The Parliament of the Commonwealth of Australia

# Report of the
# Joint Select Committee
# on Corporations Legislation

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Australian Government Publishing Service
Canberra

ISBN 0 644 09620 9

Printed by Pirie Printers Sales Pty Ltd, Fyshwick, A.C.T. 2609

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**Secretary**

Andrew Snedden
The Senate
Parliament House
Canberra

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## PREFACE

### Terms of Reference

1. On the motion of Senator Macklin (Queensland), the Senate resolved on 17 October 1988 to establish a select committee of the Parliament to be known as the Joint Select Committee on Corporations Legislation, and that the Committee inquire into and report on 16 Bills known as the Corporations Legislation package. The resolution was agreed to by the House of Representatives on 17 October 1988.

The Committee's terms of reference read:

'That, acknowledging that the Senate Standing Committee on Legal and Constitutional Affairs has unanimously recommended that the Commonwealth should introduce comprehensive legislation to assume responsibility for all areas covered by the Co-operative scheme and that a package of Bills for this purpose is now before the Senate, the Bills be referred to a select committee, to be known as the Joint Select Committee on Corporations Legislation, and the Committee inquire into and report on the Bills for the regulation of companies and the securities and futures industries with reference only to the adequacy of the proposed legislative provisions to:

(a) improve the regulation of companies;

(b) facilitate the performance of the securities and futures markets; and

(c) ensure adequate protection for investors in companies and the securities and futures markets;

and, in particular, report on the adequacy of the fund-raising provisions'.

2. The 16 Bills in the Corporations Legislation package, (which will be referred to as 'the Bills'), were introduced into the House of Representatives on 25 May 1988 by the Attorney-General, the Hon Lionel Bowen. The 16 Bills are:

Australian Securities Commission Bill 1988

Corporations Bill 1988

Corporations (Fees) Bill 1988

Securities Exchanges (Application for Membership) Fidelity Funds Contribution Bill 1988

Securities Exchanges (Membership) Fidelity Funds Contribution Bill 1988

Securities Exchanges Fidelity Funds Levy Bill 1988

National Guarantee Fund Reportable Transactions) Levy Bill 1988

National Guarantee Fund (Participating Exchanges) Levy Bill 1988

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Futures Organisations (Application for Membership) Fidelity Funds Contribution Bill 1988

Futures Organisations (Membership) Fidelity Funds Contribution Bill 1988

Futures Organisations Fidelity Funds Levy Bill 1988 Close Corporations Bill 1988

Close Corporations (Fees) Bill 1988

Close Corporations (Liquidators' Recovery Trust Fund Contribution) Bill 1988

Close Corporations (Additional Liquidators' Recovery Trust Fund Contribution) Bill 1988

3. There are 3 principal Bills: the Australian Securities Commission Bill, the Corporations Bill and the Close Corporation Bill. The 13 other Bills relate to various levies and fees.

4. The Dills were debated by the House of Representatives on 28 and 29 September 1988. During the course of debate, 280 amendments to the Australian Securities Commission Bill, the Corporations Bill, and Close Corporations Bill, moved by the Government were passed. The amended Bills were introduced into the Senate on 14 October 1988.

## Committee's Approach to the Reference and Inquiry

5. The Committee considers its terms of reference constitute a statement of the Parliament's expectation that the Committee Report on the provisions of the Bills, and not on the matters dealt with by the Senate Standing Committee on Constitutional and Legal Affairs in its 1987 Report on 'The Role of the Parliament in Relation to the National Companies Scheme'

('the Senate Committee Report'). (Parliamentary. Paper 113/1987). The Senate Committee Report recommended that the Parliament should enact comprehensive legislation covering the field currently regulated by the Co-operative scheme.

6. A number of important questions regarding the implications of the new scheme proposed by the Bills were raised in submissions to the Committee. The Committee heard oral submissions on these matters and deals with them in Part 1.

7. The first meeting of the Committee was held on 10 November 1988. Because of its short reporting deadline, the Committee immediately advertised the reference of the Bills to it and invited public submissions. The Committee identified the issues raised by its terms of reference which were material to its inquiry and set them out in a booklet of guidelines for witnesses. In the guidelines (which were provided to those who responded to the Committee's advertisement) the Committee stated that it would not be considering the issue of the Constitutional validity of the Bills; provisions in the Bills which were merely transferred unaltered from the existing companies and securities codes and issues currently subject of other current inquiries on companies and securities, by the Senate Standing Committee on Legal and Constitutional Affairs (on the duties of company directors), the House of Representatives Standing Committee on Legal and Constitutional Affairs (on takeovers, mergers and acquisitions), and the Australian Law Reform Commission (on insolvency). The Committee also stated that issues currently, or recently, the subject of report by the Companies and Securities Law Reform Committee and the Securities Industry Research Committee (particularly on prospectuses) would not be considered.

8. In the week 14-19 November 1988, the Committee advertised in 10 major daily newspapers throughout Australia asking interested persons and organisations to make written submissions to it by 6 January 1989. On 18 November 1988 the Committee wrote to over 150 individuals and organisations it considered had a direct interest or involvement in companies and

securities forwarding the Committee's guidelines for witnesses and inviting views. These invitations were sent to prominent individuals and organisations in the administration of companies and securities; principal legal and accounting firms; commercial organisations; the ACTU; the Australian Stock Exchange; and company directors' bodies and shareholders' groups.

9. The Committee also wrote to each State Premier and Leader of State Parliamentary Opposition asking for their views.

**Evidence and Submissions**

10. The Committee received a total of 61 written submissions (Appendix 1) and a large number of letters providing brief individual views. All submissions received are tabled with the Report both for the information of the Parliament and to allow access to views put to the Committee. Also tabled with the Report are detailed comments on a number of submissions prepared at the Committee's request by the Attorney-General's Department. The written submissions greatly assisted the Committee in its understanding of the legislation. The Committee records, however, that some of the persons and organisations it invited to contribute their views indicated they would not be able to do so due to the Committee's short timetable.

11. As well as the submissions and evidence, the Committee also had access to a large volume of published material such as commentaries on the Bills; reports on overseas experience; reports from other Parliamentary inquiries and from the specialist Australian companies and securities law review bodies (such as the Companies and Securities Law Review Committee and the Securities Industry Research Committee). The Committee has also considered the implication of developments resulting from the activities of the NCSC and certain initiatives of the Ministerial Council which occurred during its inquiry.

12. The Committee held 12 public hearings between 30 January and 2 March 1989; 3 in Canberra and 9 in State Capital cities at which it held discussions with 25 individuals and organisations. (Appendix 2). A Hansard record of the Committee's public hearings is tabled with the Report. Most of the public meetings were held outside Canberra so that organisations and individuals primarily affected by the implementation and application of the legislation could make oral submissions to it. The details of its public hearings are:

| | |
|---|---|
| Canberra - 3 | (13 and 14 February, 2 March 1989) |
| Sydney - 2 | (30 and 31 January 1989) |
| Melbourne - 3 | (1, 2 and 15 February 1989) |
| Brisbane - 1 | (3 February 1989) |
| Adelaide - 1 | (6 February 1989) |
| Perth - 2 | (9 and 10 February 1989) |

13. Following its public hearings a number of organisations and individuals provided detailed supplementary material in response to request by the Committee.

14. At the Committee's public hearings, discussions were held with various sections of the community including all State Corporate Affairs Commissions, a cross section of the securities, futures and commercial industries, and members of the legal and accounting professions. A Hansard record 'of the hearings is tabled with the Report.

**Style and format of the Report**

15. The Committee has sought to write a report which not only addresses policy and technical issues raised by the Bills, but also identified issues of importance to practitioners. Despite the volume of material before the Committee - comprising some 1200 pages of legislation and explanatory notes, 1000 pages of submissions, and over 1500 pages of Hansard - the Committee has

attempted in the time available to write a readable report of moderate length. Rather than attempting to analyse and discuss the whole field of activity, and the detailed provisions which

will be covered by the Bills, the Report deals with those issues considered by the Committee to be of most importance to the effective working of the new scheme.

16. The Report discusses provisions of the 3 principal Bills in the following order:

Australian Securities Commission Bill 1988

Corporations Bill 1988

Close Corporations Bill 1988

The Committee deals, as far as possible, with the issues in the order in which they are covered by the Bill.

17. At the end of its public hearing program in February, it was evident to the Committee that it would need to extend its reporting date to enable it to hold a final public hearing, and prepare its report. On 28 February a Resolution was agreed to by the Parliament to extend the Committee's reporting date to 13 April 1989.

18. The Committee's recommendations are set out immediately following this Preface. The Committee has recommended that a number of clauses of the Australian Securities Commission Bill and the Corporations Bill should be amended so as to give effect to the Committee's findings. The Committee has discussed the provisions of the clauses that, in its view, should be amended. In a Schedule to the Report the Committee provides a list of proposed amendments to the ASC Bill and the Corporations Bill drafted by the Office of Parliamentary Counsel on instructions from the Committee. Several amendments to the Bills, which are recommended in the Report have not been included in the Schedule as the Committee did not reach a concluded view on those recommendations until late in their deliberations.

**Acknowledgements**

19. In view of its earlier comments about the time constraint under which its inquiry proceeded, the Committee wishes to express its particular appreciation to those who contributed to the inquiry through written submissions and personal contribution in public discussions. The preparation of submissions on such lengthy and complex legislation on short notice and during the traditional summer holiday period, was greatly appreciated by the Committee. Those who made submissions or wrote letters to the Committee but did not appear before us may be assured that their contributions and views were taken into account during the Committee deliberations.

20. The Committee specifically acknowledges the considerable assistance it received during its inquiry from the Commonwealth Attorney-General's Department, the National Companies and Securities Commission and the Australian Stock Exchange. Brian O'Callaghan of the Attorney-General's Department, Mark Dickens of the NCSC and Michael Heffernan of the ASX attended all the Committee's public hearings and provided the Committee with valuable advice, and discussion based on their experience and detailed knowledge.

21. The Committee also acknowledges with thanks the professional assistance provided at short notice by the Office of the Parliamentary Counsel in the drafting of the recommended amendments to the Bill.

**RECOMMENDATIONS**

**CHAPTER 2: TRANSITIONAL PROVISIONS**

1. The Government should prepare an outline of proposed transitional arrangements for the transition from the Cooperative scheme to the now scheme. (p.12)

**CHAPTER 3: STRUCTURE AND ROLE OF THE ASC**

2. That Clause 9 of the ASC Bill should be amended so as to make it clear that a majority of the members should be part-time members selected from persons with the qualifications set out in subclause 9(4) of the Bill. The Committee favours continuation of the collegiate decision-making process currently employed by the NCSC. (p.19)

3. That paragraph 11(2)(b) of the ASC Bill should be re-drafted so as to provide the Commission with the same advisory functions as are provided to the Companies and Securities Advisory Committee by Clause 148 of the Bill. (p.21)

4. That subclause 12(5) of the ASC Bill should be amended so as to require the Minister to table a copy of the directions, given under the clause, in the Parliament within 15 sitting days of their publication in the Gazette. (p.22)

**CHAPTER 4: THE INVESTIGATION AND INFORMATION GATHERING POWERS OF THE ASC**

5. That Clause 16 of the ASC Bill should be re-drafted so as to provide that an interim report be made by the ASC when the ASC has formed the opinion that a serious contravention of the law has been committed. In particular, subclause 16(2) should

be re-drafted so as to make it obligatory upon the ASC to advise or

notify the Attorney-General when it has formed an opinion that such serious contravention has been committed, and that the ASC advise the Attorney-General of the nature of the offence the evidence upon which such an opinion has been formed and when it was formed.

That subclause 16(2) should also give the ASC discretion to notify other relevant bodies of a serious contravention. (p.28)

6. That Clauses 41, 42, 44 and 45 of the ASC Bill and Clauses 47 and 48 of the ASC Bill be reviewed to ensure that the day-to-day market surveillance role of the ASC is not unduly restricted. (p.36)

7. That Clause 50 of the ASC Bill should be re-drafted so as to allow the ASC to commence proceedings in accordance with the Clause without the written consent of a company's directors. Where the ASC considers that such proceedings should be taken in other cases, the Clause should still provide that a person's written consent is required before action is commenced by the ASC. (p.38)

8. That the ASC Bill be amended so as to allow the use in criminal proceedings of information obtained as a direct or indirect consequence of the production of books to the ASC. (p.41)

**CHAPTER 5: THE CORPORATIONS AND SECURITIES PANEL**

9. The provisions of the Bill relating to the Corporations and Securities Panel be redrafted so as to provide for

(a) a Panel with a minimum membership of 5, composed of both part-time and full-time members;

(b) a full-time President with powers to make interlocutory and other interim orders as provided for by Clause 734 of the Corporations Bill;

(c) the Minister to have the option of appointing a pool of members to the Panel with the qualifications provided for in subclause 172(3) of the ASC Bill. (p.47)

10. (a) That Clause 185(3) of the ASC Bill be amended so as to provide that hearings conducted by the Corporations and Securities Panel take place in public; and

(b) That Clause 185(4) of the ASC Bill be amended so as to provide that where the Corporations and Securities Panel is required to hold a hearing, the Panel may direct that the hearing take place in public or direct that the hearing take place in private.

**CHAPTER 6: OTHERS MATTERS RELATED TO THE ASC**

11. That Clauses 94, 97, 99 and 120 should be amended so as to replace reference to the "Chairperson" with reference to the "Commission". (p.56)

12. That appropriate amendment of Clauses 3(1)(c) of the ASC Bill be effected so as to allow the Advisory Committee to provide advice to the Minister about matters relating to corporations as well as to securities markets and futures markets. (p.58)

**CHAPTER 7: ACCOUNTABILITY OF THE ASC TO THE PARLIAMENT**

13. That Clause 138 of the ASC Bill be re-drafted so as to provide criteria which need be complied with by the Commission in the preparation of its Annual Report. (p.70)

14. That there be established a Parliamentary Standing Committee to be known as the Parliamentary Joint Committee on Corporations and Securities and that the Committee have the

powers and functions set out in the Schedule to this Report. (p.72)

**CHAPTER 8: COMPANY FORMATION AND ADMINISTRATION**

15. That the Government outline the arrangements it will make to ensure that existing registers of State Business Names are integrated with existing company name registers. (p.81)

16. That the Corporations Bill be amended so as to provide for a separate group of dormant companies in accordance with the proposal put to the Joint Committee by the Attorney-General's Department. (p.85)

**CHAPTER 9: FUNDRAISING BY PUBLIC COMPANIES**

17. That paragraphs 1033(2)(d), (e), (f) and (g) of the Corporations Bill be deleted. (p.96)

18. The Committee recommends that prospectus provisions under the Bill be amended as follows:

(i) That Clauses 66(1)(b) and 66(2)(b), exempting offers to "professional investors" be removed;

(ii) That, in line with the Securities Information Review Committee's recommendation, the maximum number of offerees in Clauses 66(1)(e) and (2)(e) be reduced to 20.

(iii) That Clauses 66(1)(e) and (2)(e) be amended to prevent corporations from issuing securities of different classes so as to evade the intent of the "limited offerees" exemption;

(iv) That Clauses 66(1)(e) and (2)(e) be amended to exclude prescribed interest offers from this exemption.

(v) That Clause 66(1)(g) be amended to exclude from the exemption options relating to unlisted companies;

(vi) That Clause 66(1)(h)(ii) be amended so that the exemption for issues of shares upon the conversion of a convertible note relates only to listed companies.

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(vii) That Clauses 66(1)(j)(i) and 66(2)(h)(i) be amended to make clear that :

(a) the offering of convertible notes to existing debenture holders is not exempt; and

(b) the offering of debentures to existing convertible note holders is not exempt

(viii) That the exemption from prospectus registration requirements in Clause 1017A(3)(b)(ii) for offers by unlisted corporations of debentures to existing debenture holders be removed.

(ix) That the exemption from prospectus registration requirements in Clause 1017A(4)(a), for offers of prescribed interests under a listed unit trust be removed.

(x) That the exemption from prospectus registration requirements in Clause 1017A(4)(b)(i) for offers of unlisted prescribed interests to existing holders under the same approved deed be deleted.

(xi) That the exemption from prospectus registration requirements in Clause 1017A(3)(a) for any shares or debentures of a listed corporation be restricted so as to apply only to securities that have been approved for quotation on the stock market.

(xii) That Clause 1020 be amended so as to allow prospectuses for debentures to include a "loose-leaf" application form.

