co-operative scheme. Under sub-clause 8(a) of the Agreement, the Commonwealth Government is required to 'submit to the Commonwealth Parliament legislation which has been unanimously approved by the Ministerial Council to form the basis of the scheme and take such steps as are appropriate to secure the passage of the legislation…'. Clause 9 imposes upon the States and Northern Territory a corresponding obligation to 'take such steps as are appropriate to secure the passage of legislation which has been unanimously approved by the Ministerial Council'.

3.31 These clauses apply only to so-called 'initial' legislation, that is, legislation establishing the scheme. Clause 15A, inserted by the Third Amending Agreement signed on 16 October 1986, imposes similar obligations (mutatis mutandis) in respect of the initial legislation regulating the futures industry. The Futures Industry Code was enacted in 1986.[28]

3.32 Amending legislation is dealt with separately, in clauses 44-47 of the Formal Agreement. The clauses are framed in terms of legislation 'approved by the Ministerial Council' and the obligation on the Commonwealth is to take 'such steps as are appropriate to secure the passage of the Bill'.[29] Sub-clause 44(c) provides:

If a Bill has not been passed by the Commonwealth Parliament within six months from the date on which it was approved by the Ministerial Council, any State may submit to its Parliament and secure the passage of separate legislation which amends the State Acts of that State in such a manner as to give effect to the amendment which that Bill would have made to the Commonwealth Acts.

3.33 Clause 46 further provides: The Commonwealth will not:

(a) submit to the Commonwealth Parliament any Bill to amend the Commonwealth Acts; or

(b) cause to be made any regulation which amends the regulations made under the Commonwealth Acts,

unless the amendment which will be made by the Bill or by the regulations, as the case may be, has been approved by the Ministerial Council.

Nature of the agreement

3.34 The Formal Agreement is not an ordinary contract. Even if it were, contractual remedies would be irrelevant where the Commonwealth Parliament passed legislation in a form different from that agreed to by the Ministerial Council. Inter-governmental agreements (such as the Formal Agreement) are political agreements rather than legal agreements and, as a result, are not legally enforceable.

3.35 The High Court has treated such arrangements as being largely political in nature. The High Court has therefore been reluctant to treat these arrangements as creating rights and duties which are enforceable by the courts.30 In the Railway Standardization case, the then Chief Justice, Sir Owen Dixon, noted that:

The agreement now in question certainly contains provisions which no court could undertake specifically to enforce, that is by detailed specific relief, yet in general terms what each government undertakes to do is defined or described with sufficient clearness, and, in the case of some provisions, on fulfilment of the work undertaken on one side there can be little

doubt that the financial responsibilities on the other side would be considered legal obligations capable of enforcement by any judicial remedy available in the case of a government liability. Enough has been said to show that in the first place, to generalize about the operation of the agreement in question must be unsafe and misleading and that in the second place, it could only be in respect of some definite obligation the breach of which is unmistakably identified that a court can pronounce a judicial decree in a case such as this. It is only in this way that the necessary distinction can be maintained between, on the one hand, the exercise of the jurisdiction reposed in the Court, and on the other hand, an extension of the Court's true function into a domain that does not belong to it, namely, the consideration of undertakings and obligations depending entirely on political sanctions.[31]

3.36 In an article entitled 'From Co-operative to Coercive Federalism and Back', Dr. Ross Cranston argued that there are two

…good policy reasons for supporting the high Court's view that such arrangements are not necessarily the subject of adjudication

... the Australian government must retain control over its public expenditure. The viability of a particular project may change, the overall economic situation may demand a reduction in government expenditure, and a change in government may produce a reversal of policy. Perhaps an even more important reason why the High Court should not regard intergovernmental agreements as enforceable is that it is desirable that it should abstain from interfering in any disputes if there is a good chance the matter can be settled in the political arena even though this may take some time.[32]

3.37 If inter-governmental agreements, such as the Formal Agreement, are not legally enforceable, then the Commonwealth Parliament is not <u>legally</u> precluded from amending or rejecting scheme legislation. In any event, the Commonwealth Parliament is not a party to the Agreement.

3.38 Mr Cornell, one of the representatives of the Commercial Law Committee of the Law Institute of Victoria at the public hearings, developed this argument when he said:

One of the things that has always intrigued me is the Senate's reluctance to reject this legislation if it finds something in it that is objectionable. The feeling seems to be, from talking to members of parliament: 'Because of this Commonwealth-State agreement we are forced to pass this Bill, because if we do not pass it we send the whole thing back to the drawing-board'.[33]

3.39 Senator Gareth Evans, QC, also made a statement to this effect in 1983, during debate on the Companies and Securities Legislation (Miscellaneous Amendments) Bill 1983. He said:

You cannot amend this legislation without being in breach of the agreement. That is the whole problem with this legislation.[34]

3.40 The Commonwealth Parliament is not a party to the scheme. Consequently, even if the scheme were legally binding, it would impose no legal obligations upon the Commonwealth Parliament, as distinct from the Commonwealth Government.

3.41 For the reasons discussed in paragraphs 3.34 - 3.37 above, the Committee is of the view that Senator Evans' 'cannot' must refer to political impediments not legal ones.

3.42 It is not material to consider in contractual terms the consequences of the Parliament's rejection or amendment of scheme legislation. The Formal Agreement is between the Commonwealth Government and the State and Territory governments. It does not bind the Commonwealth Parliament. To the extent that the Senate 'cannot' amend legislation, this is because the political consequences of rejection or amendment may be perceived by Senators as precluding the Senate from so doing.

3.43 This is not to say that these agreements are exclusively dependent upon the goodwill of the governments party to them. Inter-governmental agreements are analogous to international treaties and to constitutional conventions establishing constitutional rules which are observed in practice although they lack the force of law.

Disallowance of regulations

3.44 There is some parliamentary confusion as to the obligations imposed by the scheme. This was evident in the 18 February 1987 debate in the House of Representatives on the motion moved by the Shadow Attorney-General, Mr John Spender, QC, for the disallowance of certain amendments to the Companies Regulations.

3.45 In opposing the motion, the Attorney-General, Mr Bowen, suggested that Mr Spender was 'not entitled' to move for disallowance because of sub-clause 45(2) of the Formal Agreement.[35] Sub-clause 45(2) provides:

In the event that any draft regulation to amend the Commonwealth regulations to give effect to such a proposal is approved by the Ministerial Council, the Commonwealth will submit the draft regulation to the Executive Council for making by the Governor-General and will take such steps as are appropriate to secure the making of that amending regulation.

3.46 There is nothing in the Formal Agreement which prevents a Member or Senator from moving for the disallowance of regulations. Indeed, disallowance is contemplated in sub-clause 45(3), which provides:

If upon the expiration of six months from the date on which any such amending regulation was approved by the Ministerial Council the

amending regulation has not been made or, having been made, is subject to disallowance or has ceased to be in force by disallowance or f or any other reason, any State may cause a regulation to be made which amends the regulations made under the State Act of the State in accordance with the amending regulation that was approved by the Ministerial Council.

3.47 The disallowance of regulations by the Commonwealth Parliament does not give the States and the Northern Territory an immediate right to withdraw from the Formal Agreement. Sub-clause 51(3) confers an immediate right to withdraw only where the Commonwealth Government breaches clause 46.

3.48 The Committee notes that, under sub-clause 51(1), the parties to the Agreement are each entitled to withdraw from the Agreement after giving 'notice in writing to the Ministerial Council'. However, under sub-clause 51(2), the notice period is 'not less than one year'.

3.49 Sub-clause 45(3) expressly contemplates the possibility that regulations may be disallowed. It provides that where an amending regulation which has been 'approved by the Ministerial Council... has not been made or, having been made, is subject to disallowance or has ceased to be in force by disallowance or for any other reason' the States and the Northern Territory may choose to make their own amending regulations 'in accordance with the amending regulation that was approved by the Ministerial Council'.

3.50 In the course of the argument on the motion of disallowance, Mr Spender asserted:

This Parliament remains seized of its own powers and it can disallow anything that it wants to.[36]

In response to the statement by Mr Bowen that:

[o]nce a decision is made [by the Ministerial Council] , we are duty bound to abide by it and duty bound to introduce it here ...[37]

Mr Spender added:

But not duty bound to pass it and not duty bound to oppose disallowance.[38]

3.51 The Committee considers that this interpretation is correct. The sanctions which inhibit the amendment or disallowance of scheme legislation by the Parliament to which Mr Bowen and Senator Evans referred are political, not legal.

'A unique constitutional creature'

3.52 In a statement to the Victorian Legislative Council in 1985, the Victorian Attorney-General, the Hon. J.H. Kennan, MLC, described the co-operative companies and securities scheme as la unique constitutional creature' .[39] His successor as Chairman of the Ministerial Council, the Hon. Mr T.W. Sheahan, has taken a negative view of the scheme. He described it as 'hybrid institution'[40] which 'imposes severe limitations on developing of necessary policies'.[41]

3.53 According to Dr. Cheryl Saunders, the constitutional peculiarities of inter-governmental co-operative schemes, such as the companies scheme, originate, 'largely because they involve structures which were not envisaged when the Constitution was drafted'.[42] This may account for many of the differing views on the obligations imposed by the Formal Agreement.

3.54 Dr. Saunders has suggested that inter-governmental co-operative schemes have developed in a manner which pays little regard to the principles of responsible and parliamentary government.[43] In an article discussing the co-operative companies scheme, Dr. Saunders commented:

[T]he appearance of responsible government is a superficial one. No real degree of responsibility to any single parliament can exist where the decision-making body represents seven [now eight] governments. For example, in view of the requirement of a simple majority for most resolutions passed by the Ministerial Council, it is possible for an individual Minister to be answerable to his parliament for a decision to which he is in fact opposed.[44]

3.55 The Formal Agreement is 'political' in the sense that it is an agreement between various political entities. However, it fails to accommodate some of the concepts which are central to the Australian political system - such as responsible government.

3.56 The Committee noted above that the agreement is not an ordinary legal contract. The Committee considers that it is unwise to attempt to adapt legal concepts such as 'breach' and to apply them to the Formal Agreement, or to attempt to interpret the effects of such 'breaches'. In the Committee's view, it is more realistic to focus upon the political nature of the Agreement.

Administrative inefficiency

3.57 There is criticism that the delegation of powers by the National Companies and Securities Commission has resulted in administrative inconsistencies and inefficiencies. The submission from the Confederation of Australian industry set out this criticism as follows:

One of the main reasons for the failure of the scheme is lack of uniform administration. The scheme is administered by eight [now nine] autonomous bureaucracies - the National Companies and Securities Commission (the NCSC) and the seven [now eight] Corporate Affairs Commissions. In order to develop centralised policy planning but decentralised execution, the NCSC delegated its functions and powers to the Corporate Affairs Commissions. The Deputy Chairman of the NCSC has stated the following weakness of such a delegation:

* the NCSC is not responsible for providing the resources of the Corporate Affairs Commissions

* the NCSC is not consulted on the resources which should be made available

* the NCSC is expressly constrained by the Formal Agreement, from giving any directions concerning facilities and services available to its Delegates

* no machinery exists to satisfy either the Ministerial Council for Companies and Securities or the Commission that resources are provided by individual States on a reasonably consistent and uniform basis, having regard to the extent of the Corporate Affairs Commissions' obligations

In these circumstances, the attainment of uniform administration has not been achieved. The State Corporate Affairs Commissions look to the Commission for their authority under the legislation, but they do not depend on the co-operative scheme, or the NCSC for their employment, appointment, resources, assessment, promotion, recognition, reward, sanction, censure or removal. [5]

3.58 The New South Wales Corporate Affairs Commission's submission drew the Committee's attention to the administrative duplication between the National Companies and Securities Commission and the Corporate Affairs Commissions. The Corporate

Affairs Commission suggested that the scheme could be reformed to 'lower the incidence of duplication between the NCSC and delegates and reduce the inevitable costly delays which result there from'.[46]

3.59 The New South Wales Corporate Affairs Commission also suggested that this administrative duplication and resulting delays had undermined the public confidence in the administration of some of the areas of law covered by the co-operative scheme.[47]

3.60 Professor Baxt also refered to 'frustrations and difficulties ... caused by differing interpretation of the law by officials from different states etc.'. However, Professor Baxt conceded that he had only 'second-hand' knowledge of these difficulties.[48]

3.61 The submission from the Business Council of Australia discussed the problem in some detail:

Much of the problem stems from the relationship between the National Companies and Securities Commission and its delegates i.e. Corporate Affairs Commissions. Frequent complaints by business of frustrations and costly delays with the system relate to inconsistent rulings by the NCSC and CAC's and inconsistency between jurisdictions.

These problems are highlighted by one Council member company's experience with the administration of the scheme.

* Inconsistent rulings given by the NCSC and CAC. For example, the NCSC may advise as to the contents required in a prospectus in certain circumstances, but this would later be contradicted by the CAC when the prospectus is lodged. The main problem is that the NCSC has no power to bind the CACIs. it is considered that the Scheme would operate much more effectively if the NCSC had the power to do this.

* Inconsistency between Jurisdictions. We have recently needed to licence representatives to sell Unit Trusts. The Sydney CAC required the company to submit a training scheme comprising 40 hours of training for their approval and this scheme was subjected to minute scrutiny and considerable delays in negotiation. The CAC Melbourne, on the other hand did not require experienced representatives to have any training in order to obtain a Dealer's Representative Licence. This difference resulted purely from different interpretations of sections in the Securities Industries Code. Another example is related to prospectus requirements. The CAC Canberra has frequently required the prospectus to contain details that the CAC Sydney has said were not required.

* The minute checking of prospectuses by the CAC's is a major cause of delay and frustration. This leads to the delay in having a prospectus approved running into months and always there seems to be a huge list of minute new requirements, even when the prospectus is an up-date of one lodged only a few months earlier.
It is common for this list of requisitions to be between 40 and 60, many of which are matters of grammatical usage only and similar trivia. It is believed that the CAC should have no role whatsoever in checking prospectuses. It would be better for the Act or Regulations to state the requirements for prospectuses clearly, require certification by a Solicitor and/or Accountant that these requirements have been complied with, contain strict provisions against misleading information (including omission of important information) and much larger fines for non compliance.
The emphasis could then move to enforcement instead of minute checking.[49]

3.62 In response to the Committee's request for specific examples of administrative inconsistencies, the Confederation of Australian Industry drew the Committee's attention to an article in the Victorian Law Institute Journal. That article referred to a letter from the Law Institute of Victoria to the Victorian Attorney-General, indicating the Institute's concern over certain aspects of the scheme.[50]

3.63 The letter discussed the problems which had arisen out of 'differing interpretations' and provided the following illustration:

[A] differing interpretation s the requirement by the Victorian Corporate Affairs Commission that acceptors of a partial takeover offer must accept for all of their shares whereas the Tasmanian Corporate Affairs Commission will register takeover documents which permit offerees to accept for only part of their shares.

The article continued:

Also, in some circumstances, a Corporate Affairs Commission will recommend a variation or modification of the code only to find that this recommendation is over-ruled by the NCSC.[51]

3.64 In this context, the Committee also notes that there has been some criticism of the variations between the State stock exchange 'second boards'. Second boards are separate trading boards which, unlike the main boards, provide for share structures with differential voting control. Listing on the second boards is limited to industrial companies. Mining companies, foreign corporations and property trusts are specifically excluded.

3.65 A report by Damon Frith in the Australian Financial Review on 19 February 1987 referred to some of this criticism. According to the report:

Mr Ansett said, "North [Melbourne Football Club] will ga in a listing with the popular Hobart Stock Exchange because listing approval from the Tasmanian Corporate Affairs Commission could be obtained within a few weeks."

He then went on to blast other second board exchanges which "were taking months for companies seeking approval" and in particular the Melbourne second board which had delays of up to nine months.

3.66 The letter from the Law Institute of Victoria also contained some reference to general administrative inefficiency. According to the Law Institute Journal:

The Institute's letter to the Victorian Attorney-General said that delays occur in a number of areas of the Commission's operations ranging from getting advice about the availability of a company name to the approval of a prospectus.[52]

3.67 The consideration of the administrative problems does not fall within the Committee's terms of reference. They have been noted, however, because the Committee considers that they should be drawn to the attention of the several governments charged with administering the co-operative scheme.

Other problems

3.68 Mr C.E. Caldwell's submission drew attention to several problems arising out of the operation of the Accounting Standards Review Board. According to Mr Caldwell:

[S]ome of the standards proposed or promulgated through the ASRB venture outside the purely technical accounting area and into the territory of disclosure by companies.[53]

3.69 As was noted in paragraphs 2.50 - 2.52 above, the Accounting Standards Review Board may approve an accounting standard under section 266B of the Companies Code, a provision inserted in 1983. The Board is also empowered to revoke accounting standards. In turn, the Ministerial Council may disallow the Board's approval or revocation of accounting standards.

3.70 Approved accounting standards are notified in the Gazette and are, in effect, similar, to delegated legislation. However, the Commonwealth Parliament has no control over these accounting standards. The Parliament is unable to disallow these accounting standards. Only the Ministerial Council may disallow these standards.

This is the cause of some concern.

3.71 Mr Caldwell argued that:

... issues such as (for example) the extent of reporting about the commercial segments within a business, or its dealings with related parties, are non-technical, and the standards are simply prescriptive rather than technical in character.

The only appeal against such prescriptive 'standards' is therefore to the Ministerial Council, a body which is remote from the normal democratic process. This ... is inconsistent with our democratic tradition of control of the law by Parliament.[54]

3.72 Although the Accounting Standards Review Board is established by the statute, its members are appointed by the Ministerial Council. As a consequence, the Commonwealth Parliament has little control over either the Board or its rule-making.

3.73 In the November 1983 debates on the Companies and Securities Legislation Amendment Bill which inserted section 266B into the Companies Act, Senators Peter Durack and

Peter Rae, in particular, were critical of this provision, and moved their own amendments to subject accounting standards to Parliamentary disallowance.[55] These amendments were not accepted. The legislation was enacted in the form which had been approved by the Ministerial Council.

3.74 However, the then Attorney-General, Senator Gareth Evans made the following remarks about the suggestion that the Accounting Standards Review Board should present an annual report to the Commonwealth Parliament:

There is absolutely no reason in the world why the Accounting Standards Review Board report should not be tabled through the proper processes in all the parliaments of the competing governments. There is no reason why there should not be a statutory obligation for them to do so, but not a statutory obligation cast in this particular way and not one that obliges me to accept it on the run, although it is something, I am sure, there will be no difficulty at all about the Ministerial Council accepting. There will be no difficulty at all about an appropriate amendment coming forward before the first annual report is due at the end of 1984. ... I undertake, quite explicitly, to ensure that there are appropriate provisions in the legislation .[56]

3.75 As a result of a 1985 amendment to the Companies act, these annual reports are now tabled in both Houses of Parliament, and are submitted to the relevant State and Territory Ministers for tabling in their respective parliaments.[57]

3.76 The Committee notes that this amendment was inserted in response to the concerns voiced by the Commonwealth Parliament. This may be an indication of the responsiveness of the scheme to parliamentary criticism.

3.77 The Committee is conscious of the criticisms which have been raised by the Queensland Parliament's Subordinate Legislation Committee in correspondence with the Senate Standing Committee on Regulations and Ordinances. These criticisms related to the amendment by regulation of the companies legislation applying in the State. The Queensland Parliamentary Committee has consistently urged the Ministerial Council to remove these so-called 'Henry clauses' from the legislation.

3.78 In 1982, the Ministerial Council endorsed the comments which had been made in support of the offending provisions by the then Attorney-General of Western Australia, the Hon. I.G. Medcalf, QC, MLC:

This unusual method was adopted deliberately as being necessary to ensure the continuous application of uniform companies and securities legislation throughout Australia, once the application Bills had taken account of the preexisting diversity in detail of ancillary State laws'.[58]

3.79 The Committee received a number of other criticisms of the scheme. These included suggestions that the drafting of the legislation was too complex, that there was insufficient time given for members of the public to comment upon the legislation and that the scheme involved the production of too much legislation too quickly.

3.80 These matters are beyond the scope of the Committee's reference and are not dealt with in this report. They are noted here for the same reason as were the criticisms of the administrative inconsistencies and inefficiencies: so that they might be drawn to the attention of the several governments party to the scheme.

Endnotes

1. Australian Financial Review, 2 April 1987, at p. 21: 'Our very own Little Big Bang as Aust Stock Exchange tiptoes in' by Terence Maher.

2. 'Chairman's Review', 1985-1986 Annual Report by the National Companies and Securities Commission, at p. 6.

3. Letter dated 5 June 1985, at p. 1. None of the letters identified their authors.

4. 'Global economy seen as having major impact on business law' (1986) 21(8) Australian Law News 34.

5. (February 1986) Special Sponsored Supplement to Euromoney 115, at p. 122.

6. Australian Financial Review, 5 March 1987, at p. 15: 'Accountability is the issue for regulatory watchdogs'.

7. Address to Companies and Securities Luncheon by the Hon. T.W. Sheahan, MLA, 26 March 1987, at p. 3.

8. ibid., at p. 2.

9. Submission from the New South Wales Corporate Affairs Commission, at p. 5.

10. Submission from Professor R.P. Austin, at p. 9.

11. Submission from Professor R. Baxt, at p. 11; transcript of evidence, at p. 559.

12. Submission from Associate Professor H.L. Ffrench, at p.1.

13. Submission from Senate Standing Committee for the Scrutiny of Bills, at pp. 8-9.

14. Submission from the South Australian Government, at pp. 3-4; transcript of evidence at pp. 477-478.

15. Submission from the Northern Territory Corporate Affairs Office, at p. 6.

16. Submission from the Western Australia Corporate Affairs Department, at pp. 2-3; transcript of evidence, at pp. 260-261.

17. Submission from the Institute of Affiliate Accountants, at p.1.

18. Submission from the Australian Society of Accountants, at p. 4; transcript of evidence, at p. 163.

19. Supra n. 11.

20. Submission from the Victorian Government, at p. 2; transcript of evidence, at p. 606. See also discussion in paragraphs 4.4 to 4.7 below.

21. Submission from the Tasmanian Government, at pp. 4-5.

22. Submission from the Senate Standing Committee on the Scrutiny of Bills, at p. 5.

23. Formal Agreement, cl. 44(b).

24. Submission, from the Attorney-General's Department, at p. 6; transcript of evidence, at p. 418.

25. Transcript of evidence, at p. 463.

26. Transcript of evidence, at p. 269.

27. Transcript. of evidence, at p. 125.

28. Futures Industry Act 1986.

29. Sub-clause 44(b).

30. See Cranston, R. 'From Co-operative to Coercive Federalism and Back' (1979) 10 Federal Law Review 121, at p. 125.

31. South Australia v The Commonwealth (1962) 108 CLR 130, at p. 141.

32. Supra n. 30, at p. 125.

33. Transcript of evidence, at p. 584.

34. Senate, Hansard, 16 November 1983, at p. 2689.

35. House of Representatives, Hansard, 18 February 1987, at p. 221.

36. ibid., at p. 223.

37. ibid.

38. ibid.

39. Victoria, Legislative Council, Debates, 16 October 1985, at p. 316; see Appendix III, at p. 79 below.

40. Supra n. 7, at p. 3

41. ibid., at p. 1.

42. Saunders, C. A., 'The Federal System' in Galligan, B., (ed), Australian State Politics [1986. Longman Cheshire. Melbourne].

43. Saunders, C.A., 'The Co-operative Companies and Securities Scheme' in Information Paper 4, Intergovernmental Relations in Victoria Program (1982), at p. 40.

44. ibid., at p. 27.

45. Submission from Confederation of Australian Industry, at pp. 2-3; transcript of evidence, at pp. 376-377.

46. Supra n. 9, at p. 6.

47. ibid.

48. Transcript of evidence, at p. 552.

49. Submission from the Business Council of Australia, at pp. 1-2; transcript of evidence, at pp. 530-531.

50. 'Concern over Companies Legislation', (1985) 59 Law Institute Journal 458.

51. ibid.

52. ibid.

53. Submission from Mr C.E. Caldwell, at p. 1.

54. ibid., at p. 2.

55. Senate, Hansard, 16 November 1983, at pp. 2680-2705.

56. ibid., at pp. 2704-2075.

57. See section 266G of the Companies Act 1981.

58. Cited in 73rd Report Senate Standing Committee on Regulations and Ordinances (December 1982) at p. 6.

CHAPTER 4

REFORM OF THE CO-OPERATIVE SCHEME

4.1 There are a number of suggestions for the reform of the the co-operative scheme. Some submissions suggested retaining the co-operative scheme, and making some relatively minor adjustments by way of reform. Others suggested that the scheme could be modified by the substitution of a split scheme or replaced in entirety by Commonwealth legislation.

4.2 The rationale underlying the suggestions for the minor modification of the scheme ranged from general satisfaction with the operation of the scheme through to an acceptance of the shortcomings of the scheme on the basis that this was a small price to pay for uniformity.

4.3 Examples of these views are reproduced below:

* This co-operative scheme is infinitely better than the previous arrangements ... overall it has worked reasonably well.[1]

* Its critics should take into account that the Co-operative Scheme itself represented a herculean task ...[2]

* No neat and simple solution has been found in the USA or Canada and it seems unlikely that one will be found here. Improvement of one aspect of the present system is likely to increase difficulties elsewhere.[3]

* Participating in such a scheme of necessity will involve some cost to the ability of an individual parliament to scrutinise and control the operation of the scheme. In the view of the Tasmanian Government, this is simply the price of participating in a

Federal system. It may be that this represents a cost, but the Tasmanian Government considers that there are countervailing benefits in continued existence of an effective Federal system.[4]

Parliamentary tabling of draft bills

4.4 The Western Australian Corporate Affairs Department's submission suggested that in order to ensure that Members and Senators were better informed, draft bills should be tabled in the Commonwealth Parliament.5 The Victorian Government suggested that draft bills could be tabled in all the respective Parliaments and, where appropriate, referred to relevant parliamentary committees.[6]

4.5 The submission from the Institute of Directors in Australia proposed that draft legislation should be tabled and debated in both Houses of Parliament before being submitted to the Ministerial Council for formal approval.[7]

4.6 In a similar vein, the Institute of Chartered Accountants' submission suggested:

If the present scheme is to continue, it is desirable to provide for maximum and earliest practicable opportunity for exposure of draft legislation to Parliaments (presumably both Commonwealth and States) as well as to other interested parties before finalising legislation.[8]

4.7 However, these proposals would not allow the Commonwealth Parliament any veto power. The Institute of Directors commented:

[I]t would be expected that the Ministerial Council would be influenced by the debate. While this could, and probably would, slow down the passage of legislation, the

increased accountability would justify the processes and it should be possible to place a time limit on the opportunity for debate.[9]

Responsible federal minister

4.8 The submission from the Western Australian Corporate Affairs Department also suggested that the Commonwealth Attorney-General should be the permanent Chairman of the Ministerial Council and that the National Companies and Securities Commission should be directly responsible to the Chairman.[10]

4.9 Similarly, the submission from the Stock Exchange of Perth Limited suggested that:

[P]erhaps this [difficulty arising out of the lack of ultimate responsibility] could be overcome by appointing a Minister to be responsible to Parliament. A Federal Minister may be most appropriate and certainly continuity would be more readily achieved.[11]

4.10 In the view of the Stock Exchange of Perth Limited:

[T]he effectiveness of the NCSC may be enhanced by each of the Commissioners being given individual responsibility for the three main functions being securities matters, companies matters and administrative .[12]

4.11 If these proposals were to be implemented, the Commonwealth Parliament would be better informed about the operation of the scheme, and the Commonwealth Government might be able to exercise some control over the National Companies and Securities Commission. However, these proposals would not reduce the diffusion of ministerial responsibility which is inherent in the Ministerial Council.