(xiii) That Clause 1020A be amended to include a time limit, to be prescribed by regulation, within which the Commission shall register prospectuses. (p.98)

19. That the legislation include a 'grandfather clause' to exempt from prospectus requirements all securities currently listed. (p.102)

**CHAPTER 10: OTHER FUNDRAISING ISSUES**

20. That regulations be prescribed along the lines of the present NCSC guidelines ensuring that the matters proposed in a trust deed are in accordance with good business practice and consistent with a trustee's fiduciary duty.

That the words "if any" appearing in brackets in subc1ause 1067(1) be deleted. (p.111)

21. That standard forms be prescribed by regulation setting out the liability attaching to each class of adviser who assists in the preparation of the prospectus and that these forms be included in all prospectuses. (p.118)

**CHAPTER 11: CONDUCT OF THE SECURITIES INDUSTRY**

22. That:

(a) The right of rescission of agreements relating to dealings and securities given to clients of unlicensed dealers by Clause 798 of the Corporations Bill should be removed; and

(b) Noting that dealers' clients would not have a right of rescission, the ASC should have the right to take action for disgorgement of profits such as brokerage, fees, commissions or benefits received on behalf of clients and paid to an unlicensed dealer. (p.125)

23. That subc1ause 1005(2) of the Corporations Bill be amended so as to provide that action under subclause 1005(l) or paragraph 1013(l)(d) of the Bill may be begun within 6 years. (p.131)

**CHAPTER 12: INSIDER TRADING**

24. That provision be made in Clause 1013 of the Corporations Bill to enable the ASC to take action against a person engaged in insider trading for the recovery of any profits realized as a result of that trading. (p.136)

**CHAPTER 13: TAKEOVERS**

25. That Clause 11 of the Corporations Bill be amended so as to remove the extension of the definition of associates to include executive officers. (p.142)

26. That Clause 644 of the Corporations Bill be amended so as to require the ASC to refuse to register a Part A statement if it believes the statement does not comply with the Corporations Act, and contains any matter that is false or misleading.

27. That Clause 701 of the Corporations Bill be amended so as to provide that:

(a) where an offeror begins with 10 percent or more of a target, the offeror must have received acceptances from at least 75 percent of the target shareholders, or

(b) that 75 percent of the shareholders who were on the share register at the time of the offer are no longer there at the end of one month after the offer period. (p.154)

28. (a) That the Corporations Bill be amended so as to provide a company with similar powers to those currently provided by Section 261 of the Companies Code;

(b) The Corporations Bill also be amended so as to provide that the ASC shall require information as to beneficial ownership at the request of the company or a shareholder in the company on the condition that:

(i) the requesting party has provided the prescribed fee (which contributes to the cost of the request by the ASC of the shareholder);

(ii) the ASC is not of the view that it is unreasonable to request the person to whom a notice may be addressed to respond to those matters. (p.157)

29. That Clause 733 of the Corporations Bill be amended so as to provide that the power to make declarations of unacceptable acquisition or conduct be vested in the Australian Securities Commission. (p.164)

30. That the Government review the terms of the Corporations legislation to ensure that it will provide the ASC with the power to effect commercial settlements in matters involving unacceptable conduct proceedings. (p.165)

31. That the ASC have the ability to publish any declarations of unacceptable conduct and referrals to the Corporations and Securities Panel. (p.166)

**CHAPTER 14: OTHER ISSUES**

32. That the reforms proposed by the Harmer Report on insolvency receive early attention and that necessary amendments to the insolvency provisions in the Corporations Bill be proposed as soon as possible. (p.174)

33. That the matter of 'Shield of the Crown' be referred to a Parliamentary Committee for further examination in the near future. (p.176)

## CHAPTER 1

## REGULATION OF COMPANIES AND SECURITIES: A NEW SCHEME

### Introduction

1.1 The scheme proposed by the Bills ('the new scheme') is intended to replace current administrative and legal arrangements of uniform companies and securities law. The National Companies and Securities Scheme (the Co-operative scheme) was established in 1980 following the breakdown of the Uniform Companies law scheme in 1974. The Co-operative scheme has provided uniformity of law under separate administrations. The newsc will give effect to the recommendation of the Senate Standing Committee on Constitutional and Legal Affairs in its Report on the Co-operative scheme. (Parliamentary Paper 113/1987) that 'the Commonwealth parliament should enact comprehensive legislation covering the field currently regulated by the co-operative scheme.

1.2 The new scheme will replace the existing Co-operative scheme in which companies and securities law is based upon State legislative power but in which the States co-operate to achieve uniformity through a Ministerial Council with a national scheme based upon Commonwealth legislative power.

1.3 The administrative proposal inherent in the scheme is that each State Corporate Affairs Commission (CAC) will continue to operate as a separate entity but will become delegates of the Australian Securities Commission (ASC) and will administer Commonwealth laws rather than State laws.

1.4 Each State CAC will participate in what will be known as the ASC Management Committee to supervise the operation of the scheme. The States will collectively nominate two part-time members of the ASC. The States will be consulted on the content

of future legislative amendments with their views being reported to Parliament on the introduction of the legislation. The new scheme proposes that the States will be reimbursed seven eighths of all revenue collected through the administration of Companies and Securities Law, with the remaining one eighth being retained by the Commonwealth to fund the activities of the ASC.

1.5 As mentioned in the Preface, the Committee was required by its terms of reference to consider the new scheme having regard to the recommendation of by the Senate Committee. Annexed to the Senate Committee's Report was an opinion in relation to the Commonwealth's power to legislation for the regulation of the field provided by Sir Maurice Byers, QC. That opinion was that in Sir Maurice's view, the Commonwealth possesses the power under the Constitution to enact legislation concerning company law, takeovers and the securities and futures industries.[1]

1.6 In its guidelines for witnesses on the preparation of submissions, and in the course of its public discussions, the Committee emphasised that the Parliament plainly did not expect conclusions or recommendation from the Committee about the necessity or desirability for a national scheme, or the constitutional validity of the Bills.

1.7 Submissions to the Committee from the State Governments stated, however, that at the meeting of the Ministerial Council held on 2 December 1988, the Attorney-General

indicated that he would arrange to have the Terms of Reference of the Joint Select Committee extended for the sole purpose of receiving representations from the State and Territory Ministers.[2]

Submissions from each State reflected this, and dealt with the general question as to the desirability of Commonwealth regulation of companies and securities; the scope of its constitutional power to do so; and suggested changes to the operation of the Co-operative scheme.

1.8 The Attorney-General wrote to the Committee Chairperson in early February 1989 as follows:

Dear Ron,

You will recall that the Terms of Reference for the Joint Select Committee on the Corporations Legislation were agreed by the Parliament on 17 October 1988.

The Joint Select Committee and the Terms of Reference were discussed at a subsequent meeting of the Ministerial Council on Companies and Securities on 1 December 1.988. Mr G. Peacocke, the NSW Minister for Business and Consumer Affairs, asked if I had an objection to States making submissions generally to the Committee because of their special positions through their participation in the existing Co-operative scheme.

I indicated that I would have no objection to that course but that it would a matter for the Committee as to how they dealt with their submissions.

Yours sincerely,

(Sgd) Lionel Bowen

1.9 While the issues raised are outside its Terms of Reference, the Committee believes that, as a matter of courtesy to the States, the Parliament should be made aware of the arguments that were advanced in favour of retention, or modification of the Co-operative scheme.

**A new scheme: reasons for and against**

1.10 The arguments for and against a uniform Commonwealth companies and securities scheme were canvassed thoroughly during the course of the Senate Committee's 1987 enquiry. The

views put to this Committee by the States and echoed by others supporting the co-operative scheme.

1.11 Arguments that were put to the Committee in favour of a national scheme are based on the following matters

* a need exists for a national scheme to meet developments in international trading practices, including the rapid development of markets based on screen trading, such as 24-hour markets;

* a need also exists for prompt rulings on takeovers and other matters, which can only be provided by a national regulator established under a national scheme

1.12 These arguments recognise the development of a national and more international structure of company and securities activity, highlighted by the support given to the Bills by the Business Council of Australia.

1.13 Arguments supporting the scheme recognise that there is currently no single responsible political 'locus' to give effect to a national priority of effective, efficient and proper administration of companies and securities. The argument is based on the view that State Ministers will allocate scarce funds to local administration in preference to the Co-operative scheme. This argument also recognises that the Co-operative scheme has operated on what has been described as the 'lowest common denominator', whereby decisions cannot be made by Ministerial Council unless and until every State, including States that may have no interest in development of companies and securities law, agrees to change.

1.14 It is also a problem that separate State administrations and jurisdictions have meant that the process of conducting a company's activity from one jurisdiction in Australia to another, or alternatively carrying business in more than one jurisdiction, is complicated and results in high associated costs which arise purely because there are separate administrations based on State boundaries.

1.15 A further argument centres on the role and activities of the NCSC. In terms of political or administrative accountability

the NCSC is only accountable to the Ministerial Council established by Co-operative scheme legislation. This perceived lack of accountability and responsibility results in limited financial and personnel resources being allocated to the NCSC. It also means that no individual State or Commonwealth Minister will accept responsibility for the activities of the NCSC.

1.16 Arguments which oppose the introduction of a uniform new scheme administered by the Commonwealth were forcefully put to the Committee by each of the State Governments that made submissions to the Committee and other groups such as the South Australian Working Party on Companies and Securities Administration, and the Western Australian 'Opposition Group'. These arguments assert that the outstanding virtue and strength of the Co-operative scheme are that, whilst it may appear to be remarkable that the Co-operative scheme has worked at all, it is important to recognise that it has, in practice, worked well.

1.17 By giving effect to a uniform scheme of law in an area of doubt and complexity under the Constitution, the scheme has given form to the imperative of providing a uniform, predictable and workable system of administration in an area of vital economic importance. Emphasis was placed in the submissions to the Committee upon the constructive role that State CAC's and other authorities play in the regional administration of locally incorporated companies; prevetting of local prospectuses and trust deeds; takeovers; accounts and other licensing requirements; roles greatly assisted by local knowledge and experience.

1.18 However, the majority agree with the view taken by the Parliament in the formulation of the Committee's terms of reference. The Dissenting Report by four members of the Committee about this matter appears at the end of the report.

**A compromise scheme**

1.19 The Committee received detailed submissions from the South Australian Attorney-General, The Hon. Chris Sumner, and the Victorian Attorney-General, the Hon. Andrew McCutcheon, on a proposed modification of the Co-operative scheme. The proposals are called 'the compromise scheme' and were first advanced by Mr Sumner in November 1988 shortly after the establishment of this Committee.

1.20 Following a meeting of the Ministerial Council on 2 March 1989, it was announced that:

Further discussions ensued between Ministers as to the Commonwealth initiatives in the area of companies and securities law. However, it is now clear that no agreement can be reached either between the States themselves or between the States and the Commonwealth.[3]

1.21 The proposed scheme was rejected by the States. This was a further indication to the Committee that the Co-operative scheme cannot be successful in proper administration of companies and securities.

**Endnotes**

1. Senate, Standing Committee on Constitutional & Legal Affairs Committee, Appendix IV, pp.89-106.

2. Submission No.37, p.1.

3. Ministerial Council Press Statement, 2 March 1989

## CHAPTER 2

## TRANSITIONAL PROVISIONS

### Requirements for transitional provisions

2.1 The Committee was told that the transition from the Co-operative scheme to the new scheme would, in addition to being constitutionally uncertain, be difficult and of unknown cost. Uncertainty as to transitional provisions have been claimed to have already caused a great deal of uncertainty in State CAC's, leading to a loss of capable and professionally qualified officers, according to submissions by State CAC's.[1]

2.2 The need for transitional provisions was highlighted by the Law Council of Australia:

Transitional provisions are designed to safe guard existing legal rights and obligations. It is therefore essential that these provisions work effectively. Past experience has shown that, to achieve this, it is necessary for provisions of this kind to be subjected to public scrutiny before passage. However, the great bulk of the transitional provisions have not yet been formulated.[2]

2.3 Transitional arrangements governing administration, and the acquisition of State or Territory records are set out in Clauses 235 and 236 of the ASC Bill. These provisions, in general terms, contemplate a voluntary change from a State-administered scheme to a Commonwealth-administered scheme. A number of submissions pointed out that no draft transitional provisions have yet been proposed. Issues that would need to be covered by transitional legislation would deal with areas such as

* status of existing prospectuses

* existing company charges

* how current company investigations will be handled

* how existing liquidations will be handled, e.g. whether they will be dealt with by State or Commonwealth law

* how existing prosecutions will be dealt with

* licensing of dealers and investment advisers.

Under the Co-operative scheme such matters were legislated for in the Companies (Transitional Provisions) Act 1981.

2.4 In its letter to the Committee, the Law Council noted that:

When the Co-operative companies and securities scheme was brought into operation, the Commonwealth and the States had common objectives and were able to plan the transitional arrangements as a single, integrated exercise. that is not the case now.[3]

**Proposed transitional provisions**

2.5 In evidence to the Committee, officers of the Attorney General's Department responded to points raised by submissions public discussions in relation to the question of transitional provisions.

2.6 Mr Starr of the Department noted that, at the end of May 1988, the Attorney-General proposed to the States

... that the existing Corporate Affairs Commission's act as agents of the ASC to administer the ASC and Corporations Bill package of Legislation and basically set out from the

Commonwealth's point of view an offer of the types of undertakings that the Commonwealth would be prepared to make in order to see if the States were interested in that sort of arrangement.[4]

2.7 When questioned as to whether legislation would be necessary to give effect to funding and transitional arrangements, Mr Skehill advised that in addition to the transitional provisions in the ASC Bill

Clearly if the Commonwealth was not able to use existing State mechanisms on an agency basis, we would need to establish our own Commonwealth branch office network and so on. That would affect timing and transition arrangements, and because these questions have not been resolved it is just not possible to talk with specificity about start-up dates, cross-over periods and so on.[5].

2.8 Also of importance in this regard are inquiries, prosecutions and other matters in hand by the NCSC and State CAC's during the transitional period. Mr O'Callaghan of the Attorney-General's Department told the Committee that

Of course, depending on what sort of arrangements the Commonwealth and States get to in resolving the new ASC process there are various ways in which responsibility, for example, for continuing investigations, continuing prosecutions, could be dealt with. For example, if a State Corporate Affairs Commission was acting as an agent of the ASC, then it would simply continue its previous work as well as work flowing under the new legislations.[6]

2.9 When asked whether, in the absence of specific Commonwealth State arrangements, appropriate Commonwealth provisions ensuring the continued existence of corporate entities, records and incomplete actions would be required, Mr O'Callaghan said that such provisions are not necessary

... because the legislation does not dissolve the NCSC nor does it dissolve the current companies and securities legislation. The Commonwealth legislation just overrides it to the extent of any inconsistency. So that anything that needed to be dealt with under the legislation prior to the Commonwealth law coming into force could be dealt with under that legislations.[7]

2.10 The Committee regards uncertainty about the proposed transitional provisions as undesirable. The Committee has been made acutely aware that it is unlikely that the States will co-operate in the implementation of the new scheme, unless and until it is found to be constitutionally valid.

2.11 The Committee notes that in a letter dated 29 April 1988 the Attorney-General has notified State Ministers that he will not proclaim certain of the legislation in the Bills package until a case determining the Constitutional validity of the new scheme has been determined by the High Court. The relevant part of that letter reads:

The legislation will be introduced during the current Autumn Sittings of the Commonwealth Parliament but passage through the Parliament will not be sought until the Budget Session. It is the Government's intention that, following passage, commencement of the legislation would be held back if it has become clear by then that a State or Territory Government proposes to initiate a comprehensive challenge to the constitutional validity of the legislation. In these circumstances, the Government would seek to have the resolution of any such challenge handled as expeditiously as possible.

2.12 The Committee considers that, as a part of its response to this Committee's Report, the Government should provide the Parliament with an outline of what transitional provisions are proposed to allow a proper and orderly change from the Cooperative Scheme to the new scheme.

**Recommendation:**

**The Government should prepare an outline of proposed transitional arrangements for the transition from the Co-operative Scheme to the new scheme.**

**Endnotes**

1. Submission No.10, para.5-6, Submission No.37, p.6

2. Letter to Committee dated 2 March 1989, p.3.

3. ibid., p.2.