Increased consultation

4.12 The Company Directors' Association submission suggested that:

The present scheme can be modified to provide better consultation, for better reception towards those who have views about the legislation, and for better attention to input once the final Bill has been drafted. It is at that stage consultation becomes critical.

It could be further improved by a mechanism which allowed personal appearances before the Ministerial Council - not in front of a departmental committee which will act as a filter - to ensure that Ministers understand the practicalities of their department' s proposals or alternatively what is being proposed to them from outside - especially if their departments oppose it.[13]

4.13 This modification is intended to give the Ministerial Council a greater 'grass roots' feel for the scheme and its effects upon the business community. However, it would do nothing to meet the Committee's primary concern about the restrictions upon the Commonwealth Parliament's ability to modify legislation introduced under the scheme.

Parliamentary committee

4.14 There is some suggestion that the scheme could be modified to incorporate a parliamentary committee.

4.15 It has been suggested that this might provide a method of dealing with the complexity of companies and securities legislation. In 1983, Senator Durack, QC said:

Consideration of this legislation will be an annual exercise. Based upon the experience that I have had in trying to cope with it, I believe it will be necessary for this Senate

either to set up a special committee to cope with it or to set up a standing committee of the Senate to do so, which I think would be a preferable course of action because it is very important that we do have a group of senators who will take an on-going interest in the matter and develop some expertise in dealing with the matters contained in this type of legislation ...

I believe that we should be giving some thought to the way in which we will handle this matter in the future and the best proposal I can make in order that we may sensibly handle this type of legislation - I am not moving any motions in this respect at the moment, but we should consider it - is to have a Senate committee, either one of the standing committees or a special standing committee such as the one we set up in relation to the scrutiny of Bills, deal with the legislation. Senators themselves do not have the opportunity to go through legislation with the fine tooth comb necessary to determine matters, so the Standing Committee for the Scrutiny of Bills looks at legislation and accepts responsibility for it. I think that in the future a committee of that kind should be set up for this purpose.[14]

4.16 This view was supported by Senator Peter Rae:

I wholeheartedly support Senator Durack's suggestion that there ought to be some committee association. That is something which I said when the legislation was first before the chamber some years ago and have continued to say. I see no reason for departing from that view. I should have thought that it is a view which is obvious. Unless we can have some committee involvement of the Parliament which can ensure that this very complex and technical area is continually considered by and within the parliamentary process, all that we shall have is legislation by Executive and bureaucracy.[15]

4.17 It was also supported by the then Attorney-General Senator Gareth Evans, QC:

I do not shrink from, the idea of a Senate committee dealing specifically with companies and securities matters on a regular and ongoing basis. If the membership of that committee can be found in this place - given competing demands on people's time in a small chamber such as this - and if interest and enthusiasm for it can be found, this may well constitute the vehicle through which, over time, we can evolve a bipartisan approach towards having national companies and securities law which would be more satisfactory than the arrangements that exist at the moment.[16]

4.18 The Member for Hawker, Mr Ralph Jacobi, MP, has campaigned vigorously for the establishment of a Parliamentary Joint Standing Committee on Business Affairs, to review legislation, the administrative practices of regulatory agencies, and the quality of regulations. The object of this review would be to ensure that unreasonable burdens are not imposed upon business. Mr Jacobi's proposal specifically contemplates reviewing scheme legislation.

4.19 A detailed Notice of Motion relating to the appointment and the activities of the proposed committee is contained in the House of Representatives Notice Paper.17 The committee would consist of five members of the House of Representatives and four Senators, to be nominated by the various parties as set out in clause 3 of the Notice of Motion.

4.20 In order to satisfy the criticisms about the complexity of companies and securities legislation, any parliamentary committee should include Members and/or Senators with expertise in this area. This would make the committee a parliamentary parallel of the Business Regulation Review Unit contained in the Department of Industry and Technology and Commerce.

4.21 The Committee notes that the establishment of a parliamentary committee was considered in the Attorney-General's Department's submission, and expressly rejected. The Department commented:

Ultimately, however, committee recommendations would come back to the floor of the Parliament where the Government would be in no different position than it is now: it would not be able to accept any amendments which the committee had proposed unless the Ministerial Council had agreed to them. It is an integral element of the co-operative scheme that the Commonwealth Government is obliged to seek to give effect to legislative proposals favoured by a majority of members of the Ministerial Council. In other words, the Commonwealth Government is bound to act in accordance with the legislative policies and views of the Council even when they conflict with its own policies or views or those of the Commonwealth Parliament.[18]

4.22 The submission argued that it would not be practical for the committee to refer its recommendations back to the Ministerial Council, because this would require the Council to initiate further consideration and consultation amongst the several Attorneys-General.

4.23 This is the argument which is invoked to defeat the suggestion that amendments to scheme legislation may be moved on the floor of either the House of Representatives or the Senate. The Northern Territory Corporate Affairs Office submitted that the amended legislation would have to be returned to the various governments for examination and consultation and that this would be unacceptable unless it were subject to stringent time constraints. [19]

4.24 The establishment of a Federal Parliamentary committee would ensure that the Federal Parliament was informed about the operations of the co-operative scheme. However, it would not render either the Ministerial Council or its subordinate bodies accountable to the Federal Parliament. Nor would this enable individual parliamentarians to introduce amendments to scheme legislation from the floor of the Parliament.

4.25 The Law Institute of Victoria's submission followed a similar theme. It suggested:

... that legislation should be open to free debate in Parliament. Perhaps an answer to this would be to allow debate in the Senate which is representative of all participants in the Scheme - upon Bills to amend the legislation, and upon the basis that the Senate be ceded power by participants, to pass reject or amend Bills on the Scheme as if it were the sole legislator.[20]

4.26 The implementation of this suggestion would ensure that scheme legislation was susceptible to amendment. However, it would not entitle the Federal Parliament to initiate legislation. Further, it is unlikely that the Law Institute's proposal would be acceptable to the State and Territory Governments.

4.27 The Committee also considers that the Law Institute's suggestion would do nothing to ensure that the administration of companies and securities law was accountable to any parliament.

Reforms suggested by Victorian Government

4.28 The submission from the Victorian Government supported the scheme. It also advanced some valuable suggestions for reform.

4.29 As was noted earlier, The Victorian Government suggested that draft scheme legislation could be tabled in the various parliaments, where it 'could be referred to the relevant Parliamentary Committees where this was considered appropriate'.[21] Comments could then be forwarded to the Ministerial Council for further consideration. The submission rebutted the criticism that this would slow down the legislative process, by emphasising the value of extensive consultation.

(i) 'Plain English' drafting

4.30 The submission advocated three basic reforms. First, the submission recommended the adoption of the principles of 'Plain English' drafting, to reduce the scheme legislation to a core of clear and simple principles which would be readily interpreted by the administrators and the public. The Committee was interested to read the attachment to the submission, which provided 'Plain English' versions of two of the more difficult provisions contained in the scheme legislation.

(ii) Investigative and adjudicative branches

4.31 Secondly, the submission proposed that the National Companies and Securities Commission should be divided into an administrative and investigative arm and a tribunal arm. The Victorian Government argued that decisions of the tribunal arm should be reviewable by the courts on questions of law only. Decisions by the administrative and investigative arm should not be reviewable.

(iii) Self-funding

4.32 Thirdly, the submission argued that the National Companies and Securities Commission should receive increased funding, and suggested that direct funding by the markets regulated or private sector secondments should be considered.

4.33 The Committee considers that these proposals address some of the practical problems arising out of the operation of the co-operative scheme. However, they are outside of the Committee's terms of reference which focus upon the role of the Parliament in relation to the co-operative scheme. Nonetheless, the Committee would commend these suggestions to the attention of the several governments party to the scheme in the event that the Committee's recommendation in chapter 6 is not accepted.

Attorney-General's Department's split scheme

4.34 The Attorney-General's Department proposed that the regulation of companies, takeovers and the securities and futures industries could be separated into two distinct areas of responsibility. This proposal would leave the regulation of companies under a co-operative scheme and give the Commonwealth sole responsibility for the regulation of takeovers and the securities and futures industries.

4.35 The Attorney-General's Department's proposal rests upon three assumptions. First, it assumes that the Commonwealth lacks the constitutional power to regulate the entire area covered by the scheme. Secondly, it assumes company law is a State concern whilst the regulation of takeovers and the securities and futures industries should be the Commonwealth's responsibility. Thirdly, it assumes that the two areas of responsibility are severable.

4.36 The Committee has received from the Attorney-General's Department an opinion provided by Sir Maurice Byers, QC, as to the 'constitutional power of the Commonwealth to enact national legislation dealing with companies, securities and the futures industry'.[22]

4.37 In the letter to the Committee which accompanied the opinion, Mr Levy of the Attorney-General's Department expressed the view that the opinion:

... would appear to provide the basis for the Commonwealth Parliament to legislate comprehensively in relation to company law and the regulation of the securities and futures industries.[23]

4.38 Mr Levy's assessment contrasts with the Departmental representatives' reticence and tentativeness before the Committee in public hearings.

4.39 Further, the Attorney-General's Department appears to have abandoned its first assumption about the Commonwealth Parliament's lack of constitutional power. The Department appears to have accepted Sir Maurice Byers' conclusion that the Commonwealth Parliament does possess the necessary constitutional power.[24]

4.40 The Committee does not accept that company law is a State concern. Its 'State' aspects are essentially historical. In the Committee's view, it is no longer possible to quarantine company law in this way. The Committee agrees with the assessment provided by Mr Halstead, a committee member and representative of the Business Council of Australia, at the Committee's public hearings:

[T]he whole general body of corporate law, as with securities law, has become one national market place.[25]

4.41 The Company Directors' Assocation made a similar point. Its submission contained the following passage:

One nightmare which could be contemplated is individual State legislation for the Companies Act and Commonwealth legislation for the Securities Industry Act. An alternative of Commonwealth legislation for

the Securities Act and leaving the Companies Scheme otherwise intact is of no utility and fragments the legislation. The Securities Industry Act is probably the least troublesome part of the package.[26]

4.42 The submission from Howard Belcher and Associates rejected the split scheme proposal. According to Howard Belcher and Associates, the different regulatory authorities would necessarily have overlapping responsibilities and this would inevitably result in administrative duplication.[27] Similarly, the Institute of Directors in Australia submission asserted:

There is too much interaction to allow such a separation to be workable.[28]

4.43 The Governments of South Australia and Tasmania opposed the suggestion that there should be any attempt to 'partition [the] ... regulatory responsibility in relation to the companies' and securities industries'.[29] Similarly, in a 1984 publication entitled 'Understanding Company Law', Lipton and Herzberg argued that:

[I]t is artificial to regard the regulation of companies and the regulation of the securities industry as separate areas of law.[30]

4.44 The Committee is of the view that it would be highly undesirable to split the co-operative scheme in the way comtemplated by the Attorney-General's Department.

4.45 In addition, the Attorney-General's Department's 'theoretical'[31] proposal does not address the central difficulty of the scheme: its failure to accommodate parliamentary accountability and ministerial responsibility. The split scheme would simply eradicate them from certain parts of the scheme by removing those parts from the co-operative scheme.

Endnotes

1. Submission from Mr W.A. Wilton, at p. 1; transcript of evidence, at p. 292.

2. Submission from Company Directors' Association, at p. 4; transcript of evidence, at p. 188.

3. Submission from the National Companies and Securities Commission, at p. 1; transcript of evidence at p. 7.

4. Submission from Tasmanian Government, at p. 5.

5. Submission from Western Australian Corporate Affairs Department, at p. 3; transcript of evidence, at p. 261. This possibly was also canvassed by the Senate Standing Committee for the Scrutiny of Bills in its 1985-86 Annual Report, Parliamentary Paper 447/1986, at para. 5.11.

6. Submission from Victorian Government, at p. 2; transcript of evidence, at p. 606.

7. Submission from the Institute of Directors in Australia, at p. 4; transcript of evidence, at p. 336.

8. Submission from the Institute of Chartered Accountants, at p. 2; transcript of evidence, at p. 314.

9. Supra n. 7.

10. Supra n. 5, at p. 4; transcript of evidence, at p. 262.

11. Submission from Stock Exchange of Perth Limited, at p. 1.

12. ibid.

13. Submission from Company Directors' Association, at p. 8; transcript of evidence, at p. 192.

14. Senate, Hansard, 16 November 1983, at p. 2681.

15. ibid, at p. 2693.

16. ibid, at p. 2699.

17. Notice Paper no. 165 of 1987, House of Representatives, 28 April 1986, General Business Notice no. 45.

18. Submission from Attorney-General's Department, at p. 7; transcript of evidence, at p. 419.

19. Submission from the Northern Territory Corporate Affairs Office, at para. 17.

20. Submission from the Commercial Law Committee of the Law Institute of Victoria, at p. 3; transcript of evidence, at p. 581.

21. Supra n. 6.

22. Letter dated 9 January 1987, from Mr P.G. Levy to secretary of the Committee.

23. ibid.

24. ibid.

25. Transcript of evidence, at p. 547.

26. Submission from Company Directors' Association, at p. 9; transcript of evidence, at p. 193.

27. Submision from Howard Belcher and Associates Pty Ltd, at p. 2.

28. Supra n. 7.

29. Submission from the South Australian Government, at p. 7; transcript of evidence, at p. 487; submission from Tasmanian Government at para. 4.12, p. 8.