4. Evidence, p.1269

5. Evidence, p.1270

6. Evidence, p.1272

7. Evidence, p.1272-1273

## PART 2 - AUSTRALIAN SECURITIES COMMISSION

## CHAPTER 3

## STRUCTURE AND ROLE OF THE ASC

### Introduction

3.1 The Australian Securities Commission Bill 1988 (the ASC Bill) establishes the principal administrative organs of the new scheme. The ASC will replace the NCSC and will be responsible for the administration of the new scheme, with certain powers comparable to the NCSC's, although its role will be more extensive in the respects discussed further in this and following chapters. The ASC will be responsible to a Commonwealth Minister and, through that Minister, to the Commonwealth Parliament. The ASC's independence is to be protected by provisions allowing the Minister to give directions as to general policies or priorities, but not as to particular matters.

3.2 In its examination of the ASC Bill, the Committee has had particular regard to the submissions to it by the NCSC (Submission 30) and to comments on that submission prepared for the Committee by the Attorney-General's Department.

### Objects and Aims of the ASC

3.3 The objects and aims of the ASC are set out in Clause 3 of the ASC Bill. They are:

**3(1) [Objects of Act]** The objects of this Act are:

(a) to establish an Australian Securities Commission to administer the laws of the Commonwealth relating to companies, securities and the futures industry;

(b) to provide for the functions, powers and business of the Commission;

(c) to establish a Companies and Securities Advisory Committee to provide informed and expert advice to the Minister about the content, operation and administration of those laws and about the securities markets and futures markets; and

(d) to establish a Corporations and Securities Panel, a Companies Auditors and Liquidators Disciplinary Board and an Accounting Standards Review Board.

**3(2) [Aims of Commission]** In performing its functions and exercising its powers, the Commission shall strive:

(a) to maintain, facilitate, and improve the performance of the securities markets and futures markets in the interests of commercial certainty, reducing business costs, and the efficiency and development of the economy;

(b) to maintain the confidence of investors in the securities markets and futures markets by ensuring adequate protection for such investors;

(c) to achieve uniformity throughout Australia in how the Commission and its delegates perform those functions and exercise those powers;

(d) to administer national scheme laws effectively but with a minimum of procedural requirements;

(e) to receive, process, and store, efficiently and quickly, the documents lodged with, and the information given to, the Commission under national scheme laws;

(f) to ensure that those documents, and that information, are available as soon as possible for access by the public; and

(g) to take whatever action it can take, and is necessary, in order to enforce and give effect to national scheme laws.

3.4 The NCSC noted in its submission that its present role includes advising the Ministerial Council on desirable law reform, reviewing the structure and efficiency of the securities and futures industries and other matters relating to companies and securities. It noted that paragraph 3(1)(a) of the Bill merely gave the ASC power to 'administer the law'. The paragraph, in the NCSC's view appears to give the ASC a limited role in law reform and in other matters related to the improvement of the operation of the securities and futures markets.[1]

3.5 The NCSC suggested that the Bill had been drafted so as to ensure that advice to the Minister from the ASC would be 'filtered' through the Attorney-General's Department and that, accordingly, the ASC would be considerably weakened.[2]

3.6 The Committee has considered the NCSC's argument but does not accept it in this respect. The Committee believes that Clause 3, when read with other clauses in the Bill governing the relationship between the ASC and the Minister, make it clear that the ASC (and particularly the Advisory Committee on Companies and Securities) will be able to play have an important role in advising the Minister where necessity for reforms exists. (The Committee deals with other suggested amendments to Clause 3 in Chapter 7.)

**Membership of the ASC**

3.7 Clause 9 of the ASC Bill provides that the ASC will consist of at least three full-time members, with the possibility of up to five part-time members being appointed. Members are to be nominated by the Minister. A member can only be appointed if the Minister is satisfied that the nominated person is qualified for appointment by virtue of knowledge or experience in one or more of the following fields, namely, business, the administration of companies, the financial markets, law, economics and accounting (subclause 9(4)).

3.8 In its submission the NCSC emphasised that the part-time members of the ASC, in the light of the working experience of the NCSC, would be of 'crucial importance' to the successful operation of the ASC; in fact would be crucial to its continued contact with the market and with the activities and developments in the professions associated with the market. The NCSC noted

The part-time members of, the NCSC have been invaluable in ensuring that the NCSC's administration takes into account the needs of the wider Australian business community, rather than one particular segment of it, and in preventing the NCSC from developing an overly bureaucratic and inward looking culture, They have provided a depth of valuable knowledge and insight which has improved the NCSC's decision-making on policy, administration and law enforcement.

3.9 Mr Bosch told the Committee that he strongly favoured a collegiate decision-making process for the ASC, with strong representation from the business community. In illustrating the strengths of such a process as he saw them, Mr Bosch drew upon the NCSC experience and told the Committee

The Bill makes provision for such a Commission [i.e. a collegiate commission] but does not require it to be so. I understand that the intention is that there shall be the three full-time members plus two rotating delegates from the States, which looks like a political sop to win the State support for the scheme. I do not feel that the commission is likely to have the same benefit of advice that we have nor that it will be a strong collegiate body. I would, therefore, advocate most strongly that you insert into the Bill the requirement that there should be a permanent majority of part-time members, in order to keep the full-time people in order.[4]

3.10 The Attorney-General's Department responded to the NCSC comment by pointing out that as Clause 9 is identical to the corresponding section in the NCSC Act, the Bill will permit the appointment of the same number of part-time members to the ASC as are presently appointed to the NCSC. The number of part-time members will be determined by the Government.

3.11 The Committee considers that a continuation of a collegiate decision-making process will offer considerable benefits. The operations of the NCSC indicate to the Committee, while the position of Chairperson is important and influential, it is equally important for the Commission to have the benefit of extensive day-to-day commercial experience; clearly a qualification for membership envisaged by the Clause 9. In the Committee's view, however, the requirement to have a majority of part-time members should be clarified. The Committee recommends accordingly.

**Recommendation:**

**(a) The Committee recommends that Clause 9 of the ASC Bill should be amended so as to make it clear that a majority of the members should be part-time members selected from persons with the qualifications set out in subclause 9(4);**

**(b) The Committee favours continuation of the collegiate decision-making process currently employed by the NCSC.**

**Functions and powers of the ASC**

3.12 Clause 11 of the ASC Bill lists the functions and powers of the ASC. The clause reads

**11(1) [Primary functions of Commission]** The Commission has such functions as are conferred on it by or under a law of the Commonwealth of which the Commission has the general administration and that deals with, or with matters including, any or all of the following:

(a) the formation of companies or close corporations;

(b) the regulation of bodies corporate;

(c) the regulation of acquisitions of shares in bodies corporate;

(d) the regulation of the securities industry;

(e) the regulation of the futures industry;

(f) matters incidental to a matter referred to in a preceding paragraph.

**11(2) [Additional functions of Commission]** The Commission also has the following functions:

(a) to provide such staff and support facilities to the Panel, the Disciplinary Board and the Review Board as are necessary or desirable for the performance and exercise by the Panel, the Disciplinary Board and the Review Board of their respective functions and powers;

(b) to advise the Minister about any changes to a national scheme law that, in the Commission's opinion, are needed to overcome, or would assist in overcoming, any problems that the Commission has encountered in the course of performing or exercising any of it functions and powers.

**11(3) [Incidental powers of Commission]** The Commission has power to do whatever is necessary for or in connection with, or reasonably incidental to, the performance of its functions.

**11(4) [Powers conferred under national scheme law]** Without limiting the generality of subsection (3), the Commission also has such powers as are conferred on it by or under a national scheme law.

**11(5) [Powers of administration]** Subject to this Act, the Commission has the general administration of this Act.

3.13 In its submission, the NCSC pointed to paragraph 11(2)(b) which, in its view, limited the role of the ASC in relation to law reform and in providing advice to the Minister as to changes that might overcome problems the ASC had encountered in performing or exercising its functions or powers. The NCSC maintained

The ASC would be limited to suggesting such changes as overcoming investigatory problems, improving the efficiency of registers, providing a clearer specification of offences and so on. It

would not enable the ASC to advise the Minister on law reform to better structure Australian markets to meet competitive overseas pressures.[5]

3.14 The NCSC suggested in this regard that a number of the changes to the existing Co-operative scheme legislation effected by the Corporations Bill result from proposals that were made by the NCSC to the Ministerial Council after consultation with the business community.

3.15 The NCSC's recommendation to the Committee was that subclause 11(2) of the Bill be amended so as to give the ASC

... the same powers in relation to law reform as the Advisory Committee so that the Minister can get advice from all expert sources.[6]

3.16 The Committee agrees that the functions of the ASC, as defined by Clause 11 of the ASC Bill, can be improved by a minor amendment. The Committee recommends accordingly

**Recommendation:**

**Paragraph 11(2)(b) of the ASC Bill should be re-drafted so as to provide the Commission with the same advisory functions as are provided to the Companies and Securities Advisory Committee by Clause 148 of the Bill.**

**Independence of the ASC from Ministerial direction**

3.17 Clause 12 of the Bill provides as follow:

**12(1) (Policies and priorities]** The Minister may give the Commission a written direction about policies it should pursue, or priorities it should follow, in performing or exercising any of its functions or powers.

**12(2) [Notification of proposed direction]** The Minister shall not give a direction under sub-section (1) unless he or she has:

(a) notified the Commission in writing that he or she is considering giving the direction; and

(b) given the Chairperson an adequate opportunity to discuss with the Minister the need for the proposed direction.

**12(3) [Particular case]** The Minister shall not give a direction under sub-section (1) about a particular case.

**12(4) [Compliance]** The Commission shall comply with a direction under sub-section (1).

**12(5) [Publication of direction]** The Minister shall cause a copy of an instrument under sub-section (1) to be published in the Gazette within 21 days after the instrument is made, but failure of the Minister to do so does not affect the instrument's validity.

3.18 Clause 12 is a means of allowing the Minister to ensure proper responsibility for the activities of the ASC, by allowing general directions on policies and priorities.

3.19 However, the Committee sees no reason why the follow-up of publication of any direction in the Gazette, so as to require its tabling it in Parliament within 15 sitting days, should not be required. This will allow for Parliamentary scrutiny of directions given under the clause.

**Recommendation:**

**Subclause 12(5) should be amended so as to require the Minister to table a copy of the directions, given under the clause, in the Parliament within 15 sitting days of their publication in the Gazette.**

Endnotes

1. Submission No.30, para.8.

2. ibid.

3. ibid., p.4

4. Evidence, p.507

5. Submission No.30, para.9-21

6. ibid.

## CHAPTER 4

## INVESTIGATION AND INFORMATION GATHERING POWERS OF THE ASC

### Introduction

4.1 Part 3 of the ASC Bill combines a number of powers of investigation and information-gathering that are presently distributed throughout the Co-operative scheme legislation. The ASC Bill sets out to deal comprehensively with all aspects of information gathering as follows:

* Investigations (Part 3, Division 1)
* Examination of Persons (Part 3, Division 2)
* Inspection of Books (Part 3, Division 3)
* Disclosure of Information about Securities and Futures Contracts (Part 3, Division 4)
* Hearings (Part 3, Division 6)

4.2 Amendments of this Part of the ASC Bill during debate in the House of Representatives have answered a number of objections to the originally drafted Bill. The Committee also draws attention to the Third Report of 1989 from the Senate Scrutiny of Bills Committee on the Corporations legislation. The Committee notes that in that Report, the Scrutiny of Bills Committee reported details of the response by the Minister for Justice to comments on a number of Clauses of the ASC Bill.

Investigation powers of the ASC

4.3 The ASC Bill empowers the ASC to conduct investigations pursuant Part 3, Division 1 (Clauses 13-

18). The ASC will possess general powers to initiate investigations under Clause 13 of the Bill, by allowing it to make such investigations as it thinks

expedient for the due administration of a national scheme law where it has reason to suspect that there may have been committed a number of contraventions of a national scheme laws, or of a law of the Commonwealth or of a State or Territory.

4.4 Clause 14 allows the Minister to direct the ASC in writing to undertake investigations where the Minister is of the opinion that it is in the public interest for such an investigation to take place.

4.5 In its submission to the Committee on the effect of Clause 14, the NCSC pointed out that, under existing legislation, a direction by the Minister to the NCSC to investigate a particular matter is required to be published in the Gazette so as to ensure that the Minister is properly accountable for such directions. That is not the case under Clause 14 of the ASC Bill. The NCSC's view was

…in view of the fact that the ASC is obliged to comply with such a direction, irrespective of its other priorities, and that such directions may be of considerable political significance, and also that such directions could be expected to be rare, it appears desirable in the interests of accountability, that they be published.[1]

4.6 In considering the provisions of Clause 14, the Committee has had regard to the likely incidence of such directions. The NCSC's experience is that Ministerial directions, are rare. on the basis of this experience, the Committee can see no reason why the Minister should not be obliged to publish a copy of a direction in the same manner as the requirement to publish a direction pursuant to subclause 12(5) of the Bill.

**Interim Reports**

4.7 Under Clause 16 of the Bill, the ASC must prepare an interim report on an investigation in certain circumstances. The circumstances are that it has formed an opinion that

(a) a contravention of a law of the Commonwealth or a State or Territory has been committed;

(b) to prepare an interim report about the investigation would enable or assist the protection, preservation and prompt recovery of property; or

(c) there is an urgent need for a national scheme law to be amended; .

4.8 Clauses 16 and 18 appear to be directed at simplifying the existing law in so far as Clause 18 provides that where a report relates to a person's affairs to a material extent, the Commission may provide a copy of the whole or part of a report to that person; and that the Minister may cause the whole or part of a report to be printed and published. In its comments regarding Clauses 16 and 18, the NCSC drew upon its own experience of the requirements of the existing Code in such situations.

4.9 The NCSC stated that a difficulty arises having regard to the fact that it believed there was a requirement that an interim report be prepared, whenever the ASC formed an opinion that an offence had been committed. In practical terms almost 'all investigations by the NCSC or the CAC's relate to suspected offences'.[2] It also noted that where an investigation may have been commenced otherwise than because the NCSC suspect an offence (such as suspected unacceptable conduct or breach of licence conditions) it is commonplace for contraventions of many procedural requirements under the legislation to be discovered also. The NCSC submitted that

Clause 16 would therefore require, in almost every investigation, that the investigator prepare an interim report suitable for Ministerial scrutiny and which is sufficiently comprehensive to be a self contained document to the satisfaction of the officers of the Minister's Department.[3]

4.10 The Committee was also told by the NCSC that the Minister would be able to adequately supervise the activities of the ASC, if the legislation merely provided that the Minister could direct the production of an interim report on an investigation if required.

4.11 The Attorney-General's Department noted that Clause 16 is based on a similar requirement in the special investigation provisions of the Co-operative scheme legislation. The provision is in the Bill to provide a mechanism to facilitate the timely initiation of prosecutions or other proceedings. The Department invited the Committee

... to consider whether the NCSC's concern that the ASC may be compelled to prepare an interim report relating to the investigation of a minor contravention, could be overcome by amending Clause 16(l)(a) to apply only to a serious contravention. The effect of this would be that where the ASC, in the course of an investigation, formed the opinion that a serious contravention of a law of the Commonwealth or a State or Territory had been committed, it would be obliged to prepare an interim report relating to the investigations.[4]

4.12 The Committee is attracted to this suggestion, as it believes that it will provide a more effective way of achieving the aim of the Clause. If the ASC forms an opinion concerning a serious contravention of the law, or that an interim report would assist protection, preservation or prompt recovery of property or there is an urgent need for amendment of the law, it is crucial that the ASC be able to report that matter to the Minister in a way which will have the most immediate effect.

4.13 The Committee also believes that the legislation should ensure that the ASC has the discretion to inform the agencies, such as the National Crime Authority, and the Director of Public Prosecutions of the matters which would be dealt with in an interim report.

**Recommendation:**

**Clause 16 of the Bill should be re-drafted so as to provide that an interim report be made by the Commission when the Commission has formed the opinion that a serious contravention of the law has been committed. In particular, subclause 16(2) should be**

**re-drafted so as to make it obligatory upon the Commission to advise or notify the**

**Attorney-General when it has formed an opinion that such serious contravention has been committed, and that the Commission advise the Attorney-General of the nature of the offence the evidence upon which such an opinion has been formed and when it was formed.**

**Subclause 16(2) should also give the Commission discretion to notify other relevant bodies of a serious contravention.**

4.14 In relation to **Clause 18**, which empowers the Minister to cause any investigation report to be printed and published, the Committee is not persuaded to the view that the Clause should be amended so as to require the Minister to be satisfied that the publication of a report under the Clause would not be prejudicial to the administration of justice. The Committee has received no evidence that a Minister has proceeded in such a manner in the past.