30. Lipton, O., and Herzberg, A., Understanding Company Law, [1984. Law Book Co. Sydney] at p. 322.

31. As it was described by Mr R. St John, Deputy Secretary, Attorney-General's Department, in his evidence to the Committee - see transcript of evidence, at p. 471.

CHAPTER 5

COMPREHENSIVE COMMONWEALTH LEGISLATION

5.1 There is increasing support for the suggestion that the Commonwealth government should assume complete responsibility for the regulation of companies and for securities law. Mr Halstead, a committee member of the Business Council of Australia and one of the Council's representatives at the Committee's public hearings, summarized the Council's submission as being 'that the Commonwealth Government should make a bid for the whole field'.[1]

5.2 The Australian Merchant Bankers' Association also appears to have come to this view. In its submission, the Association suggested that the Commonwealth should assume legislative responsibility for 'the securities industry, takeovers, the futures industry and those aspects of the scheme which are national in character'.[2] However, in an interview on 22 February 1987, Mr Bill Beerworth, a member of the executive committee of the Australian Merchant Bankers' Association, commented that he had 'always had doubts about the co-operative scheme' and that the Association 'is on record as preferring national legislation in this areal.[3]

5.3 The Company Directors' Association characterized this as the 'next step' in a natural progression.[4] According to the Chief Executive of the Confederation of Australian Industry, Mr Darryl George:

The present system of State and Federal co-operation on company regulation has now proven its limitations and should be

abolished. Instead, the Federal Government should use its powers in this area to enact national legislation which would result in a better and more efficient system.[5]

5.4 Similarly, the Hon. T.W. Sheahan, MLA, the current Chairman of the Ministerial Council, has expressed his 'firm belief' that the co-operative scheme should be replaced by a national scheme. According to Mr Sheahan:

…the world is passing by the co-operative scheme. Our economy has changed considerably since the co-operative scheme was established. Three factors are obviously important:

* financial deregulation
* floating of the Australian dollar
* the establishment of a national stock exchange.

These changes increase national and international commercial links and the mobility of capital. The Australian financial system is now more fluid and part of the larger world.

I cannot over-emphasize the importance of this factor in my assessment of the deficiencies of the scheme. The scheme currently gives us the wrong tools for the job.[6]

5.5 In view of the doubts which have been expressed about the ambit of the Commonwealth's constitutional power in this area, the Committee sought advice from the Attorney-General's Department.

5.6 As was noted in paragraph 4.36 above, the Attorney-General's Department provided the Committee with an opinion from the former Commonwealth Solicitor-General, Sir Maurice Byers, QC, who is the Chairman of the Constitutional Commission. The opinion was received on 9 January 1987 and is reproduced as Appendix IV to this report.

5.7 The Byers opinion propounded a wide interpretation of the scope of the Commonwealth' s power. Sir Maurice Byer s concluded that the power covers the whole range of corporate activities, from incorporation through to dissolution. In his opinion:

[T]he power necessarily extends to embrace any conventional Companies Act. The topic is companies, but not all companies. So internal management, accounts, audit, arrangements, reconstructions, receivership, official management and winding up all fall within the power because laws about these things deal with characteristics of company life and the resolution of the consequences of and the adjustments of rights resulting from incorporation. Of course section 51(xvii) would enable a law to be passed providing for the winding up of every type of company and the application to them of bankruptcy provisions as extensive as those in the Bankruptcy Act.[7]

5.8 The Byers opinion discussed the types of companies the Commonwealth can regulate. Sir Maurice Byers found that the power extended to the regulation of, inter alia, mining, manufacturing, real estate and commercial trustee companies.[8]

5.9 However, Sir Maurice Byers came to the view that the Commonwealth's power does not extend to cover all companies. He concluded that the Commonwealth's power would not extend to legislation with respect to recreational, scientific, educational and charitable companies unless trading or commercial activities formed a significant part of their operations.[9]

5.10 The Committee understands that very few companies would fall into this category. In the Committtee's view, the comprehensiveness of Commonwealth regulation would not be significantly impaired if the State and Territory governments

were to regulate the non-trading, non-financial aspects of non-trading, non-financial, companies of the types referred to in the Byers opinion.

5.11 Sir Maurice Byers concluded that the Commonwealth Parliament also had the constitutional power to legislate with respect to takeovers, and the futures and securities industries.

5.12 The arguments in support of these propositions are set out in the opinion.[10] The Committee has not gone behind the Byers opinion. Having received advice from the former Commonwealth Solicitor-General, the Committee has not sought to 'second guess' his reasoning. Rather, the Committee has accepted and relied upon his conclusions.

5.13 Nevertheless, the Committee notes that expansive views of the Commonwealth's powers under sub-section 51(xx) are widely held.[11] Mr R.J. Ellicott, QC, Sir Maurice Byers' predecessor as Commonwealth Solicitor-General (and subsequently Commonwealth Attorney-General), has also taken an expansive view of the Commonwealth's powers in this area.

5.14 In a speech entitled 'Why Change the Constitution?' delivered at a law convention in Tahiti on 7 July 1986, Mr Ellicott asserted that the poor record in Australia of constitutional reform by referendum was off-set by a wide interpretation of Commonwealth power in a series of cases before the High Court:

I refer in particular to the Uniform Tax case, the Concrete Pipes case; the Payroll Tax case the Seas and Submerged Lands case and the Franklin Dam case. As a result of these decisions, the Commonwealth Parliament not only has power to enforce a uniform tax

system and tax the states under the taxation power, but seemingly has power to do at least the following:

* to regulate the trading activities of corporations and the production and distribution of their goods and services in intra state trade;

* to control prices and interest rates through its power to legislate with respect to corporations;

* to control wages and industrial relations and establish a comprehensive industrial relations system through the corporations power and the external affairs power;

* to pass a national companies and takeover code;

* to implement a national superannuation scheme; and

* to pass a law implementing an international agreement on any subject.

5.15 In addition, both the current Commonwealth Attorney-General, Mr Bowen, and the Shadow Attorney-General, Mr Spender, QC, have indicated their respective beliefs that the Commonwealth has the power to enact comprehensive legislation in this area unilaterally. On 18 February 1987, Mr Bowen informed the House of Representatives:

We need one piece of legislation on a national basis. We have the power to enact such legislation.[12]

On the same day, Mr Spender said, 'the Federal Government has power in this area; whether it uses that power is a separate matter'.[13]

5.16 It has been suggested that the Commonwealth's power could, if necessary, be supplemented by the referral of power by the States pursuant to section 51(xxxvii) of the Constitution.[14] It is possible for the Commonwealth to legislate to cover the entire field by seeking the referral of powers sufficient to empower the Commonwealth to legislate in respect of the small number of companies which might fall outside of Commonwealth power as contemplated by Sir Maurice Byers. These were referred to in paragraphs 5.9 and 5.10 above.

5.17 Associate Professor Ffrench suggested that the States would have little choice in the matter:

My view is that the areas over which the central government have constitutional control are sufficiently large to make it almost inevitable that the States will feel constrained, for political reasons and reasons of logic and economics, to cede to the Commonwealth the (probably small) areas which are outstanding and over which the States may be held to have constitutional power.[15]

5.18 Professor Ford also advocated the referral of power by the States.[16] Similarly, the Law Council of Australia suggested that comprehensive Commonwealth legislation 'should be supported by adequate reference of power from State Parliaments or alternatively a legislative device like that used in the present co-operative scheme' in order to avoid a constitutional challenge. [17]

5.19 The Committee does not agree with Professor Ffrench's assertion that the States would be 'constrained' to cede power to the Commonwealth. In any event, this might undermine Commonwealth/State relations and would, therefore, be politically unattractive. The Committee notes that the States were reluctant to adopt this course when the scheme was originally conceived. However, the Committee also notes the

comments by the Attorney-General of New South Wales and current Chairman of the -Ministerial Council as to the desirability of national legislation in this area. (See paragraph 5.4 above.)

5.20 In the Committee's view the Byers opinion provides the assurance that Commonwealth legislation could be enacted, without fear of successful constitutional challenge, to apply to all except the very small class of companies which was referred to in paragraphs 5.9 and 5.10 above. In the Committee's view, the inability of the Commonwealth Parliament to legislate with respect to the small number of companies which fall outside of the Commonwealth's legislative power would not preclude the Commonwealth from exercising this power.

5.21 The extract from the letter from Mr Levy of the Attorney-General's Department, which was quoted in paragraph 4.37 above, is evidence that the Attorney-General's Department also takes this view.

5.22 The Commonwealth does not need to seek the referral of any powers from the States. It might be desirable if this were to be done so as to quell any lingering concerns about gaps in the Commonwealth's legislative power. However, the Committee's view is that the Byers opinion demonstrates that referral is not necessary in order for the Commonwealth to enact national legislation to replace the co-operative scheme.

5.23 The Committee recognizes that the Commonwealth could adopt an opposite course of action from that supported by the Byers opinion. The Commonwealth could vacate the area and return responsibility for the matters regulated by the co-operative scheme to the State and the Territory governments, thereby restoring the unsatisfactory position which prevailed prior to the Uniform Companies Act.

5.24 The Committee rejects this suggestion. A uniform system of law to regulate companies, takeovers, and the securities and futures industries is essential.

Endnotes

1. Transcript of evidence, at p. 535.

2. Submission from Australian Merchant Bankers' Association, at p. 13; transcript of evidence, at p. 239.

3. 'Business Sunday' interview on 22 February 1987.

4. Submission from Company Directors' Association, at p. 5; transcript of evidence, at p. 189.

5. Australian Financial Review, 30 March 1987, at p. 2.

6. Address by the Hon. T.W. Sheahan, MLA, to Companies and Securities Luncheon, on 26 March 1987, at pp. 3-4. See also the report of the remarks made by Mr Robert Herzstein about the 'internationalisation of business activity' reported in (1986) 21 (8) Australian Law News, at p. 34: 'Global economy seen as having major impact on business law'.

7. See below at p. 92.

8. ibid., at pp. 94-95.

9. ibid., at pp. 95-96.

10. ibid., at pp. 96-106.

11. This provision empowers the Commonwealth Parliament to 'make laws for, the peace, order and good government of the Commonwealth with respect to ... foreign corporations, and trading or financial corporations formed within the limits of the Commonwealth'.

12. House of Representatives, Hansard, 18 February 1987, at p. 220.

13. ibid., at p. 222.

14. This provision empowers the Commonwealth Parliament to 'make laws for the peace, order, and good government of the Commonwealth with respect to... matters referred to the Parliament of the Commonwealth by the Parliament or Parliaments of any State or States, but so that the law shall extend only to States by whose Parliaments the matter is referred, or which afterwards adopt the law.'

15. Submission from Associate Professor H.L. Ffrench, at p. 3.

16. Submission from Professor H.A.J. Ford, at p. 1.

17. Submission from Law Council of Australia, at pp. 5-6.

CHAPTER 6

CONCLUSION

6.1 The co-operative scheme operates in a difficult political environment. The federal nature of the Australian political system, coupled with the historical uncertainty of the boundaries between Commonwealth and State constitutional power, has influenced the development of a co-operative scheme which the Victorian Attorney-General has called 'an exceptional constitutional creature' (paragraph 3.52 above).

6.2 The Committee received evidence that, under the circumstances, the scheme performs remarkably well. However, the Committee believes that it has now outlived its usefulness. The chairman of the Ministerial Council and Attorney-General of New South Wales described the scheme as a 'hybrid institution' which 'imposes severe limitations on developing necessary policies' (paragraph 3.52 above).

6.3 For the reasons discussed in Chapter 4, the Committee does not endorse the Attorney-General's Department's 'split scheme' proposal. This would not solve the problems inherent in the scheme. In addition, the Committee rejects the assumptions upon which the Attorney-General's Department's 'split scheme' rests.

6.4 Many people and orgainisations regard the Commonwealth takeover of this area of the law as the next step in a natural progression (paragraph 5.3 above).

6.5 The opinion from Sir Maurice Byers, QC, asserts that the Commonwealth possesses the constitutional power to enact comprehensive legislation covering company law, takeovers, and the securities and futures industries. The Committee favours this option.

6.6 The Committee has taken into account the support for the retention of the co-operative scheme. Much of this support was accompanied by constructive criticism and suggestions for reforms, which were discussed in chapter 4. The Committee commends these suggestions to the various governments which are party to the scheme in the event of the rejection of the Committee's recommendation.

Recommendation

6.7 The Committee recommends that the Commonwealth Parliament should enact comprehensive legislation covering the field currently regulated by the co-operative scheme.

Senator Nick Bolkus

The Senate
Parliament House
April 1987

APPENDIX I

INDIVIDUALS AND ORGANISATIONS WHO MADE WRITTEN SUBMISSIONS TO THE COMMITTEE

		Submission Number
ATTORNEY-GENERAL'S DEPARTMENT	Canberra, ACT	5
AUSTIN, Prof R. P.	Sydney, NSW	3
AUSTRALIAN ASSOCIATED STOCK EXCHANGES	Sydney, NSW	20
AUSTRALIAN MERCHANT BANKERS' ASSOCIATION	Melbourne, Vic	26
AUSTRALIAN SOCIETY OF ACCOUNTANTS	Melbourne, Vic	21
BAXT, Prof R.	Clayton, Vic	15
BUSINESS COUNCIL OF AUSTRALIA	Melbourne, Vic	36
CALDWELL, C. E.	Melbourne, Vic	7
COMPANY DIRECTORS' ASSOCIATION	Sydney, NSW	11
CONFEDERATION OF AUSTRALIAN INDUSTRY	Canberra, ACT	27
FFRENCH, Assoc Prof H. L.	St Lucia, Qld	1
FORD, Emeritus Prof H. A. J.	Kew, Vic	2
HORWATH & HORWATH	Sydney, NSW	14
HOWARD BELCHER & ASSOCIATES PTY. LTD.	Melbourne, Vic	16
INSTTTUTE OF AFFILIATE ACCOUNTANTS	Melbourne, Vic	23

INSTITUTE OF CHARTERED ACCOUNTANTS IN AUSTRALIA	Sydney, NSW	24
INSTITUTE OF DIRECTORS IN AUSTRALIA	Sydney, NSW	18
LAW COUNCIL OF AUSTRALIA	Canberra, ACT	32
LAW INSTITUTE OF VICTORIA	Melbourne, Vic	34
MASEL, Mr L.	Melbourne, Vic	4
NATIONAL COMPANIES AND SECURITIES COMISSION	Melbourne, Vic	22
NATIONAL STANDARDS COMMISSION	North Ryde, NSW	25

NEW SOUTH WALES, CORPORATE AFFAIRS OU44ISSICN	Sydney, NSW	35
NEW SOUTH WALES LEGISLATIVE COUNCIL, COMMITTEE OF SUBORDINATE LEGISLATION	Sydney, NSW	13
NORTHERN TERRITORY, CORPORATE AFFAIRS OFYICE	Darwin, NSW	37
SECURITIES INSTITUTE OF AUSMALJA (NSW DIVISICN)	Sydney, NSW	17
SENATE STANDING COMMITTE FOR THE SCRUTINY OF BILLS	Canberra, ACT	8
SOUTH AUSTRALIAN GOVERNMENT	Adelaide, SA	28
STATE CHAMBER OF CCHIMCE AND INDUSTRY (NSW)	Sydney, NSW	30
STOCK EXCHANGE OF PERTH LIMITED	Perth, WA	31
TASMIAN GOVERNMENT	Hobart, Tas	29
TRUSTEE COMPANIES ASSOCIATICN OF AUSTRALIA	Melbourne, Vic	6
VICTORIAN GOVERMENT	Melbourne, Vic	33
WARREN, Mr R.	Perth, WA	9
WESTERN AUSTRALIA, CORPORATE AFFAIRS DEPARTPOT	Perth, WA	12
WILTON, Mr W. A.	Davidson, NSW	10
WISHART, Mr D. A.	Kuala Lumpur, Malaysia	19

APPENDIX II

WITNESSES WHO APPEARED AT PUELIC HEARINGS

Attorney-General's Department

Mr R. A. St John, Deputy Secretary.
Mr P. G. Levy, Senior Assistant Secretary, Companies and Securities Branch, Business Affairs Division.
Mr M. Starr, Special Adviser, Companies and Securities Branch, Business Affairs Division.

Australian Associated Stock Exchanges

Mr R. Coppel, Executive Director.
Mr M. Kinsky, General Counsel.

Australian Merchant Bankers' Association

Mr J. A. Hall, Executive Director.
Mr D. H. Danks, Executive Officer.
Mr W. R. Sheppard, Executive Director, Macquarie Bark Limited.

Australian Society of Accountants

W C. N. Westworth, Representative of Task Force Appointed by National Executive.

Baxt, Professw B.

Business Council of Australia
Mr M. A. Besley, Chai-man, Business Law Committee.
W R. T. Halstead, Committee Member.
Prof R. Baxt, Consultant.

Confederation of Australian Industry

W R. C. Gardini, Deputy Director and General Counsel.

Company Directors' Association of Australia

Mr C. B. Peters, Federal President.
Mr A. B. Yeomens, Executive Director.

Institute of Chartered Accountants in Australia

W W. E. Small, President.
W V. A. Prosser, Executive Director.

Institute of Directors in Australia

Mr G. Bartels, Director General.

Law Institute of Victoria

Mr D. Bailey, Chairman of the Commercial Law Committee.
Mr A. K. Coniell, Member of the Commercial Law Committee.

Masel, Mr L.

National Companies and Securities Commission

Mr H. Bosch, Chairman.
Mr P. J. Schoer, Executive Director.

Priddice, Mr J. A.

South Australian Government

Hon C. J. Sumner, MLC, Attorney-General.
Mr K. I. McPherson, Comissioner for Corporate Affairs.

Trustee Companies Association of Australia

Mr A. A. Quinn, Deputy National President.

Victorian Government

Hon J. 14. Kennan, MLC, Attorney-General.

Western Australia, Corporate Affairs Department
Mr A. D. Smith, Commissioner for Corporate Affairs.

Wilton, Mr W. A.

APPENDIX III

VICTORIA, LEGISLATIVE COUNCIL, DEBATES, 16 OCTOBER 1985

MINISTERIAL STATEMENT

Co-operative companies and securities scheme

The Hon. J. H. KENNAN (Attorney-General)-I wish to make a Ministerial statement on the operation of the co-operative companies and securities scheme.

INTRODUCTION

It has been nearly seven years since the Commonwealth and the States executed the formal agreement to establish a cooperative Commonwealth/State scheme for the uniform regulation of companies and the securities industry. The scheme is a unique constitutional creature which has at times proven unwieldy and has left itself open to the criticism of lack of effective Ministerial control. On the positive side, it remains a creative response to the realities of a Federal system of government. It has demonstrated that there can be continuing co-operation between the States and the Commonwealth resulting as it has in uniform legislation and regulation of the companies and the securities industry in Australia.

In accordance with the formal agreement, the Victorian Parliament enacted legislation in 1981 to adopt as law in Victoria the Commonwealth Companies Act, the Companies (Acquisition of Shares) Act and the Securities Industry Act. Legislation also gave State administrative jurisdiction over this field to the National Companies and Securities Commission-NCSC. The Victorian Corporate Affairs Office became a delegate of the NCSC. It derives its power from the commission and is subject to its general supervision and direction.

The commission holds Commonwealth and State responsibility for the entire area of policy and administration with respect to company law and the regulation of the securities industry. It is answerable to the Ministerial Council for Companies and Securities, which consists of the Attorneys-General of the States and the Commonwealth. Under the legislation, the Ministerial Council must meet at least four times each year. Urgent decisions between these meetings are made by telex votes and, occasionally telephone conferences. It may be seen then that the scheme is administered directly by a Ministerial Council made up of seven Ministers and the executive branch is

the commission, which, in conjunction with its delegates, the State Corporate Affairs Offices, carries out the wishes of the Ministerial Council. Proposals for legislation are also dealt with by the Ministerial Council. These proposals are ultimately submitted to the Federal Parliament and after their passage they bind the States by way of the arrangements I have already referred to.

It is worth examining the first recital to the formal co-operative scheme agreement. It states that:

It is generally acknowledged in the interests of the public and of persons and authorities concerned with the administration of the laws relating to:

(a) companies. and
(b) the regulation of the securities industry,

that there should be uniformity both in those laws and in their administration in the States and Territories in Australia in order to promote commercial certainty and bring about a reduction in business costs and greater

efficiency of the capital markets and that the confidence of investors in the securities market should be maintained.

The document is of more than passing historical interest. It sums up, perhaps, the pre-Campbell, pre-Costigan philosophy to corporate regulation. It does not explicitly seek deregulation nor does it refer to the social or economic responsibilities of the corporate sector. These objectives have, however, not been ignored by the Ministerial Council in recent years. Indeed, there has been much that has happened in the seven years since the signing of the formal agreement which has led to a recognition that the regulation of the companies and the securities industry must be seen in a wide economic and social context. The deregulatory thrust apparent in our political and business world is of as much importance to the operation of the National Companies and Securities Commission and to the legal regulation of the corporate sector as it is anywhere. In addition, the abuse of the very notion of a corporation, highlighted by the Costigan commission, in order to cheat and to defraud, has also been a matter which has been of concern to corporate regulators in recent years.

THE MINISTERIAL COUNCIL

It is a stark testimony to the dangerous nature of the shoals and reefs of our political world that since the establishment of the co-operative scheme at the end of 1978 there have been 24 different Ministers-Attorneys-General-who have been members of the Ministerial Council. In that time the Ministerial Council has met on 29 occasions. At most meetings of the Ministerial Council a new Attorney-General has been in attendance.

The complex nature of the business to be conducted by the Ministerial Council and the relatively high turnover of Ministers has meant that the Ministerial Council is singularly vulnerable to the *Yes Minister* process. Until recent changes, which I shall outline in more detail shortly, Ministers were presented with a huge amount of paper prior to every Ministerial Council meeting. Ministerial advisers met frequently between Ministerial Council meetings and often fought out their battles by the circulation of lengthy papers arguing differing viewpoints. Ministerial advisers would then meet the day before the Ministerial Council meeting. Ministers would be met not only with a huge amount of paper but also a list of decisions which had been made by the advisers in respect of every item on the agenda culminating in the recommendations to the Ministerial Council. The process was certainly such that it was difficult for Ministers unless they had taken a singularly close interest

in developments in the ensuing weeks and months to get control of the agenda. This year there has, however, been a concerted attempt by Ministers to exert tighter control over the operation of the Ministerial Council. In particular the Ministerial Council has resolved at it last two meetings to:

(a) Reduce the number of advisers' meetings by the consolidation and formalization of advisers' meetings into a committee known as the Administrative and Legislative Policy Committee. That committee is chaired alternatives by a representative of the commission and a representative of the Commonwealth Attorney-General's department depending on whether it is dealing with matters relating to the administration of the scheme or with matters relating to policy in a broader sense.

(b) The Ministerial Council now fixes the number of advisers' meetings between meetings of the Ministerial Council. These meetings have generally been reduced to one.

(c) The amount of paper being sent to Ministers has been pruned and summary sheets along the lines of two-page Cabinet summary sheets have been prepared for each item giving an outline of issues and the recommendations. Advisers have been discouraged from advancing their arguments in lengthy papers and there has been a much greater endeavour to resolve issues directly at meetings.

(d) The Ministerial Council secretariat, which had been established in Sydney, consisting of stair of three at a cost of some S290 000 a year, has been disbanded. Its functions will be performed directly by the commission. Those functions relate to keeping the minutes of Ministerial Council meetings, the distribution primarily of those minutes and the preparation of the agenda for each meeting. The funds

will be redeployed to give the commission a more effective presence in Sydney and to allow for the appointment of additional part-time members.

These developments have reflected a determination by Ministers to take control of the agenda and give some tighter direction to the operation of the scheme. In particular, there has been a recognition encouraged by both Leigh Masel, the former Chairman of the National Companies and Securities Commission, and Henry Bosch, the present chairman, that the Ministerial Council must see the role of the commission and the issue of corporate regulation as having an important place in the operation of the Australian economy. The Ministerial Council must therefore be sensitive to issues such as deregulation and must take recognize of the impact of its forms of regulation on the operation of corporations. It must recognize that what it does may well have an important impact, positive or negative, on wealth and job creation.

NATIONAL COMPANIES AND SECURITIES COMMISSION

The National Companies and Securities Commission is the central regulatory body in the co-operative scheme. It possesses both State and Federal jurisdictions. It exercises both judicial and administrative functions.

The commission is based in Melbourne and is staffed by approximately 75 persons. There are three full-time commissioners and two part time commissioners. It has a budget of $5.4 million which may in many respects be thought to be modest compared with the budget of the Trade Practices Commission-$7.2 million-and the Industries Assistance Commission-$11.2 million.

The Commission delegates most of its administrative functions to the State corporate affairs offices. However, it retains its policy making functions and responsibility over the supervision of the securities markets.

Both the first chairman of the commission, Leigh Masel, and the present chairman, Henry Bosch, have maintained high public profiles as advocates for the pursuit of high standards of corporate behaviour. It is a tribute to the commission and to the stock exchanges that the conduct of securities markets in this country is now largely free of the sorts of abuses identified in the Rae report in 1974. However, the developments of the 1980s have presented new challenges and I shall make further comment a little later on the appropriateness of the scheme's regulatory structure in this context.

Given the general state of relationships between the States and between the States and the Commonwealth in the past fifteen years, it is somewhat remarkable that the cooperative scheme and, in particular, the commission have been able to work as well as they have. Much of the credit for this must go to Leigh Masel who retired in March of this year. He brought to the job an enormous intellectual strength and a high standing in the commercial and legal communities. He also remained constantly alive to new issues and new directions. I believe he established the commission as the powerhouse for ideas in the area of corporate regulation. It is the commission which has been the generator of initiatives, rather than its delegates or the Commonwealth. This is probably as it should be.

The role of the commission, and particularly its chairman, as the vanguard for ideas and initiatives, has been continued with vigour by Henry Bosch. In particular, Mr Bosch has Placed the issues of deregulation and the takeovers debate firmly at the forefront of concern for the commission and the Ministerial Council. He has instituted a program of at least one deregulatory measure a month for the commission. Mr Bosch has also instituted what *Australian Business* of 4 October described as a "Hands on management style" which has coincided with the desire of the Ministerial Council to exercise tighter control over the workings of the scheme and its delegates. Another recent initiative has been the prompting of the Accounting Standards Review Board to expedite its work in relation to the preparation of accounting standards.

One of the interesting features about the structure of the National Companies and Securities Commission is that it has combined full-time commissioners with part-time

commissioners. This enables a wide range of skills as well as a geographic spread to be brought to bear on the administration of the scheme. At the moment, the full-time commissioners are Mr Bosch, an industrialist with a particular background in marketing, the deputy chairman, Mr Charles Williams, a stockbroker, and Mr Tony Greenwood, formerly of the New South Wales Corporate Affairs Commission. The part-time commissioners are Mr John Nosworthy, a commercial lawyer from Brisbane, and Mr Gilles Kryger, a stockbroker from Sydney. At its last meeting in Melbourne, the Ministerial Council resolved that it would appoint three additional part-time commissioners. This will enable representation from at least some States which do not have a part-time commissioner and in addition will give the commission the ability to draw on a further range of skills and expertise.