**Examination of persons**

4.15 The effective power of examination currently available to investigators under the Code's hearing provisions will be clarified by the ASC Bill.

4.16 Under **Clause 19** the ASC will have power to examine and obtain assistance whenever, on reasonable grounds, the Commission suspects or believes that a person can give information relevant to a matter that it is investigating, or is to Investigate under Part 3, Division 1. 'Giving information' is defined by Clause 6 of the Bill to include explaining, or stating a matter, identifying a person, matter or thing, disclosing information, or answering a question.

4.17 The view advanced by the NCSC on Clause 19 was that the restriction on the ASC's power would have an unintended effect. In relation to each particular investigation it is the ASC that has to arrange to issue a notice convening an examination and

the NCSC argued that these powers cannot be delegated to staff including State CAC's, as presently provided.

4.18 The NCSC saw the restriction as 'unnecessary', and that the ASC's accountability to the Parliament under other provisions, and the ability of the courts and the AAT to review decisions by the ASC should lead to proper accountability and adequate administrative arrangements to prevent abuse of powers of examination.

4.19 The NCSC's recommendation was that the Bill be amended to make it clear that ASC's powers under Part 3, Division 2 may be delegated, is not accepted by the Committee. The Committee notes that Clause 102 of the Bill empowers the ASC to delegate investigative functions, including powers of examination of persons to prescribed persons. Pursuant to subclause 102(4) the ASC must seek to ensure that delegations are made, bearing in mind the location of a business community affected, by any delegation of powers. Such a delegation would allow a delegate to issue a notice covering an examination under subc1ause 19(2).

4.20 The Committee draws attention to the provision in subclause 19(3) requiring the ASC to set out in any notice under the Section, the effect of subclauses 23(1) and Clause 68 which prescribe an examinee's right to have legal representation and to claim the protection of the privilege against self-incrimination so as to render answers inadmissible in any subsequent criminal proceedings. (The provisions of Clause 68 are discussed in detail later in this Chapter)

**Record of examination - Clause 24**

4.21 Under **Clause 24** an inspector who is conducting an examination must supply a witness with a transcript of any evidence he gives to the inspector.

4.22 The NCSC put to the Committee that Clause 24 imposed a requirement which

can impede the effectiveness of investigations. In at least two investigations conducted in the last three years by the NCSC or its officers, significant advances were made when witnesses were re-examined and contradicted the statements they had made at earlier examinations.[5]

4.23 The NCSC noted that the questions had been litigated twice and that the courts had held on both occasions that the provision of a transcript during an investigation is not necessarily required by the rules of natural justice. A transcript must, however, be provided so as to enable a person subject to investigation to comment before the finalisation of a draft report that criticised him or her and to persons actually charged with an offence.[6]

4.24 The NCSC described the requirement as objectionable during the following exchange

**Chairman….With regard to this transcript matter, that presumably would reveal again a lot of what happened in terms of your private hearings.**

**Mr Schoer - Everything, because the transcript is cross-referenced with all the documents: if you have the transcript, you have everything.**

**Chairman - If I am correct, the Supreme Court of Victoria in a recent case said that it would not require that you release it.**

**Mr Schoer - Both the High Court and the Supreme Court, in two recent cases, said that no-one has the right to look over the Commission's shoulder during the course of investigation. Of course, if people take proceedings in natural justice, it entitles them to see the case against them.[7]**

4.25 The Attorney-General's Department noted that the clause is based on Section 298 of the Companies Act with the difference that Clause 24 will oblige an inspector to cause a record to be made if the examinee so requests.

4.26 The Department also advised

The purpose of the obligation imposed on an inspector under Clause 24 is to provide a fair method of protecting the interests of the examinee in ensuring fair investigative practice. For example, it would assist in maintaining the validity of the record and the evidence of a willing examinee can be required to be placed on record in notwithstanding an arbitrary inspector or in response to unjustified allegations. To be measured against this is tactical advantage which may be gained by the Commission in seeking to obtain inconsistent statements from parties to the investigation who do not have access to evidence they have previously given.

While the Courts are capable of resolving the competing interests of effective enforcement compared with fairness to individuals in particular cases, there is a resources cost to be considered. An advantage of the ASC provision is its certainty. The question of whether natural justice on a particular occasion will require a transcript to be provided to the examinee will vary with the circumstances and may only be able to be resolved by the Court. In Connell v. NCSC (January 1989) the court decided that a transcript did not have to be provided.

However, in the recent case BT Australia v. NCSC (March 1989) the court ruled that natural justice required that the examinees be given access to their transcripts.[8]

4.27 The NCSC suggested that the Clause be deleted and be replaced by a requirement 'that the ASC observe the rules of natural justice'. In response to this suggestion, the Attorney-General's Department told the Committee, following questioning of departmental officers by the Committee, that the provision was 'a product of a merger of inspection powers and special investigation powers'.[9]

4.28 The Committee has considered the arguments concerning Clause 24 and believes that it should not be amended.

**Record of Examination - Clause 27**

**4.29 Clause 27** obliges the ASC to attach copies of transcripts of examination to any reports to which that transcript may be relevant.

4.30 The NCSC submitted to the Committee that it could not see what purpose this Clause served. It saw it as administratively burdensome and possibly prejudicial to confidentiality and privacy, "particularly where the conclusions in the report are that there is insufficient evidence to support a conclusion that a contravention has occurred'.[10] The NCSC recommended the deletion of the provision.

4.31 In its comments, the Attorney-General's Department noted that subclause 27(2) is new and provides that if in the ASC's opinion a statement during an examination is relevant to another investigation, a record of the statement should be made and when a report of that other investigation is prepared a copy of that record should accompany the other report.

4.32 The Department noted that

The ASC has a discretion, but not an obligation, to give a copy of the report, or part of the report, to a person whose affairs to which it materially relates.[11]

4.33 It also noted that where the publication of the report or part of it may prejudice a person's confidentiality and privacy, or the administration of justice, will be a factor that should be taken into account by the ASC or the Minister, in exercising their respective discretions.

4.34 The Committee is satisfied that the discretion allowed to the ASC and the Minister under this Clause is unobjectionable. The Committee is not convinced that the Clause needs to be amended or deleted.

**Notice to Produce Books**

4.35 Clause 30 empowers the ASC to require the production, at a specified time and place, of specified books relating to the affairs of a body corporate. Clause 30 should be read with Clause 811 which makes it clear that the specification of place and time must be reasonable, and that, if it is reasonable, that specification may be to produce the books 'forthwith'.

4.36 The NCSC suggested that such a specific requirement, whilst probably adding nothing to the law, will give those who are interested in delaying or frustrating an investigation a ground or argument to forestall proceedings by the ASC. The NCSC suggested that such delaying tactics would undesirably impede law enforcement, and suggested that Clause 87 be deleted and that Clause 30 be amended to make it clear that the ASC's powers extend to requiring books to be produced 'forthwith'.

4.37 The Attorney-General's Department's view was that, as Clause 30 is based directly on an existing provision of the Co-operative scheme legislation, it has the same effect.[12]

4.38 The Department's view was also that Clauses 30 and 87, restating present statutory requirements, do not reduce the effectiveness of the ASC's powers to obtain books and documents. The provision now states that the time and place for production of books must be 'reasonable', a qualification which the NCSC recognises is probably implicit in the current requirement.

**Market surveillance power**

4.39 **Clauses 41, 42, 44 and 45** of the Bill replace equivalent provisions under the existing Securities and Futures Industry legislation. They empower the ASC to ascertain the identity of the clients and the nature of the instructions given by the clients in relation to securities and futures dealings.

4.40 The NCSC told the Committee that this information is essential to any program of market surveillance and is usually obtained and assessed as part of the process of deciding whether any further investigation is required. The existing practice is for such queries to be made routinely by facsimile, telex or telephone and to be answered in the same way. Hundreds of such queries are made by the NCSC each year.

4.41 The NCSC suggested that the inclusion of these powers in the same Division as the more significant powers of the ASC (under Clauses 43 and 46) produces unintended consequences that will prevent the ASC from continuing the routine market surveillance activities of the NCSC as:

(a) the ASC is apparently unable to delegate these powers to its staff; and

(b) the information has to be provide din what amounts to a hearing at which a lawyer may be present, instead of by telephone, facsimile or telex (Clauses 47 and 48).

4.42 The NCSC also noted that **Clauses 43 and 46** confer more extensive powers of investigation meant to be available only in relation to more serious circumstances that might arise under the legislation, and noted

There has been no situation in which it has been alleged that the equivalent powers have been inappropriately used or that the constraints imposed by Clauses 47 and 48 would have been necessary to prevent abuse.

The NCSC recommends that Clauses 47 and 48 be deleted.[13]

4.43 The Attorney-General's comment was that Regarding how the information must be provided, there is nothing in the legislation to prevent the ASC requesting the information by telephone, telex or facsimile, as the NCSC does at present. As

noted in the evidence of the Business Council of Australia, and as in fact occurs in practice, requests from the NCSC for information are often complied with

without the formal use of the compulsory powers. In those cases where a business does not voluntarily provide the information that it would be necessary for the disclosure to take place "in private" (pursuant to Clause 47) a formal hearing is not necessary. It is not considered that the provision will in practice significantly impede most investigations. The handover of information whether or not under compulsory powers usually does not occur in public in any event. The presence of the person's lawyer is not necessary in every event, but is where the person requires (pursuant to Clause 48). In many cases particularly where the disclosure relates to the party's own affairs, it is handled by that party's lawyers.[14]

4.44 The Committee believes that any doubt as to the extent of the ASC's market surveillance power, particularly its day-to-day power to monitor market movements, should be resolved. (While the Committee has not formed a view on this matter, it believes that any unintended consequence of the sort suggested by the NCSC would be undesirable.

**Recommendation**

**The Committee recommends that Clauses 41, 42, 44 and 45 of the ASC Bill and Clauses 47 and 48 of the ASC Bill be reviewed to ensure that the day-to-day market surveillance role of the ASC is not unduly restricted.**

**Bringing Proceedings in a Person's Name**

4.45 **Clause 50** reduces the ability of the ASC, when compared with the present powers of the NCSC, to bring recovery proceedings in the interests of investors. Clause 50 would require the ASC to obtain the consent of the person in whose name the action is to be brought.

4.46 The NCSC's comment to the Committee was that such proceedings often have to be brought in the name of the company

since, as a matter of law, it is the company that is regarded as the victim of the misappropriation. The NCSC maintained that the

effect of the Clause is that the ASC will be unable to bring proceedings to recover misappropriated money or property when the persons controlling the company are amongst the persons from whom recovery would be sought or are associates of such persons or otherwise under their influence.

Where, on the other hand, the controllers of the company are truly independent of the persons against whom civil proceedings would be brought, it would normally be a decision for them as to whether proceedings were worth while in the interests of the members of the company and the ASC would not, except in the most exceptional circumstances, have any reason to believe bringing such proceedings was in the public interest.[15]

4.47 The Attorney-General's Department submission to the Committee was that the requirement was written into the Bill following a submission by the Australian Stock Exchange Limited, which pointed out that Clause 1235 of the Corporations Bill requires the ASC to obtain a person's written consent before applying to the Court for an order to compensate the person for loss suffered as a result of illegal conduct in relation to securities. To maintain consistency, the requirement to obtain the person's consent was inserted in Clause 50.

4.48 The Department noted:

The policy of the provision is that it is reasonable for the ASC to have to obtain a person's consent before instituting proceedings in his or her name, because it is that person's rights and liabilities which may be affected by the outcome of the proceedings, notwithstanding that the ASC would be bearing the cost of the action.[16]

and

The Department believes to be misconceived the argument that the ASC will be unable to bring proceedings to recover misappropriated property where the company is the victim,

because the persons controlling the company or their associates are amongst the persons against whom recovery would be sought.

We understand that the basis of the argument advanced by the NCSC is the rule in Foss v Harbottle ((1843)2 Hare 461). This rule, generally stated, provides that the company is the proper plaintiff for an action to enforce any right of the company to remedy any wrong to it, or to recover its property.[17]

4.49 The Department also said that the rule in Foss v. Harbottle does not apply to a fraud on the minority or where directors have exercised their powers mala fide or for an improper purpose. It has long been established that there is an exception to the principle of the company as proper plaintiff where the persons against whom the relief is sought themselves hold and control the majority of shares in the company and will not permit an action to be brought in the name of the company. This has come to be known as the element of 'wrong-doer control' and as the concept has been developed by the courts, the failure of a shareholders' meeting to subsequently adopt proceedings instituted by the minority is a factor to be taken into account in determining whether 'wrongdoer control' exists.[18]

4.50 The Committee appreciates the distinction which is drawn by the Attorney-General's Department, but nevertheless believes that Clause 50 should be amended. The Committee discussed the provisions in Clause 50 at length with the NCSC and with other witnesses. It concludes that an additional provision in the Clause allowing the ASC to proceed against directors without written consent, if necessary, is required.

4.51 The Committee is conscious that legislation should recognise the law as it has been interpreted by the courts in this matter.

**Recommendation**

**Clause 50 of the ASC Bill should be re-drafted so as to allow the Commission to commence proceedings in accordance with the Clause without the written consent of a company's directors. Where the Commission considers that such proceedings should be taken in other cases, the Clause should still provide that a**

**person's written consent is required before action is commenced by the Commission.**

**Self Incrimination**

4.52 **Clause 68** of the Bill provides for restriction on the privilege against self-incrimination. it employs the use-derivative - indemnity, formula and extends privilege to a person who produces a book to the ASC. The privilege is also extended so as to prevent the use of evidence obtained as a direct or indirect consequence of a person making a statement, or signing a record in subsequent criminal proceedings.

4.53 The NCSC has suggested that the provision will make the compulsive powers of the ASC 'virtually useless' and noted that

In practice, the overwhelming majority of prosecutions for breaches of the companies and securities legislation are dependent on the production of such documents so that the imposition of an additional rule which prevents their use would significantly reduce the prospect of successful prosecution'.[19]

And

If the Bill were to be enacted unaltered, the ASC would need to find an alternative to its powers to require the production of documents. The most practical alternative that suggests itself is the use of search warrants executed by the Australian Federal Police under the Commonwealth Crimes Act. Such a process would significantly alter the nature of investigation of breaches of the Companies and Securities legislation and could be expected to result in considerable opposition from the commercial community.[20]

4.54 The NCSC also submitted that the ASC would be unable to use any evidence at all, unless it could show to a court that it was not obtained as an indirect consequence of a person making a statement at an examination on oath, or producing a document or book, when required to do so, and accordingly introduces a new rule for the exclusion of evidence which is unknown to the common

law in Australia and the United Kingdom, whilst bearing some resemblance to United States provisions.

4.55 The NCSC illustrated its concern as follows

> The rule not only excludes a self-incriminating statement (which is inadmissible under the existing legislation (or the document produced) made inadmissible by subclause 68(3)); it also excludes all evidence gained in further investigations relying on 'the lead' obtained in this way. In practice, the evidence excluded may be even wider. It will be for the Crown to prove that later acquired evidence was not obtained as an indirect consequence of the relevant admission and it may be very difficult for it to prove this negative.[21]

4.56 The NCSC recommended that subclause 68(3) be amended so that the privilege conferred by that subclause applies only in relation to a statement made by a person and not to a document produced, nor to any information, document, or other thing obtained as a direct or indirect consequence of the person making the statement.

4.57 In its advice to the Committee, and during public hearings, the Attorney-General's Department took the view that the privilege against self-incrimination has been extended by subclause 68(3) in two respects: namely, in respect of the production of books and other documents and to cover information obtained as a direct or indirect consequence of the information originally made available - the so-called 'use indemnity use' extension. In respect of the first point, the extension rests on the premise that there is virtually no difference between requiring a person to answer a question orally and requiring that person to produce documentary evidence. In each case the person is required, perhaps against his or her will, to provide information within his or her possession which may be incriminating. The argument is that it is logical, if there is to be any privilege against self-incrimination, that it apply to any requirement to provide information within the person's possession, whether orally or in writing.

4.58 In regard to the second point, the extension conforms with current Commonwealth criminal law policy as exemplified by Section 30 of the National Crime Authority Act 1984. This approach also conforms with the approach currently favoured by the Senate Standing Committee for the Scrutiny of Bills.[20]

4.59 The Committee recognises that the privilege against self-incrimination is a firmly established, and important rule of the common law which acts to prevent a person from being compelled to incriminate themselves. However, it must equally be recognised that abrogation of the rule by statute is an important and valuable power of the legislature which it can use to protect the public interest. The Committee is acutely aware that the abrogation of the privilege by the legislature must be treated with extreme caution; an approach regularly confirmed in the reports of the Senate Scrutiny of Bills Committee.