This experience of involving, in an institutionalized way, members of the private sector in public administration has proved to be of singular value. Leigh Masel once observed that, in order to govern effectively, Governments had to draw widely on the talents and expertise of people in the community outside Government. He did not mean just that people ought to be employed in the public sector with private sector experience on a fulltime basis, but that, wherever possible, Governments should take advantage of the expertise and advice that can be drawn on a part-time or even informal basis from the private sector. I have drawn on this notion in establishing the Victorian Corporate Affairs Advisory Board, which I shall describe later.

The commission presented to the last Ministerial Council meeting a work program for the next twelve months. I seek leave to have the work program incorporated in *Hansard*.

Leave was granted, and the work program was as follows:

1. Futures Bill

2. Licensing Review

3. Stock Exchanges:

* Short Selling
* Clearing Houses
* Screen Trading
* National Guarantee Fund

4. Deregulation program-1 issue a month

5. Takeover Regulations:

* Partial Takeovers-CSLRC proposals
* Thresholds
* Disclosure

6. Forms of Organization for Small Businesses-CSLRC proposals

7. Schedule 7 Accounting Requirements

8. Uniformity of Administration

9. Regulatory Framework (action consequent on study)

10. International Initiatives:

* Common Prospectuses
* Common Reporting Requirement
* Common Reporting Requirement
* Exchange of Information for Enforcement

11. Franchising Bill

12. Public Fund Raising

The Hon. J. H. KENNAN:

VICTORIAN CORPORATE AFFAIRS OFFICE

The Victorian Corporate Affairs Office contributes to the scheme both as a delegate of the National Companies and Securities Commission and as a policy adviser to the Victorian Attorney-General as a member of the Ministerial Council. The Victorian Commissioner for Corporate Affairs is subject to direction both from the Attorney-General and from the commission. The importance of an efficient and business oriented Victorian Corporate Affairs Office has been recognized by the Victorian Government. In the Government's economic strategy the operation of that office is recognized to be important. It stated:

If Melbourne is to be wen by investors and the financial community generally as one of the linchpins of the Australian financial markets, the resources of the Victorian Corporate Affairs Office must be strengthened.

In particular, the economic strategy proposed the employment of ten extra staff in the corporate finance division. This has been done. The economic strategy also proposed a major computerization project for the entire office.

In particular, the Victorian Corporate Affairs Office has performed well in the area of prospectus turnaround. The emphasis given by the economic strategy to that aspect of the office has resulted in new prospectus turnaround times of between two and three weeks and rollover prospectuses being disposed of within one week. Trust deeds are processed within three weeks, compared with months in some other States. The comparative efficien7 of the Victorian office is leading to some interstate registration matters being transferred to Victoria.

The staff, as a whole, of the Victorian Corporate Affairs Office has been increased and strengthened by the Cain Government. When the Government came to power in 1982 approximately 220 persons were employed at that office. By September of this year the number had increased to 351, including 44 Community Employment Program-CEP-staff However, as with other aspects of Government operation, every effort must be made to ensure that the office not only has sufficient staff but also that it is utilizing its resources in an efficient manner and in those areas which are of primary importance to the community it serves.

Drawing on the experience of the National Companies and Securities Commission and the philosophy that there must be a

constructive interaction between the public sector and the private sector, I moved earlier this year to establish a Corporate Affairs Advisory Board. This board includes Mr Matt Walsh of Mallesons, Mr Bill Conn of Potter Partners, Mr Don Carruthers of CRA Ltd. Mr David Crawford of Peat, Marwick and Mitchell, Ms Margaret Crossley, currently of the Auditor-General's Office, Mr Bill Gurry of National Mutual Royal Bank. Mr Stephen Charles, QC, past Chairman of the Victorian Bar Council, Mr Robert Miller, the head of the regulation review unit in the Ministry of Industry, Technology and Resources, and Mr John King, the Commissioner for Corporate Affairs.

The purpose of this advisory body is to meet on a monthly basis with the Commissioner for Corporate Affairs and advise him on matters of concern to the business community and the better operation of the office. The very strong personnel represented on the advisory board is an indication of the importance that the business community attaches to this form of participation. The involvement of these persons on the advisory board also provides the Commissioner for Corporate Affairs with a ready pool of advice on particular prove difficulties. One important project within the Corporate Affairs Office which is receiving the attention of the advisory board is the review of the investigation and prosecution functions being carried out by the insolvency and investigations task force.

It is not uncommon for unscrupulous operators to abuse the concept of limited liability. Approximately 700 Victorian companies went into liquidation in 1984 leaving combined deficiencies of approximately $150 million. As well as the economic implications, these insolvencies involve enormous social costs in terms of retrenchments and the plight of

unpaid creditors. The role of the Corporate Affairs Office in this context is to investigate complaints relating to insolvency to determine whether serious offences have been committed.

One of the initial proposals to come from a review of the investigation function by the insolvency and investigations task force is the proposal to introduce a penalty notice system for certain offences of a technical or minor nature. The system is called PERIN, which is an acronym for Penalty Enforcement by Registration of Infringement Notices. This system provides an alternate mechanism for the prosecution of regulatory offences such as failing to lodge annual returns. Rather than taking each individual case to court, the Corporate Affairs Office may issue a penalty notice to persons it alleges have committed specific offences. The procedure allows for a person to contest the allegation before a magistrate. However, if it is not contested, the matter is disposed of without the need for a hearing, in the same way as on-the-spot traffic infringements.

The PERIN system will assist in reducing court delays and maximizing the efficient use of Corporate Affairs Office resources. In the past two years the office has prosecuted more than 20 000 companies and individuals in the Magistrates Court for minor regulatory offences. Whilst the individual offences may be minor, the widespread disregard for these requirements is disquieting. According to Costigan and the McCabe-Lafranchi reports, it may be only the tip of the iceberg. The PERIN system will result in speedy disposal of cases while not denying the person the right to contest the allegation before a magistrate. The system also -represents a way in which existing resources can be used to achieve the same results with much greater efficiency, reducing the backlog of prosecutions and releasing investigative and legal staff to concentrate on the more serious offences.

However, probably the most important project being carried out in the Victorian Corporate Affairs Office is the computerization project. This has been undertaken in conjunction with the New South Wales and Queensland corporate affairs offices. The strategic plan for the project recognizes four basic and fundamental objectives:

(1) To establish the information data base and internal office support system.

(2) To provide direct access to data by the business community and the public in general, and to utilize electronic funds transfer facilities for fee payment.

(3) To link the computer systems of interstate corporate affairs offices and the National Companies and Securities Commission to achieve a fully integrated system across Australia.

(4) To facilitate electronic lodgment of documents using image processing technology.

These objectives are unashamedly ambitious and obviously will not be implemented immediately. The first stage covering the first objective is targeted for implementation during May 1986. The second objective of providing direct access to the public will be implemented in stages, and is planned to become fully operational during 1987. The other matters will dealt with over the subsequent years. The electronic lodgment of documents, for example, is targeted for full implementation by 1989.

DEVELOPMENTS IN THE FINANCIAL MARKETS

I have so far outlined the general features of the operation of the scheme. I would like to inform this House further as to the developments in the financial markets which may eventually require alterations to the regulatory structure of the co-operative scheme.

These developments include the implications of the McCabe-Lafranchi and Costigan reports, the proliferation of new investment products, the breakdown of traditional institutional boundaries, the introduction of new technology, the internationalization of our securities markets and the recent takeovers boom. I would like to comment briefly on the implications of these developments.

Looking firstly at the co-operative scheme from a law enforcement perspective the findings of McCabe-Lafranchi and Costigan were both clear and dramatic. There had been widespread abuse of the corporate form. This had occurred in the context of organized crime in general and by "bottom-of-the-harbour" tax promoters in particular. The fact that these abuses were not dealt with expeditiously is explicable by the uncomputerized nature of corporate affairs offices and by the problems of jurisdictional demarcation. The tax office could not disclose its suspicions, nor its information. The Corporate Affairs Office, as with other law enforcement agencies, did not have the technology nor the jurisdiction to follow the money trail.

The major response to Costigan has been the promise to computerize the corporate affairs offices. This should greatly simplify and enhance the investigating capacities of these offices. A further response which I have encouraged is the reciprocal exchange of information by law enforcement agencies.

It should also be noted that the scheme has been subject to quite contradictory pressures in recent years. On the one hand, there has been the push to strengthen law enforcement mechanisms in view of the Costigan Royal Commission findings. At much the same time, however, there have been some legitimate calls to deregulate in the light of the Campbell committee recommendations.

The other pressures on the operation of the scheme have come from the increasing sophistication of our capital markets. We have seen a proliferation of new investment products. Unfortunately, there has been a relative decline in direct investment in corporate instruments-shares and debentures-and an exponential growth in the unit trust industry, particularly in the areas of cash management, property and equity trusts. The investment products usually fall within the "prescribed interest" provisions of the Companies Code. The appropriateness of those provisions to regulate the unit trust industry has been the subject of an ongoing review by the Companies and Securities Law Review Committee. This review has become of greater importance in view of the difficulties experienced by investors in the Telford and Balanced Property trusts.

Other new investment forms include contracts, options and mortgage securities. Each of these products has been the subject of specific legislative responses or proposals. It is perhaps testimony to the unwieldly nature of the co-operative scheme that the legislative responses to some market

developments have occurred outside the co-operative scheme. There has been futures market legislation in New South Wales and Victoria and legislation in relation to the secondary mortgage market in Victoria and Queensland. Hopefully, uniform regulation of the futures industry will begin next year with the passage of the Futures Industry Bill in the Commonwealth Parliament and the Futures Industry (Application of Laws) Bills in each State.

The post-Campbell financial system has also seen the emergence of the financial supermarket. We have seen combinations of institutions including banks, trustee companies, stockbrokers, building societies and life offices. The traditional demarcation lines between Institutions are being rapidly eroded. These developments present particular challenges to the operation of the co-operative scheme. For. whilst different financial institutions may Carry on the same functions. the manner in which they are regulated will usually equate with their traditional activities. The problems this can create were dramatically illustrated with the collapse of the Trustees Executors and Agency Co. Ltd which was carrying on business as a financier and property developer but being regulated as a trustee company.

The absurdities which can be created by continuing to treat financial institutions according to their traditional functions can be illustrated by the example of the regulation of the marketing of approved deposit funds-ADFs. Assume a bank which owns a trustee company wishes to market its ADF to the public. Until recently the bank would have had to issue a prospectus but the trustee company would not have been required to do so. A finance company would have had to a prospectus but a building society would not. A persuasive rationale for the different treatment simply does not exist.

It is clear that regulatory mechanisms relying on the old pre-Campbell functions may no longer be valid. Similar functions should be regulated in similar ways. The co-operative scheme mechanisms will increasingly need to be reformed to remove the exemptions which were given to institutions based on their activities in the 1960s and 1970s. This argument, described in the trade as the level playing field argument, is one which requires desirable review and reform. The National Companies and Securities Commission has taken on that task and proposals for reform will soon be canvassed.

THE TAKEOVERS BOOM

The most dramatic and colourful development in securities markets in recent years has been the takeovers boom. The magnitude of the boom has been well documented in a widely reported speech by the Chairman of the National Companies and Securities Commission, Henry Bosch. I would like to add a few comments on the boom and inform the House as to the issues currently under consideration by the Ministerial Council.

The first comment which needs to be made is that one cannot assume that unfettered markets will necessarily create the desired degree of economic and social progress. Nor, in fact, can Government planning and intervention alone achieve these goals. It is only the constructive interchange between the business and civic cultures which will result in any long-term consensual progress.

The takeovers boom appears to be diverting enormous resources into the threatened and actual rearrangement of industrial assets. For companies with ambitions for expansion, the use of takeovers is socially less desirable than direct investment in new capital machinery and labour. As mentioned in the 1985 Victorian Budget Papers:

There are ... grounds for concern about the continued concentration of some major companies on takeovers and mergers as routes for expansion.

The Ministerial Council as the body responsible for the regulation of takeovers has been increasingly concerned to ensure that the legislation operates consistently with our current economic and social objectives.

As I mentioned to this House on 16 July, the National Companies and Securities Commission has commissioned with Ministerial Council support, a study of the economic impact of takeover activity. I quote Reich in this context. He has described this

modern outbreak of corporate cannibalism as "paper entrepreneurialism". Such entrepreneurialism is based not on technological innovation nor the development of new products or processes, but on creative accounting, tax avoidance, takeovers and unwarranted litigation. Reich states in *The Next American Frontier*

Paper entrepreneurialism can be a ruthless game. It can be fascinating and lucrative for those who play it well. It therefore attracts some of our best minds and most talented citizens. But it does not create new wealth. It merely rearranges industrial assets. And it has hastened our collective decline."

I point out that it refers to the American context.

The Federal Minister for Industry, Technology and Commerce, Senator John Button, has recently indicated his views that many recent takeovers and mergers have been based not on a wealth and employment-creating basis but instead on aggrandizement and agglomeration.

It has been agreed that at the December meeting of the Ministerial Council, the general issue of the regulation of company takeovers should be discussed as a matter of priority. The issues to be discussed will include the regulation of partial bids and the continuation of the 20 per cent threshold.

On the question of partial takeover bids the Companies and Securities Law Review Committee has delivered its final report which has now been published for public comment. Having previously indicated the merits of a downward adjustment of the threshold, the committee has now given its support to the concept of shareholder plebiscites. As mechanisms for increasing equality of opportunity in these circumstances, both have great

merit and will no doubt receive full consideration by the Ministerial Council, along with the committee's other recommendations.