4.60 The Committee believes that the balance that must be struck in the end case is enactment of a provision which will allow the ASC maximum effectiveness in achieving its investigatory function. Equally, such a provision as subclause 68(3) should not deny - any more than is demonstrably necessary the protection that has always been enjoyed in Australia. One of the purposes for establishing an ASC, is to allow investigation of possible breaches of the national scheme laws. The Committee believes that subclause 68(3) will not unnecessarily or unacceptably act to abrogate the privilege against self-incrimination, if it were amended to apply only to statements made by a person, and not to documents nor to any information, document, or other thing obtained as a direct or indirect consequence of the person making the statement.

**Recommendation**

**That Clause 68 of the ASC Bill be amended so as to allow the use in criminal proceedings of information obtained as a direct or indirect consequence of the production of books to the ASC.**

**Endnotes**

1. Submission No.30, p-31
2. ibid., para.35
3. ibid., para.37
4. Attorney-General's Department comments Pt.2, p.3
5. Submission No.30, para.56
6. ibid., para.57
7. Evidence, p.521
8. Attorney-General's Department comments Pt.2, p.7
9. Evidence, p.1183
10. Submission No.30, para.61
11. Attorney-General's Department comments Pt.2, p.7
12. Submission No.30, para.65
13. ibid., paras.71-80
14. Attorney-General's Department comments Pt.2, p.9
15. ibid., para.87
16. Attorney-General's Department comments Pt.2, p.10
17. ibid.
18. ibid.
19. Submission No.30, para.102
20. ibid, para.103
21. ibid.
22. Attorney-General's Department comments Pt.2, pp.13-14

## CHAPTER 5

## THE CORPORATIONS AND SECURITIES PANEL

### Introduction

5.1 Part 10 of the ASC Bill (Clauses 171-184) will establish the Corporations and Securities Panel. The Panel will be a separate body with functions limited to those conferred on it under the Corporations Bill. Its specific function for the present will be to conduct hearings with respect to unacceptable conduct or unacceptable acquisitions pursuant to the provisions of Clauses 732 to 734 of the Corporations Bill, and to make orders as a result of its determination.

5.2 The Committee has examined the proposed powers -of the Panel and has focused on several matters relating to the powers of the Panel when compared to the powers of the NCSC. The NCSC presently has the power to carry out investigations of, and adjudicate on cases of unacceptable conduct.

### Structure and Membership of the Panel

5.3 The members of the Panel will be appointed as part-time members on the nomination of the Minister. A prerequisite of for appointment will be qualifications similar to those of the members of the Advisory Committee on Corporations and Securities. During the Committee's inquiry, it heard competing points of view as to what should be appropriate membership of the Panel.

5.4 A contribution to the Committee's inquiry, particularly regarding the Panel, was made in a submission and evidence provided by Mr John Green.[1] Attached to Mr Green's submission to, the Committee was a published survey that he had prepared of a sample of members from the Sydney and Melbourne commercial

communities. The sample of persons surveyed comprised chief executives of a number of leading companies, other company directors as well as other professionals active in the areas likely to come under the Panel's scrutiny. The other people surveyed were merchant bankers, accountants, stock brokers, public servants, self-regulators, lawyers (both in-house and external) and financial journalists. Of the 150 questionnaires distributed by Mr Green, about 100 responses were received. The Committee found the survey to be of particular assistance in matters regarding membership of the Panel. The Attorney-General's Department, in its comments to the Committee, and in answer to comments from the NCSC, have noted the findings in Mr Green's survey.

5.5 The principal findings of Mr Green's survey concerning membership of the Panel were that it should be a Panel with the following attributes

* the President be a lawyer, preferably a commercial solicitor and not a judge or barrister

* the Panel should have a minimum 'pool' membership of five, being a mix of part-time and full-time, with the President preferably being full-time. All should be appointed for a period of 2-3 years.

5.6 When giving evidence to the Committee on the question of membership of the Panel, Mr Green noted

... looking then to who determines whether or not something is unacceptable, because we are talking about something which is extra legal, it seems to me that you do need to have involved in the decision-making process, people who are involved in that particular sphere or activity whether they be the Commissioners or the NCSC or whether they be the Panel members of the Panel. You want to draw into that decision-making process what really are the standards that people believe should apply in the commercial community today. I do not think the result would be that you would have rogues being governed by rogues. I do not

believe that that would be the result. I believe that self regulation of this sort which is what we are talking about

with the Panel would result in pretty good standards being applied. One will not know until it happens, but I believe it should be tried.[2]

And

There needs to be a mix of people on it both full-time and part-time. By having some fulltime members who ideally would sit on all of the hearings, you ought to eliminate the conflict issue because they would be out of the market-place for that period. They may still feel constrained in some cases because of a relationship which they had going back many years with particular market players, from engaging in a hearing for that particular individual or company, but I would not think that that would occur very often. But you will eliminate, I think, much of conflict and tension by having some part-timers. You will also have a much greater independence of the Panel by having some full-time members because the natural proclivity of bureaucrats who will no doubt be in the secretariat to run it their way. If some of the members are full-time it will make the bureaucrats job that little bit harder.[3]

5.7 In its comment to the Committee the NCSC noted that the members will be required to preside at hearings over periods of several weeks, as well as be prepared to work long hours in order to meet the proposed statutory deadlines for determinations.

5.8 In his evidence concerning membership of the Panel, Mr Bosch told the Committee that the proposed membership structure would be less effective than the NCSC

To explain more about those two things, there would be delay because it would be necessary to convene the panel. The members, as I understand the Bill, are all senior people, busy people with their own agendas. It would not be possible to get them along that day and so on. They would have to go through a process that would inevitably involve several days of hearings. They would have to adjust their appointment books and so on. Our experience with conducting hearings of that sort is

that you really cannot get them over in less than about three weeks, and we are talking about using full-time people. So there would be

delay. With regard to uncertainty, the panel would be different from the Commission different people - and might come to different judgements. The panel is a part-time panel. Those who sit on each individual case would not necessarily be the same as those who sat on the previous case. Again, there is an element of uncertainty there . Over time, there may develop a series of precedents which might lead people to be able to predict what the panel would decide. But even if that happened, those that were approached would know that they would have a second opportunity to run the case: the first would be with the Commission prior to its recommendation that the panel consider the matter, and the second would be before the panel when they would bring in their barristers and so on.[4]

5.9 In addition, the NCSC noted that

* Panel members will have to be available at short notice on a full-time basis for extended periods

* The Panel will need members who are legally qualified or to retain its own counsel to assist it.

* It will require its own staff to carry out necessary organisational and clerical functions.5

5.10 The Attorney-General's Department, in its comments, advised the Committee that the legislation intends the President to be the person responsible for the composition of the Panel ,case by case by selecting a Deputy President and one other member from a pool of expert Panel members appointed by the Governor-General'.6 It is intended that the President will accordingly have flexibility in selecting other members of the Panel for hearings should difficulties such as conflict of interest occur.

5.11 The Department also told the Committee that the arrangements which are envisaged by the legislation, but not spelt out, to ensure that experts relevant to the nature of

issues raised by the ASC, and referred to the Panel, will facilitate quick hearings.[7]

5.12 One question raised in regard to membership of the Panel was the difficulty posed by potential conflicts of interest for members. Mr Green highlighted this point as follows

That leads to the conflict of interest question. It is obviously a lot easier in a bigger country to have a Panel run by professionals, whether part-time or full-time, and have few conflicts of interest, than in Australia. Some of the problems that will occur if we have the Panel - and they are the same problems whenever we seek to have part-time commissioners for the NCSC - include who is going to do it, where we are going to get them and how frequently will there be conflicts of interests when they are investigating or looking at a particular case. I would say that if people are saying that we are not going to be able to get sufficient numbers of qualified people to be on the Panel then we have exactly the same problem at the moment with part-time commissioners on the NCSC.[8]

5.13 The Committee has considered these views. It can find no argument with the basic findings of Mr Green's survey. The Committee notes that the results of Mr Green's survey tend to reflect other submissions. The Committee has two recommendations concerning membership of the Panel.

5.14 The Committee also believes that the President of the Panel should be a qualified legal practitioner with established experience in commercial law. The Committee does not believe that the President of the Panel needs to be a judge.

**Recommendation:**

**The provisions of the Bill relating to the Corporations and Securities Panel be redrafted so as to provide for**

**(a) a Panel with a minimum membership of 5, composed of both part-time and full-time members;**

**(b) a full-time President with powers to make interlocutory and other interim orders as provided for by Clause 734 of the Corporations Bill;**

**(c) the Minister to have the option of appointing a pool of members to the Panel with the qualifications provided for in subclause 172(3) of the ASC Bill.**

**Powers of the Panel**

5.15 In its submission to the Committee, the NCSC asserted that there were several important differences between the powers possessed by the NCSC in its hearings and matters to be decided by the Panel.

5.16 It noted that the the Bill does not appear to confer adequate power on the Panel to make rules regulating contested proceedings before it, and in particular it is not clear as to when or how a party, such as lender or a bank, having security interests in shares could be joined in proceedings before the Panel so that he or she is bound by any order made by the Panel in relation to the shares. In this regard, it is not clear what the status of certain rulings or orders of the Panel might be or how they might be enforced. The NCSC noted

An important feature of present proceedings before a court for orders based on a declaration of unacceptability is that the proceedings take place in public, unless the circumstances are exceptional. This is not required by the existing legislation but is an outcome of rulings made by the courts after considering submissions made by interested parties.[9]

5.17 When commenting further on the general question of whether it would be in the public interest that matters heard by the Panel, (being matters which are currently heard by the courts under the Companies (Acquisition of Shares) should be heard in public, the NCSC submitted that conducting hearings in public is consistent with community values as to proper administration of justice, and also has several other important benefits.

* the reasons for making a declaration of unacceptability can be made public, as is much of the evidence on which such a declaration is based,

* the parties whose rights may be affected by the proceedings, including shareholders of relevant target companies are able to assess what the proceedings are about and what steps, if any, they need to take to protect their interests,

* The market is informed about the nature of the proceedings and is able to make its own assessment of the likely effect of the proceedings on share prices,

* Participants in the securities industry and their advisers are better able to understand the basis of the Panel's decisions, and to ensure their present and future conduct abides by the principles developed by the Panel.

5.18 The NCSC particularly noted that, under subclause 185(4), Panel hearings will be public, if all parties agree, otherwise they were to be held in private. The NCSC strongly opposed this procedure. The NCSC recommended that the Bill be redrafted to distinguish between the "investigating" and "adjudicating" phases of a Panel hearing.

5.19 The Attorney-General's Department notes that the rules of natural justice which the Panel is bound to observe pursuant to subclause 190(3), require that any person likely to be affected by a declaration of unacceptability must be given an opportunity to be heard by the Panel. The Department noted that the Panel will have the power to determine the course of its own proceedings and will accordingly be able to ensure that a party does not abuse its right to a hearing.

5.20 The Department also observed that

While it is true that the Panel's orders may affect the rights of third parties, such as banks who have made loans on the securities of shares, any party affected will have a right under the Administrative Decisions (Judicial Review) Act 1977 to appeal against the Panel's decision on specified grounds such as breach of natural justice, error of law and improper exercise

of power. The Department also pointed out that other judicial remedies are available from the High Court and Federal Court pursuant to the Judiciary Act.[10]

5.21 In the survey prepared by Mr Green, a large proportion of respondents supported the Panel's ability to conduct hearings either in public or private and particularly supported the requirement that the Panel only observe the rules of natural justice, as distinguished from observing the rules of evidence. Those surveyed also believed that hearings should be conducted with as little formality and technicality as possible. In his comment on these findings, Mr Green noted in his report on the survey that

That such a great majority in the poll sought these rights [flexibility and the right to hold hearings in private] is interesting, when at the same time they sought informality and no rules of evidence. Presumably, any reluctance to permit such rights would relate to a desire to keep hearing short, especially given the time constraints on them. But given the orders the Panel can make, and on a final basis, although subject to limited appeal, one can be expected to be naturally concerned that all witnesses should be rigorously tested as to veracity and credit and that all material evidence should be before the Panel is so.[11]

5.22 The Attorney-General's Department echoed the support shown by the respondents to the survey. It noted that participants or people subject to Panel hearings find desirable the degree of confidentiality that may be given during a hearing, and the likelihood of unfair prejudice that may result to a person's reputation, covered by subclauses 185(4) and 185(5). The Department noted that

In practice, NCSC public hearings on Section 60 declarations have been frustrated and truncated by aggrieved parties and through threats of litigation. As a result the NCSC has previously announced that it will normally hold such proceedings in private in future. It is noted, however, that by virtue of the September amendments to the Bill the Panel will be able to decide to hold a hearing in public if the relevant parties so agree.[12]

5.23 Submissions in favour of private hearings have suggested that those people appearing before the Panel (a point conceded by the NCSC) are more likely to be open and less inhibited in their comments and answers than if such matters are dealt with in public.

5.24 However, it was also submitted to the Committee by the NCSC that different considerations presently apply to the making of orders as a result of a declaration which is a matter for the Courts under the Code. Proceedings for orders are generally held in public, which means that all potential parties that may be affected by the proceedings and who may have an interest in being

represented at the hearings, are aware of the course of the proceedings. These hearings should be in public, it was submitted, for two reasons: proper administration of justice and provision of essential information to the market to enable investors to form their own evaluation of the likely impact of the proceedings on the price of shares involved.

5.25 The Committee believes that hearings conducted by the Panel should be in public, unless the Panel itself decides that such hearings should be private.

**Recommendation**

**(a) Clause 185(3) of the ASC Bill be amended so as to provide that hearings conducted by the Corporations and Securities Panel take place in public.**

**(b) Clause 185(4) of the ASC Bill be amended so as to provide that where the Corporations and Securities Panel is required to hold a hearing, the Panel may direct that the hearing take place in public or direct that the hearing take place in private.**

5.26 It is important that findings by the Panel are publicised and provide complete detail of the matters canvassed before the

Panel, the reasons for the Panel's decision whether to declare conduct unacceptable, or to not find conduct unacceptable and to ensure that a consistent body of principles is developed.

5.27 It also seems to the Committee that the order of the Panel which must be published in the Gazette (pursuant to Clauses 733 and 734) should also be published by way of public release. While there is nothing preventing the Panel from publicising its findings, the Committee believes that the Panel should be given the power to publish its decisions more widely than in the Gazette.

5.28 The Committee has a detailed discussion of the role of publicity and commercial settlements in Chapter 14 where it deals with takeovers and the role of the Panel in declarations or in examining cases for unacceptable conduct.

**Other Matters related to the Panel**

5.29 A further matter raised by the NCSC was that the ASC would be in a position to limit funding and staffing provided to the Panel.

5.30 The Attorney-General's Department commented on this suggestion by noting that Clause 136 of the Bill provides that funds appropriated for the purpose of the ASC may only be able to be spent in accordance with estimates approved by the Minister.

Accordingly, where the Panel has made a declaration of unacceptable conduct and, has made orders it is also able, by virtue of other provisions of subclause 735(3) of the Corporations Bill to include such ancillary or consequential orders as the Panel thinks reasonable and appropriate. The Department's view is that this provision may allow the ASC to recover expenses it has incurred in its investigations.

**Endnotes**

1. Submission No.4,

2. Evidence, p.1145

3. Evidence, p.1146

4. Evidence, p.1379-1380

5. Submission No.30, para.144

6. Attorney-General's Department comments Pt.2, p.19

7. ibid.

8. Evidence, p.1145

9. Submission No.30, para.153

10. Attorney-General's Department comments Pt.2, pp.20-21

11. Submission No.4, p.8 of Attachment 1

12. Attorney-General's Department comments Pt.2, p.21

## CHAPTER 6

## OTHER MATTERS RELATED TO THE ASC

### Introduction

6.1 Several other issues arose during the course of the Committee's inquiry relating to the ASC. Specifically, they were the position of the Chairperson of the ASC; the Companies and Securities Advisory Committee; the Companies Auditors and Liquidators Disciplinary Board; the Accounting Standards Review Board and staffing of the ASC.

### Chairperson of the ASC

6.2 In its submission to the Committee, the NCSC drew the attention to several provisions in Clauses 94, 97, 99, 120 of the ASC Bill governing the powers of the Chairperson of the ASC. The clauses confer upon the Chairperson a number of powers currently exercised by the NCSC itself as a collegiate body under its Act.

6.3 The NCSC advised

The Bills conferral of extensive powers on the Chairperson to arrange the ASC's business, and even to remove from the consideration of a division a matter in progress, provide a mechanism by which the ASC could be unduly influenced by the Minister's Department.[1]

6.4 The NCSC took the view that references in the above clauses to 'the Chairperson' should be deleted, and replaced by references to 'the Commission' so as to ensure that the Chairperson did not exercise undue personal influence over the Commission's activities.

6.5 The NCSC comment a of general comment on the role of the Chairperson, rather than adverse comment on specific powers that will be given to the Chairperson. The Committee has commented in Chapter 4 on the desirability of continuation of collegiate decision-making of the ASC.

The Committee recommends accordingly.

**Recommendation**

**Clauses 94, 97, 99 and 120 should be amended so as to replace reference to the 'Chairperson" with reference to "the Commission".**

**The Companies and Securities Advisory Committee**

6.6 The Companies and Securities Advisory Committee (the Advisory Committee) wall be a separate body corporate under **Clause 146** of the ASC Bill and will consist of a part-time Convenor and such other part-time members as the Minister thinks fit. Pursuant to Clause 147 the members will be required to have knowledge of or experience in one or more of the fields of business, the administration of bodies corporate, the financial markets, law, economics and accounting. Such qualifications might including drawing upon groups such as shareholders or unit holders in unit trusts.

6.7 The functions of the Committee are defined in **Clause 148.** The Advisory Committee on its own initiative or when requested by the Minister, is to advise the Minister and make such recommendations as it thinks fit about any matter connected with the national scheme and its operation, law reform in relation to national scheme laws, companies, close corporations, securities or the futures industry or a proposal for improving the efficiency of the securities markets or futures markets. The Minister, may after consultation with the Advisory Committee publish its advice or recommendations, or alternatively the Advisory Committee itself may publish its advice or recommendations. (see Clause 155).

6.8 The Committee notes that, compared to the existing Companies and Securities Law Review Committee, whose funding is provided under the umbrella of NCSC funding, the Advisory Committee will be separately constituted, separately funded and have a fair degree of discretion to prepare recommendations and publish them on its own initiative.

6.9 The Committee shares the concern which is expressed in a number of submissions that the Advisory Committee should operate as actively as possible in examining the need for special law reform in the complex technical areas covered by the Bills. It notes that in common with other law reform advisory bodies, the Minister is not obliged to accept recommendations made by the Advisory Committee. Its effectiveness and influence will therefore depend very much on the quality of the membership, and of course, on the amount of time the Advisory Committee will be prepared and able to give to its work.

6.10 The position of most importance to the effective working of the Advisory Committee will be that of Convenor. The fact that the Convenor will be a part time appointment will be an important influence on the quality and speed with which recommendations are made by the Advisory Committee.

6.11 One comment made to the Committee concerning the work of the Advisory Committee was made by the Company Directors' Association of Australia. In its submission the Association noted that Clause 3(1)(c) allowed for the Advisory Committee to provide advice to the Minister about certain matters; specifically about 'the securities markets and futures markets'. The Association suggested that the word 'corporations' should be included in the matters on which the Advisory Committee should be able to provide advice to the Minister, a view with which the Committee agrees.

**Recommendation**

**Appropriate amendment of Clause 3(1)(c) of the ASC Bill be effected so as to allow the Advisory Committee to provide advice to the Minister about matters relating to Corporations as well as to Securities Markets and Futures Markets.**

**Companies Auditors and Liquidators Disciplinary Board**

**6.12 Clauses 199 and 200** establish a single Companies Auditors and Liquidators Disciplinary Board to replace various State and Territory Boards. The clauses specify that the Board will consist of a Chairperson and two members, one each drawn from panels of five nominated by the Institute of Chartered Accountants in Australia and the Australian Society of Accountants.

6.13 The NCSC commented to the Committee that

The consolidation of the various Boards into a single body is likely to impose greatly increased demands upon the Board's sole Chairperson and greatly increase costs for the auditing profession and the ASC.[2]

6.14 The NCSC also noted that an increasing number of matters have recently been referred to existing Boards by State CACs. While the Boards are not convened regularly, a practical consequence of a single consolidated Board would be that the Chairperson will need to travel to the State or Territory where hearings are to be held into matters referred to the Board, resulting in increasing costs and a need for a permanent expert staff. The NCSC suggested to the Committee that the Board either have a full time Chairperson or be constituted from a panel of Chairpersons, one located in each State or Territory.

6.15 The Attorney-General's Department, in its comment to the Committee on this matter suggested that infrequent meetings of the existing State Boards indicates that one Board operating nationally is unlikely to require members to be away from their practice for an excessive amount of time, and regard a suggestion

of a full-time Chairman as being an impractical one, given the level of remuneration that might be offered and the likely demands of the time of a suitably qualified person.

6.16 The Committee believes that this is a matter on which it does not need to comment further, and regards the provisions in the Bill as satisfactory.

**Staffing**

6.17 Clauses 120 and 121 of the Bill relate to staffing of the ASC. In its submission to the Committee, the NCSC commented, in respect of Clause 120 that

The proposal in the Bill to employ staff of the ASC under the provisions of the Public Service Act would be 'a retrograde step', as it would prevent highly skilled people, on contract, from working with the ASC.[3]

6.18 In commenting on its experience, the NCSC noted

The NCSC has a small degree of discretion in its staffing policies and procedures. Notwithstanding this small degree of freedom, experiences demonstrate that the NCSC has insufficient flexibility and scope to recruit in a manner consistent with its stated criteria. Public sector constraints are inconsistent with those criteria and are the product of an entirely different recruiting environment.[4]

6.19 The NCSC is also of the view that staff of the NCSC should in no way be discouraged or lack opportunity to obtain employment with the ASC, a view the Committee endorses.

6.20 In evidence to the Committee, Mr Bosch noted that

Clause 120 of the ASC Bill removes the Commission's right to appoint its own staff. You will see in Clause 120(1) that the Commission's staff shall be persons appointed

or employed under the Public Service Act and that, of course, imposes a limitation. It reinforces the present restriction on the pay and conditions that can be offered. I do not claim that the pay and conditions thing has changed; it has not, but I do say that there is an additional restriction on the flexibility of recruitment'.[5]

6.21 Mr Bosch and Mr Schoer told the Committee that under Co-operative scheme legislation, staff employed by the NCSC are employed under the NCSC Act. Mr Schoer told the Committee

... it would be administratively impossible if the body of the staff were employed under the Public Service Act, but every now and again we thought to buy a permanent officer as well as distinct from someone on a contract. We think that Clause 121 would be fine for a contract. To bring in and have two or three classes or employees on different salary structures and different conditions, especially in a small organisation, the morale would just be disastrous, especially when you have a junior officer working for you and he gets more pay or has different set of conditions. So we see 121 probably as being about someone in a year from University or some such thing as that with whom you have some sort of contractual employment.[6]

6.22 The Committee drew Mr Schoer's attention to subclause 120(3) which reads

(3) In addition to the staff referred to in sub section (1) the Commission may, on the Commonwealth's behalf, employ under written agreements, such persons as the Commission thinks necessary for the performance or exercise of any of its functions and powers.

6.23 Mr Schoer told the Committee that he did not believe the provisions gave the NCSC, or would give the ASC, the flexibility required by an organisation such as the ASC. He said

We believe that once you have 120(1) in it that makes it pretty clear what the status of the staff or the position would be - they would be public servants.[7]

6.24 In its comments to the Committee, the Attorney-General's Department noted the NCSC's comment and stated that Clause 120 will permit specific contractual arrangements to be made for staff with special qualifications or market skills which may be considerably different to normal public service terms and conditions.

6.25 The Committee has a brief comment to make on Clause 120. Clause 120 allows the ASC to employ three categories of people; those employed under the Public Service Act; those employed as consultants under Clause 121, and those employed possibly on short-term contract under Clause 120(3).

6.26 In addition, the Committee notes that Clause 122 allows for the secondment of officers of the Australian Public Service and authorities of the Commonwealth to the ASC, if so required.

6.27 The Committee believes that the staffing provisions in the ASC Bill are satisfactory, as it appears to provide for a range of methods of staffing. The suggestion by Mr Schoer that the different classes of staff would cause divisiveness or difficulties within the ASC organisation appear to be exaggerated.

6.28 However, there is a final comment the Committee should make on the issue of ASC staffing. The Committee heard considerable critical comment of the level of funding and staffing provided to the NCSC under the Co-operative scheme structure. The proper and adequate funding of the ASC is a matter which will be of fundamental and continuing importance to the effective discharge of the ASC's functions. The funding and staffing difficulties experienced by the NCSC in the face of increasing loss of experienced NCSC staff to better-paid positions in the private sector has recently been recognised by Ministerial Council. The Committee notes that in its press releases dated 2 March, Ministerial Council stated

it was also noted that the Management Committee that was established at the Ministerial Council meeting in December [19881 had worked in a most constructive manner and had made wide ranging recommendations to improve the effectiveness of the existing co-operative scheme. In particular, Ministers approved additional resources for the NCSC and examined a variety of methods for funding the additional forty positions. These include increasing the charges for applications by the larger companies for rulings by the NCSC, imposing levies for the registration of take-over and fund raising documentation and increasing the levies on licences issued under the Securities Industry and Futures Industry Acts.[8]

**Delegations by the ASC**

6.29 **Clause 102** of the Bill will empower the ASC to delegate any of its functions or powers.

6.30 The NCSC pointed out that the clause does not empower a delegate to sub-delegate. The NCSC noted that a power to sub-delegate, which is contained in the NCSC Act, is convenient and important as it allows sub-delegation to State administrations regarding matters such as staffing.

6.31 The Attorney-General's Department commented that Commonwealth drafting practice for forms of delegation to include a standard position such as contained in Clause 102. The comment also noted that the common law recognises the need for orderly administrative practice in the exercise of decision-making functions through subordinate officers. The Department also noted that Section 34AA of the Acts Interpretation Act 1901 permits the ASC to delegate its function or powers to any person from time to time holding, occupying, or performing the duties of a specified officer or position.

6.32 the Committee considers no amendment of Clause 102 is required.

**Confidentiality**

6.33 **Clause 127** is the confidentiality provision in the ASC Bill. It provides, inter alia, for the disclosure of information provided to the ASC in confidence in a number of specified circumstances.

6.34 The NCSC has suggested that the clause should be amended. It submitted that the clause should allow the ASC power to disclose information to self-regulatory organisations such as the ASX, and to gather information to assist foreign securities or futures industries regulators.[9]

6.35 The Attorney-General's Department commented that, in relation to the first point raised by the NCSC, subclause 127(3), which would permit an ASC member, officer or delegate or other authorised person for the purpose of performing that person's function to disclose confidential information. The Department noted that

As stated in the supplementary explanatory memorandum on the ASC Bill, subclause 127(3) is directed at proper disclosure apart from disclosure required by law and will enable disclosure to a stock or futures exchange or one of its disciplinary committees.

In determining what was authorised disclosure for the purposes of this provision it is intended that the Court should have regard to the statutory investor protection role of the ASC (see C1.3). It is clearly in the interests of investor protection that there be a free flow of information between the ASC and various self-regulatory organisations such as stock and futures exchanges.[10]

6.36 In relation to the second point raised, the Department noted that the Government is presently exploring various possibilities such as amending the Mutual Assistance in Criminal Matters Act 1987 to enable the NCSC - and, the Committee

presumes, the ASC - to exercise its investigative powers in aid of overseas securities regulatory agencies, or establishing a

separate regime for mutual assistance arrangements between prescribed Australian regulatory agencies like the Trade Practices Commission and the NCSC and their overseas counterparts.[11]

6.37 The Committee strongly supports this latter initiative. It believes that co-operation between Australia and overseas agencies, while recognising the importance of ensuring a necessary degree of confidentiality is desirable. The Committee also observes that, if the ASC is to carry out investigations as the agent of overseas securities regulatory agencies, strict standards will need to be applied by the Minister in approving such arrangements so as to ensure that arrangements are entered into with agencies from countries with acceptable systems of legal process.

**Endnotes**

1. Submission No.30, paras.114-115

2. ibid., p.69

3. ibid., p.31

4. ibid.

5. Evidence, p.541

6. Evidence, p.542

7. Evidence, p.543

8. Press release dated 2 March 1989

9. Submission No.30, para.124

10. Attorney-General's Department comments Pt.2, p.16

11. Ibid.

## CHAPTER 7

## ACCOUNTABILITY OF THE ASC TO THE PARLIAMENT

### Introduction

7.1 The ASC Bill proposes the establishment of a new and extremely important body within the Australian commercial community. It has been a matter of constant and continuous comment both during this Committee's inquiry, and during the the Senate Committee's inquiry during 1986 and 1987. The Parliament responsible for the creation of the NCSC did not in fact have to take any direct responsibility for that body's actions. In the Committee's view the Parliament must be satisfied that the ASC, and other bodies created by the ASC Bill, will fulfill their expected roles in the administration and regulation of companies and the securities and futures industries, and will ensure that the development of this very complex and continually changing area of law keeps pace with the market-place changes and developments.

7.2 The Committee points out that the area of companies and securities law has drastically altered from the time when the Committee made its initial report on the administration and regulation of the securities markets.[1] Since that time, rapid development of new marketing techniques and therefore necessarily, the administration of the securities markets, has taken place.

7.3 An example of the complexity and rate of change is provided in a report prepared by the Securities Information Review Committee (SIRC) in July 1988. The report dealt with prospectuses and took some two and a half years for an expert committee on law to prepare. The SIRC could not reach a conclusion on a number of matters. In its report, it conceded that the area was subject to rapid change and was an area of

great complexity. As a result it proved very difficult for the Committee to arrive at a consensus on how the existing law relating to prospectuses could best be amended.

7.4 The Committee is also aware that while there are provisions requiring accountability by way of an annual report, the Committee believes that the area of administration and law is of such importance that a permanent form of Parliamentary scrutiny of the affairs of the ASC , its associated bodies, and companies and securities law is required.

**Annual Reports**

7.5 The ASC Bill provides, in Clause 138, that

The Commission is a public authority to which Division 3 of Part XI of the Audit Act 1901 applies.

7.6 The part of the Audit Act referred to requires the Commission to prepare and provide an annual report to the responsible Minister. The Minister in turn is required to table that annual report in both Houses of the Parliament within 15 days of its receipt. The Audit Act provision sets out certain general matters which must be in the ASC's Annual Report regarding its operations, but does not provide any specific guidance as to whether matters relating to the ASC's specific functions should be the subject of a particular report.

7.7 By way of comparison, the Committee notes that Section 61 of the National Crime Authority Act 1984 provides for the annual report by that Authority to include considerable detail of the matters which are the subject of investigation by the Authority, and of other matters relating to the Authority's activities. No such requirements are placed on the ASC by Clause 138 of the Bill.

7.8 The Committee emphasises the need and considerable value of a comprehensive annual report by all authorities. Such reporting has proved to be of assistance in increasing proper Parliamentary and public awareness of the extent and the nature of an authority's activities so long as the report provides adequate specific detail. The fact that no specific requirements will be placed on the ASC is considered unsatisfactory by the Committee. The Committee believes that the ASC Bill should be amended so as to make the ASC Annual Report informative and comprehensive.

7.9 The Committee notes that Clause 180A of the Bill, which was inserted in the Bill by way of amendment in the September 1988 amendments, provides for an annual report from the Corporations and Securities Panel. The Panel is required to report to the Minister, and hence to the Parliament, in accordance with reporting requirements similar to those imposed on the ASC. The Companies Auditors and Liquidators Board, and the Accounting Standards Review Board are required to report independently to Parliament pursuant to Clauses 210A and 230 of the Bill respectively. The Advisory Committee is not required to prepare an annual report on its activities.

7.10 The Committee notes that Section 51 of the National Companies and Securities Act 1980 requires the NCSC to

(a) Prepare a report of its operations during the year that ended on that 30 June [of each year] together with financial statements in respect of that year in such form as the Ministerial Council approves.