Sensible reforms to create more efficient forms of corporate democracy may avoid the imaginative excesses which corporate Americans have gone to, to defend themselves against unwanted raiders. The lexicon of corporate America includes "poison pills", "shark repellants", of which the Companies and Securities Law Review Committee's proposal is a variant-the "scorched earth strategy" and "pac-man defence". Beyond "White Knights" and "Golden Parachutes", Australia appears to have so far avoided such colourful responses.

The question of the continuation of the 20 per cent threshold will be discussed at the next meeting of the Ministerial Council at the request of the Queensland Attorney-General.

There is nothing magic about the 20 per cent threshold and, at least in relation to partial bids, there are substantial arguments for a reduction. Similarly, the present level of 10 per cent for compulsory disclosure of the shareholder's interest could well be reduced. However, if there is any amendment in relation to substantial shareholding notices, I consider that the Ministerial Council will look very hard at the options for a complete rewrite of the provisions. I am informed that some substantial shareholding notices are longer than the annual reports of the companies to which they are delivered. "Wheel barrows of information", is how one such notice was described to me.

The complexity of the Takeovers Code is of general concern, and I know it was always a concern of Leigh Masel's that the code was largely settled before the initial National Companies and Securities Commission members were appointed. I would not try to justify to the commercial community the needless complexity, the over-attention to detail, the conceptual tangents or the lack of clearly understood English which characterizes the Takeovers Code. It is indeed a hard Act to follow. Whether the Ministerial Council takes the opportunity to have a major rewrite of the Takeovers Code remains to be seen.

TWO CULTURES

In his influential book, *The Next American Frontier*, the American scholar Robert Reich argues that Americans have tended to divide the dimensions of their public life into two broad realms: one, the realm of government and politics; the other the realm of business and economics. He argues that American

concerns about social justice are restricted to the realm of government and politics and concerns about 'prosperity are restricted to the realm of business and economics. Reich argues that Americans, in countless ways, have been called upon to choose between two sets of central values: social justice or prosperity, government or free market, community or freedom. He goes on to argue that the choice is a false one and drawing such sharp distinctions between government and market has long ceased to be useful. He points out that Governments create markets by defining the terms and boundaries for business activity, while business is increasingly 'taking on social responsibilities. He goes on to argue that the Japanese and Western Europeans draw no such sharp distinction between business and civic cultures.

The Japanese and Europeans have a lively awareness of industry and their societies almost naturally connect economic development with social change. He argues that in such societies social investment and citizens' health, education and welfare are seen as comparable to and no less important than private investment and business plant equipment. He says that the success of modem Japan, in particular with its emphasis on community consensus and long term security for its workers, appears to have spurred its citizens to greater feats of production than the rugged individualism of modern America.

The central theme of his book is that in the emerging era of productivity social Justice is with economic growth but essential to it. He says that "a social organization premised on equity, security and participation would generate greater productivity than one premised on greed and fear with collaboration and collective adaptation coming

to be more important to an industrialized nation's well-being than a personal daring and ambition." I think that there is much validity in Reich's arguments about the necessity for business and civic cultures to be seen as compatible to Australia. The need for greater flexibility in economic organizations has also been called for in another influential text, *The Second Industrial Divide-Possibilities for Prosperity* by Michael J. Poire and Charles F. Sabel, Basic Books 1984. Jane Jacobs has argued in *Cities and the Wealth of Nations Principles of Economic Life* that the emphasis on national economics may be misplaced and that productive cities with flexible mixed economies are the secret.

In his autobiography, Lee Iacocca, the former President of the Ford Motor Car Company, who then rescued Chrysler, argues that while government should be beware of over regulation, there is a grave need in the United States of America for the evolution in industrial policy involving the restructuring and revitalizing of all industries that are in trouble. He admires the Japanese for their "clear vision of the future; the co-operation among their Government, banks and labour". He says that the alternative to planning is economic growth by accident.

I emphazise that my references to these books are in the context of a recognition by the Government of a need for co-operation between the Government and private sector. That need is reflected in the Ministerial Council, in the development of corporate regulation, and, further, in the development of the National Companies and Securities Commission, I anticipate that with the further co-operation of the private sector, there will be the ability of one to live properly and prosperously with the other.

CONCLUSION

The co-operative companies and securities scheme has substantially achieved its objectives of creating uniform law and administrative mechanisms throughout the country. The Northern Territory's entry into the scheme in the coming months will finalize this goal.

The direction and philosophy of the scheme now emerging and the Ministerial Council is demanding increasing control over the operation of the bureaucracies involved. The regulatory mechanisms of the scheme are slowly being reformed to more closely reflect the shape of the post-Campbell financial system. I would welcome comments from members of Parliament or the public on the important issues I have mentioned today.

I believe the lesson of all this is that those of us charged with making the legal rules for the administration of corporate life and the securities industry this country must be ever mindful of the economic impact of the rules that we set and the economic possibilities that may be created by rules that we do away with or change. We cannot see ourselves as governments or regulators as divorced from the business culture. but rather we should explore increasingly avenues of active co-operation between the regulators and the regulated.

APPENDIX IV
SIR MAURICE BYERS, QC

RE: NATIONAL COMPANIES AND SECURITIES LEGISLATION

OPINION

I have been asked a number of questions bearing upon the legislative capacity of the Parliament of the Commonwealth to pass valid laws upon the subject matters of the present co-operative companies and securities industry codes as well as that of the Futures Industry Act, 1986.

I shall set out each question and my response to it.

Question 1

Does the Commonwealth Parliament have power unilaterally to enact laws for the whole of Australia covering the same matters as are contained in the legislation which it has enacted for the Australian Capital Territory (pursuant to the Commonwealth-State agreement on companies and securities matters) in respect of takeovers, the securities industry, fund raising by public companies and other related Companies Act provisions and the futures industry?

The related Companies Acts provisions are Divisions 1, 2, 4, 5, 6, 7 and 8 of Part IV of the Commonwealth

Act; sections 261 and 261A and Division 2 of Part XIII. Included of course is the National Companies and Securities Commission Act, 1979.

An addendum to the brief has asked me whether the Parliament might validly enact laws relating to the incorporation, internal management accounts, audit, arrangements, reconstructions, receivership, official management and winding up of companies including those formed for the purpose of mining, manufacturing, holding real estate, acting as a paid executor and trustee or which promote recreation, science, education or charity which do not also engage in trade.

I shall deal first with what may be called conventional Companies Act matters. By this I mean those set out in the immediately preceding paragraph beginning with incorporation and ending with winding up and the nominated divisions and Parts of the Companies Act, 1981 set out in the paragraph before it. Next I shall consider whether the types of companies expressly mentioned, such as mining and manufacturing companies and so on, fall within section 51(xx) of the Constitution if they do not also engage in trade. Thereafter I shall deal with takeovers and fund raising by public companies and last with the securities and futures industry.

Conventional Companies Act matters

Section 51(xx) confers upon the Parliament power to pass laws with respect to foreign corporations and trading or financial corporations formed within the limits of the Commonwealth. There are three classes of corporation within the power. They are foreign corporations, local trading

corporations and local financial corporations. The words "formed within the limits of the Commonwealth" are necessary because the grant already embraces all foreign corporations, that is, all those formed outside the limits of the Commonwealth and because some local companies were intended to be embraced as well. Since a foreign company is one incorporated or formed outside the Commonwealth, a natural description of local companies is by reference to their place of incorporation. But such a description does not imply that the grant excludes power to incorporate the local company. It is impossible, bearing in mind that the heads of power in section 51 must "be construed with all the generality which the words used admit": Rg. v. Public Vehicles Licensing Appeal Tribunal (Tas.) (1964) 113 C.L.R. 207 at p.225, and the natural meaning of the paragraph to confine the word "formed" to "formed by the force of some other legislature".

It is obvious that the adjective "financial" does not refer to economic well being but to the character of the corporation. So with "trading". Thus "financial", "trading" and "formed within the limits of the Commonwealth" are words descriptive of subject matter. They are words of inclusion not of exclusion or qualification. It necessarily follows that a law which makes provision for the incorporation within the Commonwealth of trading and financial corporations is valid. It is one with respect to trading or financial corporations formed within the limits of the Commonwealth. This conclusion is implied in the decisions of the High Court in State Superannuation Board v. Trade Practices Commission (1982) 150 C.L.R. 282 at pp.304-305 and Fencott v. Muller (1983) 152 C.L.R. 570 at pp.601-602 and was affirmatively referred to by Murphy J. in Kathleen Investments v. Australian Atomic Energy Commission (1977) 139 C.L.R. 117 at p.159. The

significance of the first two decisions above mentioned is that they make explicit the notion that a corporation may be a trading or financial corporation within the Constitution when no more has happened but its incorporation; just as it may be when it has performed a significant proportion of trading acts within its total activities. Thus neither "trading" nor "financial" in section 51(xx) require a corporation which has traded or has conducted financial dealings nor any activity for that matter. See also the Jumbunna Case (1908) 6 C.L.R. 309 at pp.334 and 355. The contrary views in Huddart Parker (1909) 8 C.L.R. 330 I shall later deal with and the observations in the Banking Case (1948) 76 C.L.R., for example, were made before Strickland's Case (1971) 124 C.L.R. 468.

So understood the power necessarily extends to embrace any conventional Companies Act. The topic is companies, but not all companies. So internal management, accounts, audit, arrangements, reconstructions, receivership, official management and winding up all fall within the power because laws about these things deal with characteristics of company life and the resolution of the consequences of and the adjustments of rights resulting from incorporation. Of course section 51(xvii) would enable a law to be passed providing for the winding up of every type of company and the application to them of bankruptcy provisions as extensive as those in the Bankruptcy Act.

The views I have just expressed about the corporations power would have been those of Griffith C.J. in the Huddart Parker Case (1908) 8 C.L.R. 330 at p.348 but for his adherance to the reserved powers doctrine now long since exploded. They are, I think, supported by remarks of Mason J. (see Tasmania v. Commonwealth (1983) 57 A.L.J.R. 450 at 495-497)

and of Deane J. (Tasmania v. Commonwealth (supra) at p.549). I incorporate in this Opinion paragraphs 5 to 7 inclusive of that I gave as Solicitor-General on this topic on 3 January, 1974. Those paragraphs are concerned to rebut the views expressed by Sir Isaac Isaacs in the Huddart Parker Case (supra) by reference to subsequent decisions. I affirm what I then said.

Companies Act 1981, Divisions 1, 2, 4, 5, 6, 7 and 8 of Part IV, sections 261 and 261A, Division 2 of Part XIII

Divisions 1, 2, 3 and 4 of Part IV govern prospectuses for share and debenture issues and their contents; shares, their allotment, rights, classes of holders and their rights and substantial shareholdings and their consequences; Division 5 concerns debentures; Division 6, prescribed interests; Division 7, title to and transfer of shares; Division 8, transfer of marketable securities including securities issued by a body corporate not being a company or by an unincorporated society or association; (definition of it marketable security" and "prescribed corporation" in section 189). I confine my opinion to so much of this Division as relates to the shares and debentures of companies. Whether or not a body incorporated in the State which was not a company falls within section 51(20) depends on what it was incorporated for or does. (I deal later with section 51(1) Sections 61 and 261A empower companies to secure information as to the beneficial ownership of their shares. Division 2 of Part XIII controls the borrowing, investment and underwriting powers of investment companies. That is, those engaged primarily in the business of investment in marketable securities for revenue and profit.

Once the corporations power is seen to embrace the incorporation of trading and financial corporations, that is.

once it is seen to apply internally as well as externally, laws about shares, their creation, transfer, the rights they give as to dividend, on a winding up and generally, necessarily fall within the power. So too do the corporation's raising of public funds of which the issue of shares and debentures forms one aspect, the preservation of its capital as a fund to satisfy its creditors and the competing rights of creditors and shareholders. Such laws write out the nature of the corporation which the power enables the Parliament to create. A recognition that the power is one about persons as both Mason J. and Deane J. acknowledge (see above) and indeed as the grant itself proclaims entails assent to the validity of laws of the character in the various Divisions and sections elaborated above in their operation upon trading or financial corporations and upon foreign companies.
(Excluding as to the latter, initial foreign incorporation). The power over foreign corporations while no doubt assuming their existence has otherwise no limit but the relevance to the power of the practical application of the law.

Subject therefore to the reservation as to Division 8 expressed above the Parliament may make laws of this type applying to foreign, financial and trading corporations.

Mining and Manufacturing Companies

If a mining company sells its product it is clearly a trading corporation whether it makes a profit or a loss. The sole reason to mine is to sell the product. The expression "trading corporations formed within the limits of the Commonwealth" does not distinguish between trade and business any more than "financial" distinguishes between pawn-brokers and merchant bankers. Any corporation that makes

a vendible article to sell it is a trader by whatever process the article is produced. And as has been pointed out "a corporation may be a financial as well as a trading corporation" (State Superannuation Board v. Trade Practices Commissioner (supra) at p.303): and that for constitutional purposes trade cannot be confined to dealing in goods and commodities (Rg. v. Federal Court of Australia (1979) 143 C.L.R. 190 at p.209) and has the content it is now recognized as having (at p.233).

The Hydro-Electric Commission which made and sold electricity was held, despite its semi-governmental character, to be a trading corporation in Tasmania v. Commonwealth (supra). The two types of commercial activity we are considering make the companies which carry them trading corporations within the Constitution as explained in the decisions I have mentioned.

Real estate and commercial trustee companies
If the real estate company engages in commercial activities in relation to the estate, such as obtaining tenants, keeping the property in repair and so on, it is a trading corporation. It is impossible to say that a corporation which stages football matches is a trading corporation because the players are professionals and the crowds are large and a manager of /realty is not. So too a professional executor and trustee, each one of whose activities is commercial so far as he is concerned. See State Superannuation Board Case (supra) at p.305.