7.11 The Committee also notes that the NCSC has interpreted this provision widely and includes in its Annual Report a detailed account of its administration of companies, securities and futures legislation and also a detailed account of hearings, litigation and other activities, including an account of major inquiries undertaken. So for example, in the 1987-1988 Annual Report the NCSC included discussion on the 1987 sharemarket crash

and on other matters under examination including the affairs of the Bell Group Limited and Woolworths Limited.

7.12 As the Committee has noted, although there may be scope for the ASC to discuss matters of interest and importance in its activities under the Audit Act, the Committee believes it should be required to do so. That such a requirement is placed upon the National Crime Authority is relevant to the Committee's consideration of this point. The exposure to which certain activities in the securities market are currently subjected by the NCSC's activities, has played an important part in ensuring that the community is informed of the activities of such an important body. The Committee believes also there should be some formal method by which this information can be made available annually to the Parliament.

**Recommendation:**

**Clause 138 of the ASC Bill should be redrafted so as to provide criteria which need be complied with by the Commission in the preparation of its Annual Report.**

**A Parliamentary Standing Committee on Companies and Securities**

7.13 In its report on the Co-operative scheme, the Senate Committee discussed the establishment of a Standing Committee on Corporations and Securities. In its report the Senate Committee noted that one of the primary bases for such a suggestion was the complexity of companies and securities legislation, which is now only rivalled by taxation and social security law in complexity of provisions and importance.

7.14 In its report the Senate Committee noted that the then Attorney-General, Senator Gareth Evans, QC, had supported the establishment of a Standing Committee on Corporations and Securities as a vehicle through which the Parliament could evolve a bipartisan approach towards the law.

7.15 In its submission to the Committee, the NCSC advanced two reasons for supporting the establishment of a Standing Committee.

The main rationale for making specific statutory provision for such a Parliamentary Committee can be found in the extensive nature of the legislation, the established need for frequent amendment of it, the powers of the ASC to modify or suspend the impact of the legislation on individuals or classes and the implications of the adjudicative decisions of these bodies so far as future legislation is concerned.

And

It is suggested that the role of the committee should not be to act as some kind of court of appeal in relation to decisions of the Panel and the Board or in relation to the exercise of discretions by the ASC. Rather, the committee would be looking at the overall thrust of those decisions and the implications for legislative change which they suggest. The committee would, of necessity, have resort to the bodies over which it had oversight and to officials of the relevant government department in order to further its understanding and properly discharge its function.[1]

7.16 Mr Bosch also spoke in favour of the Committee in the following terms during evidence

I think that if the Bill goes through substantially unamended it would be desirable for a piece of machinery to be put in place that would ensure that any pressure that was brought to bear, either from a Minister directly, or more likely from his department, would be exposed. The best mechanism that we can think of is a permanent parliamentary committee along the model of that applying to ASIO or the National Crime Authority. I would envisage that that committee would call the ASC before it several times a year - two or three times, or whatever seemed suitable – and would act something like an audit committee in business. I would imagine that it would direct its attention particularly

to any directions that the Commission had received and that it would inquire about the relations between the Commission and the department, and that it would probably also, being a parliamentary

committee, deal with matters of policy that might bear on legislation or regulation. I guess it would call for reports from the Commission and would ask questions on those reports, very much in the way that you are doing now.[2]

7.17 The Committee believes that the methods of accountability, and examination of proposed amendments to corporations and securities law which currently exist are not completely adequate. It believes that a permanent Parliamentary Committee should be established to monitor the work and activities of the ASC, and the Corporations and Securities Panel. The Committee believes that if the powers of such a Parliamentary Committee are carefully drafted and imaginatively employed they will enable the Committee to identify important issues and inquire into and report on these matters and make a positive contribution to the efficiency and effectiveness of the ASC and its associated bodies.

**Recommendation:**

**There be established a Parliamentary Standing Committee to be known as the Parliamentary Joint Committee on Corporations and Securities and that the Committee have the powers and functions set out in the Schedule to this Report.**

**Endnotes**

1. Submission No.30, paras.185 & 187
2. Evidence, p.505

## PART 3 - REGULATION OF CORPORATIONS

## CHAPTER 8

## COMPANY FORMATION AND ADMINISTRATION

### Introduction

8.1 The Committee received submissions on several matters related to the constitution and internal administration of companies as they will be affected by provisions of the Corporations Bill. These provisions are contained in Chapters 2 and 4 of the Bill. Of particular importance in this regard was the registration and control of company names, and the position of 'dormant' companies.

### Registration of Company Names

8.2 Under the Corporations Bill, the role of the States in company incorporation will to a large degree be negated. The abolition of a system of incorporation based on the States will mean that the recognised provisions of the Co-operative Scheme legislation, particularly the Companies Code, will no longer be n

8.3 With a number of exceptions the procedure for incorporation of new companies under Corporations Bill will be the same as under the Code. Following registration, a company will be allotted an 'Australian Company Number' (ACN) which will be treated to all intents and purposes as part of its name (See Clause 121)

8.4 **Clause 219** provides for the allocation of an ACN. The name of a company followed by the expression "Australian Company number" and the registration number of a company will be required to appear legibly on any seal of the company and on its business and its public documents and on every eligible negotiable instrument. Where the company is registered without a verbal name, the registration number of the company will be required to appear on the relevant company documents after the expression "Australian Company Number".

8.5 The effect of registration of a company will be that the ASC will issue a certificate of registration to a registered company. The certificate will state:

(a) The fact of registration

(b) The fact of incorporation

(c) The day of commencement of registration

(d) The class of the company; and

(e) Whether the company is a proprietary or public company

The certificate will also be conclusive evidence of

(a) Compliance with the requirements of the Corporations legislation relating to registration and pre- registration requirement.

(b) Registration under the Corporations Act; and

(c) The day of commencement of registration. (Clause 122)

The effect of registration will bestow upon a new company the usual powers and attributes of incorporation (Clause 123).

**Companies transferring from the Co-operative to the National Scheme**

8.6 Under Part 2.2 of the Bill transitional provisions designed to provide for the transfer of Companies from the co-operative scheme to the new scheme will be enacted. Unlike provisions governing the change-over from the Uniform Companies scheme to the Co-operative Scheme codes, all trading corporations incorporated under the Code will required to apply for registration under the new legislation with some exceptions. [Clause 126]

**Company Names**

8.7 Part 4.2 of the Corporations Bill, applies to the administration of Company Names. Clause 367 of the Bill, in particular, introduces some alterations to the existing regime of name registration.

8.8 **Clause 367** provides that a name will be available to a body corporate if the Minister consents to its being available to that body. Comment on Clause 367 noted that no apparent attempt has been made to address the close conjunction between the State Business Names Acts and the intended operation of this provision. Several points of concern were raised about this proposal. A summary of the points raised with the Committee is

* In the absence of regulations, which are yet to be made available, it is impossible to determine what naming procedures will be followed. The Bill appears to envisage that a name will be available unless it is identical to an existing company.

* Registration of companies as ACN's can take place notwithstanding an identical or very similar business name.

* The importance of business names to the business community appears to have been overlooked by the draftsman. (So, for

example, the number of business names exceeds company names substantially and are routinely required by a number of bodies, e.g.

Telecom and the Australian Tax Office) to obtain registration and provision of services.

* For small business people, the option of taking legal action (by way of passing off actions, for example) to protect the business name is not available; and the change will unfairly prejudice small business in favour of large corporations.

* Large corporations, in fact use business names and may be concerned to find that the effect of the naming provisions in Part 4.2 have the effect of allowing a competitor to register a company name identical to that of an existing trading name. To this extent, business name registration practices and procedures, and existing company naming procedures have prevented duplication and here have, to some extent forestalled legal action.1

8.9 The Committee sought to establish whether proper joint names indexes were maintained by the State CAC's thereby allowing access to and searching of indexes of both business names and companies in a state. The Commissioner for Corporate Affairs in Queensland, Mr Green, told the Committee that

The proposals that the Commonwealth has come forward with (in the Bills) do not seem to make any provision for such joint names index as is operated at the moment.[2]

8.10 In reply to a question from Senator Macklin as to whether all existing names should be treated as a starting point for registration of new names, and whether the State's co-operation is required for such a move, Mr Green said

That the problem goes deeper than that. There are fundamental difficulties in bringing the two systems together. For instance the business names system operates on the same distinction, that it is not possible to register a name if it would be misleading in the eyes of the public. The Commonwealth proposal does away with that distinctions

8.11 when asked whether the Queensland commercial community was happy with the name reservation and registration system that presently applied, Mr Green said the Committee he believed Queensland users were. He conceded that a subjective judgement

has to be made in a number of cases as to whether to register a company, because of existing business names; such decisions are essentially a matter of balance. He said

You have to decide whether you would rather have the problem with the subjective test, although it is narrowed down, it can do away with the passing off problem. Similarly, if I may continue with the comparison between the Commonwealth and the State systems, the State system is based on the State. If you want to incorporate a company or use a business name in Queensland but you do not want to use it any where else in Australia, you do not have to worry about the rest of Australia. Under the new system that is being proposed by the Commonwealth, if someone down in Hobart has a certain name it is going to be very hard to explain to a small businessman in Cairns that because his business name is completely identical he cannot have it.[4]

8.12 In his evidence Mr Thompson of the WA Group said that basically three tests were applied by the WA State CAC when registration of a business name or company name is sought. He said the tests were

Is it similar? Is it likely to confuse? Is it undesirable? They apply those tests, not only just to the business names, but to names of limited partnerships and, to names of incorporated associations, etc. In our view what will happen is that ' the scheme will totally override that State protection of business names or company names or organisations names such that there will be no inter-relationship and co-ordination between the selection of company names under this scheme and the business names scheme.[5]

8.13 The Victorian Attorney- General, Mr McCutcheon, pointed out

As the Victorian submission points out, the present system of subjective testing has the effect of minimising the need for the business community to take proceedings to defend any proprietary

right or good will which they may have built up in the name of their company. By

not registering an identical or similar company name, if the subjective element is taken out, small localised business will not be able to have similar names. No longer will every Australian city be able to boast a Parthenon Cafe or a Station Hotel.6

8.14 Mr McCutcheon also advanced in his evidence the proposal that to create a single Company names register was a change to an existing situation which he believed was a response to the frustrations experienced by 'a relatively small number of companies trading interstate'.

8.15 The Committee appreciates the points raised in opposition to the proposed names provisions discussed. In his evidence, Mr O'Callaghan of the Attorney-General's Department indicated that the practical basis of the scheme proposed by the Corporations Bill obviously would be assisted by the co-operation by the States in providing the Commonwealth with a list of State registered companies and business names. When asked whether such a situation preserves a State discretion as to Business Names Mr O'Callaghan said

What we are saying is that there is a capacity to do that, but that capacity preserves State business names from poaching by companies seeking to register under the Commonwealth system depends on the States providing the Commonwealth with access to their register of names so that, administratively, the system can work. What we are saying is that there is capacity under the Bill to use the Regulations for that purpose.[7]

8.16 When asked as to whether a failure to co-operate by the States would lead to two name systems, the Departmental officers noted

That is you would have two different schemes and there would be capacity for people registering names under the Commonwealth system to poach names - names already on the register of business names in the States - and we are saying that there is the capacity to avoid that problem if the States are prepared

to provide us with the wherewithal to assist them to preserve their existing registers.

Mr Starr - alternatively if the view is taken that one should not in any way be seeking to preserve that business name system, then equally there is capacity not to make those particular regulations.

Senator Alston - In other words, it is a trade-off that you might do to get the thing through but you do not take the policy preference for the State system do you? Your

Preference is to allow anyone to use a name, as long as it is not identical.

Mr Starr - That is the policy preference that the Government has.[8]

8.17 The Department also told the Committee that if no agreement was reached between States and the Commonwealth, that persons aggrieved by the registration of an identical or similar company name in the same jurisdiction, may have to proceed to take action under Section 52 of the Trade Practices Act so as to prevent another business operating under a similar name in a similar business in the same market. [See evidence pp.1367-1370].

8.18 The Committee considers that while the importance of the potential difficulty outlined in evidence is slightly exaggerated, it also considers that a complete lack of co-ordination of the State Companies and Business Names registers could lead to unnecessary costs due to confusion as to the degree of protection offered by registration of a company's name.

8.19 The Committee directs attention this potential problem. It believes that steps should be taken to anticipate and overcome any problems.

**Recommendation:**

**The Committee recommends that the Government outline the arrangements it will make to ensure that existing registers of State Business Names are integrated with existing company name registers.**

Dormant Companies

8.20 In its submission to the Committee, the WA Group asserted that Clause 156 of the Corporations Bill was an extremely heavy handed, if not 'draconian' provision. The Clause provides that where the ASC is satisfied that a company is neither a trading corporation nor a banking corporation, it shall, unless the company is a new company or an application to wind up the company on the ground provided for in another section in the Insolvency provisions of the Bill has been made already and not yet dealt with, do either or both of the following:

(a) Make such an application, and

(b) Take action in relation to the Company under Section 572 (i.e. being declared dormant and out of business).

8.21 The WA Group comment on Clause 156 was that it was impractical and had the potential to significantly interfere with business relationships. The WA Group submission stated :

Where a company is a passive holding company, is a trustee company or is simply dormant and in consequence ceases to be a trading corporation or banking corporation, it runs the risk of being declared defunct under Clause 572, specifically having regard to the obligations under Clause 158. This is not the case under existing law and will give rise to major business uncertainty.[9]

8.22 In addition, Clause 157 of the Bill allows the ASC to make certain presumptions about the status of companies that might have operated as trading or banking corporations. When commenting on this clause, the WA Group noted that business uncertainty would be increased if the ASC acts to strike off a company in circumstances, expected to be common, where there may be some dispute as to whether the company in fact has ceased to be a trading or financial corporation. The underlying reason for the clauses appears to be that, while corporate status is

not lost immediately the company's trading activities cease, these

provisions allow a company to have a period of dormancy even before trading, thus allowing for shelf companies, but also after the cessation of trading activities, the Commission, after allowing some period of time, may presume that a dormant company is not a trading corporation and it may have it wound up.

8.23 In evidence to the Committee, the WA Group strongly attacked the provisions maintaining that an extremely large number of companies in Western Australia (some 7000) would be affected by the provisions.

8.24 In its discussion with the Committee, the Attorney-General's Department reported to the issue as follows:

I think the difficulty you are alluding to, and the one to which I am responding, is the case of a corporation which commences life as a trading corporation, or is in existence as a trading corporation and ceases its trading activities. At present the legislation imposes a compulsion on that corporation within a certain period if it has not recommenced its trading activities, to take steps to wind itself up. We would like the opportunity to take the concern of the Committee on board about that.

CHAIRMAN - I take it that the Committee is equally concerned on that.

Senator COONEY - What vice were you attempting to avoid by making companies wind up once they stopped trading?

Mr O'Callaghan - The eventual vice is that if they cease to trade and they completely cease to conduct trading activities, there must come a point in time in which they just cease to be a trading corporation altogether. The purpose of that is to ensure that the Act only regulates trading corporations. Given State co-operation there are many ways in which these could be resolved relatively simply; they could simply revert to the State system.

Senator ALSTON - Why do you force them to wind up rather than just regarding them as outside the net?

Mr O'Callaghan - Well I guess that was just a decision to get them off the register, to

focus the decision on the company as to what they were to do with their activities. The other alternative is you just leave it to the Commission to try and find out which of these companies are not trading. I must admit it happens already. Commissions currently have an obligation to find out and strike off those companies that have ceased to carry on business or are no longer in operation. But this was to try to focus the company on what its position was. If it was going to continue trading well then it could do so; but if it was not going to do so, it could wind up and transfer its business to another vehicle, such as an unincorporated firm or a partnership or whatever.[10]

8.25 In view of this discussion, the Committee asked the Department to provide it with advice on alternative means of dealing with dormant companies.

8.26 The Attorney-General's Department advice to the Committee was as follows:

The Committee has sought advice on whether there could be more convenient ways to deal with such companies, without the need to dissolve them. We understand that the Committee intends that these other mechanisms would be optional to a winding up procedure and to any of the other mechanisms that the Bill might contain, rather than there being necessarily only one procedure for dealing with such circumstances.

Comment

(a) Transfer to State Jurisdiction

One option is to provide a relatively simple procedural mechanism by which companies ceasing trading may transfer, or the ASC may take action to require them to transfer, to the residual State or Territory company law system dealing with non trading and non-financial companies.