Recreational, Scientific, Educational and Charitable Companies

If trading or commercial activities do not form a significant part of the total activities, none of the above

companies fall within the power. The analogy is the W.A. National Football League Case (supra).

Takeovers

What is involved here is a trading activity by a trading corporation. If therefore the offeror directly or indirectly is a constitutional corporation, the takeover falls squarely within power. If the target company is a trading or financial corporation, the takeover may be regulated independently of the identity of the offeror. This is because the law is about an essential aspect of or feature of corporate personality, namely, the purchase or dealing in shares. The fact that individuals may own all or the majority of the shares in the target company is irrelevant to the attraction of power, because that is derived from the identity of the target company and the nature of the activity, that is, the acquisition of shares in such a company.

The interstate communication of the offers would fall within section 51(i) as of the acceptances: McGraw - Hinds (Aust.) Pty. Ltd. v. Smith (1979) 144 C.L.R. 633. If sent by post section 51(v) would authorise a law regulating its contents and the circumstances- under which it might be sent. Both these powers apply, of course, whatever the character of the sender or recipient. The substance of Parts II, III, IV, V and VI of the Acquisition of Shares Act could be made to apply to all companies in relation to the making of any take-over offer interstate by any company. The same effect could be achieved in relation to postal or telephonic offers under section 51(v). Section 51(xx) would sustain like provisions where the target company was a foreign, trading or financial corporation whatever the identity of the offeror and the shareholders of the target company. Where a

constitutional corporation was the offeror, its offers would be trading operations and on the narrowest present view of the power could be regulated as the present statute provides, whatever the identity of the target company or its shareholders.

Fund raising by public companies

As to constitutional corporations I have already earlier in this Opinion said that the power exists.

Where interstate communications are involved sections 51 (i) and 51(v) apply in manner I have described in relation to takeovers. Where the passage of credit is involved across State boundaries section 51(i) applies so as to allow the regulation of the conditions under which that passage is allowable. If the postal or telephonic services are resorted to conditions of every character whether within or outside power, may be imposed upon transmission : Herald and Weekly Times v. Commonwealth (1966) 115 C.L.R. 418 at pp.433-434. Of course, section 51(v) may be used in the same way upon the transmission of takeover offers, that is, a prohibition of transmission may be released upon the existence of stated conditions, such as the presence of those in the present legislation, being established by the offeror or others. I should here deal with the extent to which other powers than section 51(20) may be used to support a national Companies Act. I shall not repeat my reference to takeover offers and fund raising just mentioned.

Section 51(XVII)

There is no doubt of the application of this paragraph to companies : Victoria v. Commonwealth (1957) 99 C.L.R. 575 at p.612 and the cases there cited. And the power is exercised where measures are taken to ensure the equitable

distribution of a debtor's estate among his creditors : Storey v. Lane (1981) C.L.R. 549 at pp.556-557. Thus provisions regulating receiverships to secure this end would be authorised by the power. Such ancillary laws might lawfully apply to every type of company. This power would extend to like provisions relating to official management and reconstructions and schemes of arrangement. It would also sanction measures to recover from directors and servants of the company sums appropriated by them to the detriment of creditors' rights to equitable distribution of the company's assets or distributions of capital made to shareholders under the guise of dividends or made when the effect of a declaration of dividend was to ensure the company's insolvency.

While the content of the power is not determined by what fell within the concept in 1901, I find somewhat elusive the notion that it extends to measures designed to prevent bankruptcy. A general law to be prudent in one's financial dealings hardly seems, without more, one with respect to bankruptcy, though if heeded it would in many cases have that effect. The trouble with this notion is that the paragraph refers to the rules for determining the existence of bankruptcy, the administration of estates and the discharge of debtors. I don't think the power alone or read with section 51(39) authorizes a law to secure the opposite. Certainly not one in general terms.

Section 51(1)

There is no longer any doubt that this paragraph extends to the incorporation of a proposed interstate or overseas trading corporation for such trade by the Commonwealth: Australian National Airways v. Commonwealth (1945) 71 C.L.R. 29. It would, I think-,extend to a law which required a person

proposing to or engaged in interstate or overseas trade to do so by means of a body corporate formed, regulated and answerable to its creditors in accordance with company laws of the type earlier discussed in relation to section 51(XX). Such a law could validly apply to a corporation already so engaged. In result this power could apply section 51(XX) to companies engaged in section 51(1) trade or proposing to do so. But since they would undoubtedly be trading corporations the role of the paragraph could only be subsidiary.

Sections 51(XIII) and (XIV)

While the reference to incorporation of banks in the banking power suggests that reliance on this power would presently be unwise, (see Actors & Announcers Equity Association v. Fontana (1982) 150 C.L.R. 169 at p.182), the same does not apply to the insurance power. The subject matter would extend to the character of those desiring to conduct this activity and hence laws for their incorporation and constitution: Insurance Commissioner v. Associated Dominions Assurance Society Pty. Ltd. (1953) 89 C.L.R. 78. Nor does the language of Fullagar J. in this case suggest that he really doubted that such laws could govern the winding up of an insurer (see the report at p.88). The other constitutional powers, for example, bills of exchange, copyright and patents are peripheral at best.

The Securities Industry

The present legislation forbids persons to carry on the business of dealing in securities unless they are licensed. A dealer is one who buys or sells or underwrites securities or offers to do so or endeavours to induce others to buy or sell them : Act sections 4(1) and 43. The same prohibitions are directed against advisers (section 45) and representatives

of dealers or advisers (sections 44 and 46). Securities include in addition to debentures, shares, stocks, bonds or notes issued or proposed by bodies corporate those as well as those of governments and unincorporated bodies and prescribed interests. (section 4(1) This last phrase is very widely defined : see "participation interest" and "investment contract" (section 4(1)) and option contracts (section 4(8A)). The Commission may conduct or appoint inspectors to conduct investigations into matters relating to dealings in securities if the Minister so certifies and specifies. Setting up a stock exchange except as approved is prohibited (sections 37 to 38B). The Commission may prohibit trading in particular securities to protect those buying or selling them (section 40). Dealers must disclose their personal interests and are not to deal as principals (sections 65 and 66). Short selling (section 68) and the use of clients' money (section 67) are regulated and dealers are subject to audit and their accounts regulated (sections 71 to 79), a fidelity fund requiring contributions by dealers and the exchange is required (section 94A to 111). Undesirable market manipulation and trading is prohibited. (sections 123 to 128).

I shall deal first with constitutional power, then with constitutional prohibition (section 92).

Section 51(XX)

I think this power understood in the sense I have explained at the outset extends to authorize laws regulating the manner in which shares may be sold. This comprises who may publicly engage in their public sale and under what conditions, provided the aim is to secure a fair market exchange. The dealing in shares of constitutional corporations is a step removed from the centre of the power; hence the relationship to the power should not be dislocated or made tenuous or

doubtful by the introduction of factors extraneous to the relationship between trading in company shares and the company. That is, the fact that what is in exchange is a contract between the shareholder and the company. Hence the interposition of an administrative discretion between the dealer and the right to trade is a step of crucial importance. I think the present section 48, although paragraphs (III) (IV) and M leave ambiguous areas, does not destroy that connexion between the power and licence (that is the prohibition) and would be valid even if section 92 were raised. The same applies to sections 49, 50, 51 and the remaining licensing sections.

Section 51(I)

If the transaction between seller and buyer of shares involves interstate communication, it, to that extent, falls within the power. So too if it requires the interstate movement of credit or the transfer of shares from a registry in one State to that in another. In each such case the dealer is engaged in interstate trade without more because he is participating in interstate commerce, however State bound he may appear to be. See Haddart Parker v. Commonwealth 15 (1931) 44 C.L.R. 492 at 515, 528; R. v. Wright (1958) 93 C.L.R. 528. of. Roughly v. N.S.W. (1928) 42 C.L.R. 162. So too if his dealings require interstate negotiations or credit flow (see above).

The same reasoning applies probably with greater liberation to overseas or ex-Australian transactions.

Unless the State securities have as to their sale an interstate or overseas element they lie, except for Commonwealth securities as to purchase and sale, outside this power. The

purchase by a Victorian, for example, of a New South Wales security on a New South Wales register, embodies interstate elements sufficient, I think, to attract the power. That is, the purchase is an interstate contract the obligations and enforcement of which are enough to attract section 51(I): Australian Coarse Grains Barley Case (1985) 59 A.L.J.R. 516 at p.527. The same is more clearly the case where the government is an ex-Australian one or where overseas negotiations (offers and so on) are involved.

Given the transaction that attracts the power, the method of regulation of it is also attracted. The licences, the Fidelity Fund, the stock exchange and so on are means by which the buying and selling interstate of shares, debentures, Government bonds and the other interests mentioned in the legislation are regulated to secure the safety of those who buy and sell through dealers. The dealers when they buy and sell themselves engage in such commerce and may be licensed because they carry on an interstate business of a commercial nature. The power being with respect to that commerce may, subject to section 92, either prohibit it or encourage it or subject it safeguards. See Redfern v. Dunlop Rubber (1964) 110 C.L.R. 194 at pp.219-220; Actors & Announcers Equity v. Fontana (supra) at p.183.

Section 92

The licensing provisions are those at risk because of the prohibitions in sections 43, 44, 45 and 46. The effect of section 62 is to require a hearing before the grant of a license may be refused, revoked or suspended or its conditions varied or ones imposed or the license restricted. The conditions of the license (section 51(2) the criteria for grant or revication seem regulatory only see Boyd v. Carah

Coaches (1979) 145 C.L.R. 78 at p.93. The Fidelity Fund contribution is made to meet dishonesty and, although an exaction, is a reasonable regulation of a trade in which defalcations or financial collapses have occurred. The present content of section 92 is uncertain, but there is no discrimination against interstate trade and provisions of this character will, I think, be held to be valid.

Section 51(V)

This power may be exerted to set condition on the transmission of offers, sale notes and the like in the manner indicated in relation to takeovers and public funding.

The Futures Industry

The Futures Industry Act, 1986 approaches this industry in much the same fashion as the Securities Industry Act approaches that industry. Brokers are to be licensed, investigations may be carried out, conditions are set by reference to which a licence may be granted analogous to those in the Securities Industry Act. Advisers must be licensed, the conditions of grant being the same as for brokers, and representatives of brokers and advisers also on less stringent conditions. Conditions for revocation are set and a hearing required. Accounts must be audited and a Fidelity Fund constituted. Futures Exchanges, Clearing Houses and Associations are provided for and made subject to approval. Futures brokers are those who as a matter of business deal in futures contracts whether or not also on their own behalf. Futures advisers are those who advise as a matter of business or publish advisory literature. A futures contract is an agreement, or what has been such, for the sale of something capable of delivery where under delivery obligations are

are accepted or imposed which are not likely to be dischanged. The various definitions elaborate this notion.

From this brief recital it is obvious that only section 51(I) of the Constitution could wholly support the necessary laws. The transactions must therefore occur in interstate or overseas trade or commerce. This requires that the contracts must require delivery across State boundaries or involve interstate offers or the passage of money or other considerations across State boundaries or be made between brokers in different States and in that sense involve the brokers in interstate commerce as contract makers or be made on behalf of persons in different States. The power is also attracted if overseas offers or acceptances are made, overseas delivery is required in the documents or overseas brokers and local brokers are involved.

I think the substance of the Act could be passed under this power. The setting up of the exchanges, clearing houses and so on are but means of regulation and thus comprised in the grant.

Section 51(V) would operate in the manner I've explained in relation to takeovers and the security industry. If financial or trading corporations act as principals or brokers those powers are likewise available as is the banking power if banks act as principals or brokers and section 51(XII) if local or foreign currency is the subject of the futures contract or necessary to perform it.

If the licensing criteria are regulatory section 92 will not affect it or the audit, accounts or fidelity provisions.

I answer this question as above. I should add that the Commission forms part of the regulatory processes and it and the various fees Acts fall within the above powers.

Question 2

Does the Commonwealth Parliament have power unilaterally to enact laws for the whole of Australia covering the following matters in respect of which it is proposed to legislate for the Australian Capital Territory in 1987 pursuant to the Commonwealth-State Agreement

(i) the proposed Australian Stock Exchange?
(ii) the proposed National Stock Exchange Guarantee Fund?
(iii) the proposed-National Stock Exchange Clearing House?

The main features of the proposals are outlined in the Exposure Draft of the Companies and Securities Legislation Amendment (Clearing Houses)'Bill 1986 prepared by the Business Affairs Division of the Commonwealth Attorney-Generals Department in June 1986. The Draft also contains draft legislation and a clause by clause commentary.

Australian Stock Exchange

The Australian Exchange will be provided by a body corporate, subsidiaries of which will provide the various State stock exchanges. The proposed National Guarantee Fund will be the responsibility of the Australian Exchange.

I think it likely that the conduct of a stock exchange would constitute the corporation conducting it as trading or financial corporations to which the administration of the

Fund would considerably contribute. But the power extends to the establishment of exchanges where shares of constitutional corporations are traded. If interstate or overseas transactions are involved, section 51(I) also applies as would the banking and insurance powers to trade in the shares of banking or insurance companies. However almost all companies whose shares are quoted would be trading, financial or foreign corporations so that section 51(XX) and perhaps section 51(I), (XIII) and (XIV) would support the contemplated law.

The Fund and Clearing Houses

The object of the Fund is the protection of those buying or selling quoted securities ("prescribed securities" clause 122A) as principal or broker. This clearly falls within section 51(XX) where the shares are of constitutional corporations or banking or insurance companies or where the sales are interstate or overseas sales (sections 51(1) (XIII) and (XIV)).

The clearing houses obviously aid sales of shares and other securities of such companies and are within power.

I answer this question as above.

I have been greatly assisted by the Background Paper on Companies and Securities Legislation.

M.H.BYERS

Chambers,
22 December, 1986.