The Corporations Bill could provide the mechanism for such companies to transfer 'out' e.g. by means of an appropriate application form. The State or Territory law would need to contain provisions to receive such companies, which could be achieved by a relatively simple amendment to the existing transfer of incorporation provisions. The Commonwealth could make such provisions by amending the Companies Act 1981 for the purposes of the Australian Capital Territory. The

requirement to re-register under the Commonwealth Act when the company resumes trading activities is, of course, imposed by cls.126 and 127 of the Corporations Bill and again could be achieved by a simplified procedure.

(b) Dormant company regime

Another approach that could be considered is a separate regime for companies to remain within the Corporations Bill during periods when they cease trading activities. Such a- regime could 'quarantine' and 'de-activate' such companies for those periods, pending the re-commencement of trading activities. For example one model could be for such a company on ceasing trading activities to notify the Commission, which could then have the company placed on a separate register of 'dormant' trading companies. The effect of this could be to preserve the company's basic legal status, (e.g. its corporate existence and membership, its capacity to sue and be sued etc.), but to prohibit it from carrying on business, or perhaps any activities other than simply procedural or housekeeping matters, unless it lodged a fresh activities statement. The lodgement of a new activities statement could then be effectively treated as a re-registration under Div.2 of the Corporations Bill, thus enabling the company to recommence life under the Bill as a trading corporation.[11]

8.27 The Committee believes at option (b) above suggested by the Department is a preferable means of dealing with dormant companies and endorses it.

**Recommendation:**

**That the Corporations Bill be amended so as to provide for a separate register of dormant companies in accordance with the proposal put to the Committee by the Attorney-General's Department.**

**Endnotes**

1. Submission No.28, pp.8-11

2. Evidence, p.665

3. Evidence, p.666

4. Evidence, pp.667-668

5. Evidence, p.927

6. Evidence, p.332

7. Evidence, p.1365

8. Evidence, p.1366

9. Submission No.28, p.10

10. Evidence, p.1287

11. Letter to Committee dated 31 March 1989

**CHAPTER 9**

**FUNDRAISING BY PUBLIC COMPANIES**

9.1 This chapter will examine both the existing and the proposed law regulating fundraising by issuing securities to the public. The best known form of securities issued by public companies to raise funds are shares, but two other forms are regulated under the Companies Code (the existing legislation) and the Companies Scheme (the new legislation). These are debt securities (commonly termed debentures) and prescribed interests. Companies may also raise money by means of loans from banks. This last form of financing is not regulated under either the Code or the Scheme and will not be considered in this chapter.

9.2 A share, as the name implies, gives the holder equity, or a part of the ownership of the company. The share confers upon the holder certain rights, defined in the articles of association when the company was incorporated, and perhaps obligations. Usually a shareholder is entitled to vote on questions affecting the management of the company and to share in profits when a dividend is declared. In, cases where the investor buys a non-fully paid-up share he becomes obliged to meet calls from the company for more funds until he has subscribed funds to the fully paid-up or face, value. In addition, the holder of a non-fully paid-up share is liable to pay the outstanding value of that share to creditors of the company in the event of insolvency. This situation must be distinguished from that in which an investor buys a fully paid-up share for less than its face value. In that latter instance, no further calls may be made upon the investor for funds, even in the case of the company becoming insolvent. The reason for a share being obtainable for less than its face value is that, because the share represents equity in the company, the price for which it sells is roughly proportional to the value of the company as assessed by the market.

9.3 The second kind of interest which a company may issue to raise funds is the debenture. This is defined in Section 5 of the Code as a document evidencing or acknowledging debt in respect of money deposited with or lent to a corporation. A debenture holder is entitled to a return on capital as prescribed by the document and ranks as a creditor of the company regardless of whether the debenture constitutes a charge on property of the company. This means that in the event of the company being wound up, debenture holders are entitled to the full money owing to them before the shareholders receive anything.

9.4 The final kind of interest a company may issue to raise funds is the prescribed interest, which is defined in Section 5 of the Code as any right to participate, or any interest, in profits, assets or realisation of any financial or business undertaking or scheme. No company may issue, or offer to the public, a prescribed interest unless there is in force in relation to that interest a deed which has been approved by a State Corporate Affairs Commission (Section 171 of the Code). Furthermore, companies are required to keep a register of holders of prescribed interests (Section 172). The issues relating to debentures and prescribed interests will be considered in the following chapter.

9.5 Under the Code, companies making an offer of any share or debentures to the public are forbidden to issue application forms for the securities unless the forms are attached to a prospectus and a copy of the form and of the prospectus have first been registered under the Code (Section 96). Exactly what will constitute an offer or invitation to the public is defined in Section 5(4), which has been the subject of interpretation by the Courts. Nevertheless, uncertainties remain, mainly because of exemptions from the definition of 'offer to the public'.

9.6 The form and contents of prospectuses are prescribed in Section 98 of the Code. Critics have complained that many of the requirements are excessively technical, and that much of the information which prospectuses must contain is of marginal

relevance to the basic investment decision. Matters covered in Section 98 include type size, purpose for which the capital is raised will be used, amount needed to fulfil this purpose, proposed use to be made of funds if subscriptions fail to raise the amount required, sources and amounts of funds to be raised other than by the share or debenture issue and a report by a registered company auditor.

9.7 Before a prospectus can be issued to the public it must be registered by the Commission and the Commission may not register prospectuses which do not comply with the requirements of the Code. This obligation to register prospectuses is provided in Section 103 of the Code, and the examination of prospectuses to assess their eligibility for registration is called pre-vetting. The Senate Standing Committee on Constitutional and Legal Affairs published a report on the National Companies Scheme in April 1987 and referred to complaints it had received that this process was unduly prolonged, involved minute checking of trivial points and was subject to different interpretations from one state to the next. This has led to allegations that prospectuses are registered in one State for listing in another because of the perception that the pre-vetting is less rigorous in some jurisdictions (See Professor Walker's evidence at p.115 of Hansard).

9.8 The primary requirement for registration, in addition to the technical stipulations as to form and content, is that the Commission must be satisfied that the prospectus contains no matter which is false or misleading. This involves close scrutiny of what is said and not said, and the regulator may request further information, either to test claims made in the prospectus or to fill in matters of detail where gaps in information provided could lead the unwary investor to reach a conclusion favourable to the issue, where fuller particulars may not necessarily confirm that conclusion.

9.9 Sections 107 and 108 of the Code provide for civil and criminal liability respectively of persons associated with a here false statements or material omissions have been found.

9.10 Subsequent to the issue of a prospectus, a company which has not listed the securities on the Australian Stock Exchange (ASX) is obliged only to satisfy the normal requirements relating to- companies generally, i.e. maintenance of records and lodgement of an annual return. Where the securities are listed on the ASX more detailed information about the company's activities and their results are required to be listed on a continuing basis after the issue of the prospectus.

**Regulation of Fundraising under the new scheme**

9.11 Pre-vetting of prospectuses is very costly for the authority administering corporate law and leads to delay in offers of securities reaching the public. Evidence was received that compliance with the registration procedure is often a matter of slavish adherence to ritual which not infrequently produces a document which does not assist members of the public with the basic investment decision. To overcome these defects the the National Scheme has implemented significant changes which are designed to streamline the process by which offers of securities reach the public, without reducing the protection members of the investing public enjoy under the present scheme. Registration under the Code may give potential investors greater confidence when they rely upon a prospectus, because they may assume that it has been thoroughly checked by the relevant Corporate Affairs Commission. Nevertheless, the Commission bears no responsibility for any deficiencies in its pre-vetting and indeed it is a requirement under Section 97 of the Code that a prospectus shall state that the Commission takes no responsibility as to the contents of the prospectus.

9.12 The reforms affect four areas:

(i) circumstances in which a prospectus will be required;

(ii) registration procedure applying to prospectuses;

(iii) requirements as to contents of prospectuses;

(iv) liability of persons associated with preparation and issue of prospectuses;

(i) Circumstances in which a prospectus will be required.

9.13 The requirement under the Code for a prospectus only where there is an offer to the public has been abandoned. The National Scheme requires lodgement of a prospectus wherever there is an offer or invitation for subscription or purchase of securities in a corporation (cl.1018) subject to the exceptions detailed in Clause 66. It prohibits offering for purchase or subscription shares in a corporation which has not been formed (cl.1019). Application forms for the issue of shares must be attached to prospectuses (cl.1020). While these requirements resemble, at least superficially, the requirements of the Code, the circumstances where a prospectus must be prepared and lodged are widened substantially. One instances in which prospectuses will need to be lodged is in cases of rights issues. Professor Austin in his submission considered the question of whether, if the shares which comprise the rights issue are of the same class as existing quoted securities for which a prospectus has been filed, it would be necessary to file a new prospectus for that rights issue. He concludes that it would, and takes issue with these commentators on the Bills who reached the opposite view. Assuming that rights issues are to be subject to prospectus requirements, this represents a dramatic departure from existing law.

Exemptions to Prospectus requirements

9.14 Under the Scheme a prospectus must be lodged with the Commission in respect of all offers of securities unless the offer of securities is an exempt offer as defined in Clause 66 of the Bill. Prospectuses fall into two categories: registrable and non-registrable prospectus. Registrable prospectuses are defined in Clause 1017A of the Bill as all prospectuses other than exempt prospectuses. Clauses 1017A also defines exempt prospectuses. These are prospectuses issued by a company which is included in the official list of the Stock Exchange, or prospectuses relating to the issue of securities by a company which is not a listed corporation but where the securities to be issued are issued only to existing members of the corporation, or where the offeree of the securities is a substantial institutional investor of one of the categories set out in Clause 1017 who would be expected to purchase only very large parcels of securities and would be more likely to place reliance upon its own inquiries rather than exclusive reliance upon information which may be included in a prospectus. Examples of these institutional investors are superannuation funds, investment companies and life insurance companies. The registrable prospectuses must be not only lodged but also registered which means that it must undergo a process akin to, if not exactly identical to the present pre-vetting process. The differences in the wording of the new Clause 1020A when compared to the working of Section 103 of the Code have already been considered earlier in this chapter, but it is not possible to reach a definite conclusion as to what the practical effect of these differences might be.

9.15 Exemptions to the prospectus requirements are contained in Clause 1018(2) and Clause 66. The exemption in Clause 1018 was considered in the foregoing section on secondary trading and recapitulating briefly, the exemption extends to offers of securities which have been listed on the Stock Exchange and which at the time of listing had complied with prospectus requirements set down in the appropriate companies legislation. In other words it is an exemption for secondary trading in listed securities.

9.16 Clause 1017 of the Bill provides that the prospectus requirements do not apply in relation to:

(a) an excluded issue of securities;

(b) an excluded offer of securities for subscription or purchase;

(c) an excluded invitation to subscribe for or buy securities; or

(d) an issue or offer of or invitation in relation to securities of a prescribed registerable Australian corporation being an issue, offer or invitation that is made or issued in the State or Territory in which the Corporation is incorporated.'

9.17 Clause 66 of the Bill defines excluded issues, offers and invitations. The first category of offers exempted from the prospectus requirement is where the minimum amount which can be subscribed is $500,000. The assumption underlying this provision is that investors outlaying so substantial amount will in any case satisfy themselves that the investment is a wise one independently of prospectus information which may be available. The second exemption is for offers or issues to professional investors. The rationale for this exemption is that persons who regularly trade in securities know well enough how to look after themselves in the corporate securities environment. The Committee heard evidence that professional investors could include retirees and elderly pensioners whose sole source of income was proceeds of investment of superannuation and insurance layouts. This was not confirmed by other witnesses and seems contrary to the spirit of the Bill which endeavours to provide protection to vulnerable members of the public in their dealings with the securities industry.

9.18 The Committee recommends the adoption of the proposal of the NCSC that this exclusion be withdrawn. The reason for this recommendation is not simply disquiet about the possibly unduly

wide definition of professional investor. It also reflects the arguments put by the NCSC that the exemption in Clause 66(1)(a) for subscriptions of amounts above $500,000 and the exception in

Clause 66(1)(e) relating to small scale offering, are sufficient to cover the position of the institutional investor making Clause 66(1)(b) and 66(2)(b) redundant. Clause 66(1)(c) and Clause 66(2)(c) provide exemptions from the prospectus requirement where the offer of securities relates to an underwriting agreement. This exemption seems unexceptionable

9.19 Clause 66(1)(d) and Clause 66(2)(d) provide exceptions in the case where no consideration passes in return for the securities. Professor Austin considers that this provision can only have application in the case where bonus shares are being issued. He considers that the provision will not apply in respect of new issues of securities because company law generally prohibits the issue of shares at a discount (see Clause 190).

9.20 Clause 66(1)(e) and Clause 66(2)(e) provide an exemption where the number of persons receiving offers of securities does not exceed 25 in any twelve month period. Criticism has been made of this exemption particularly with regard to two elements of it. The first is uncertainty whether large scale offerings of above $500,000 each are to be counted among the 25 offerees within 12 months. If they are then the number of offerees could become rapidly exhausted. The other uncertainty which has been highlighted by Professor Austin is the position at law when the offerees are companies, each of which has multiple shareholders or beneficiaries. For example, if offers are made to 25 companies, each of which has 25 members, is this counted as an offer to 25 offerees or is it considered to be an offer to the number of members in each company multiplied by the number of companies receiving offer. Aside from these purely interpretational problems, the NCSC has raised the question of whether this exemption should apply to prescribed interests and is firmly of the view that it should not. It says that many agricultural and agricultural schemes offered to investors by fraudulent promoters can be tailored so as to fall within the 25 offerees exception, and because of the extreme flexibility which can attach to prescribed interests, it is almost impossible to design sufficient anti-avoidance provisions to protect the interests of

investors in this situation. The NCSC recommends that prescribed interests be expressly excluded from these provisions and the Committee concurs in this recommendation.

9.21 Clause 66(1)(f) and Clause 66(2)(f) provide exemptions where the issue or offer of shares is to an executive officer of the corporation or of a related body corporate. This appears a reasonable exemption given that the executive officer in that position should be well appraised of the financial position of the company and might reasonably be assumed to have or have access to all information which might be included in a prospectus.

9.22 The remaining paragraphs in Clause 66 provide exemptions in a number of areas which are technical and would apply in very few circumstances. The main exemptions clearly are those referred to above whether the number of offerees does not exceed 25, where the minimum subscription is $500,000 and where the offerees are executive officers of the company, or of a related company.

**Registration Procedure**

9.23 This differs from the existing situation in that prospectuses for certain classes of issues need not be registered, and that the registering authority is obliged to register a prospectus unless it appears that it is in some way defective or misleading (The Code expresses the obligation of the Corporate Affairs Commission in quite opposite terms - "The Commission shall not register unless satisfied with regret to..."). The existing law requires the Commission to satisfy itself with respect to matters stipulated, and only once satisfied may it register a prospectus. The law in this way imposes on the Commission the duty to extensively examine each prospectus for defects. The new legislation does not positively impose the duty to pre-vet and the wording of the relevant clause (Clause 1020A) clearly makes registration the primary obligation.

9.24 In the event of a contravention being discovered the Commission will be able to institute civil and criminal proceedings seeking injunctions and or damages. Contraventions could be expected to come to the notice of the Commission either by way of complaint or through operation of some systematic audit procedure. As a further offset to the diminished investor protection consequent upon the abolition of pre-vetting, the Commission is to be vested with the power to issue stop orders, which have the effect of prohibiting further issue of securities until the problem has been resolved. This is a strengthening of the power conferred on the NCSC under Section 60 of the Code, because the new stop order can be issued without leave of the Court. Of course any stop order will be subject to judicial review, however.

9.25 Clause 1033 invests the Commission with power to issue stop orders in cases where it considers an issue of securities to be contrary to the interests of persons who may invest in it. Paras. 1033(2)(a), (b) and (c) relate to cases of contravention of the legislation, misleading or deceptive statements or material misrepresentations in prospectuses, and the Committee agrees that it is appropriate for the Commission to have power to issue stop orders in these cases. However, paragraphs 1033(2)(d), (e), (f) and (g) relate to instances where the Commission has reservations about the merit of the issue as an investment. The Committee believes that this is essentially a market judgement, and it is inappropriate for bureaucratic judgement to displace it. A further undesirable consequence of the Commission having power to stop an issue on its merits may be that investors may gain a false sense of security about an issue simply because the Commission has failed to stop it, whereas the failure to issue a stop order should never be able to be interpreted as an endorsement of an issue.

**Recommendation:**

**The Committee recommends that paras. 1033(2)(d),(e),(f) and (g) be deleted.**

**Contents of prospectuses**

9.26 The Scheme sets out the requirements for prospectuses in broad and general terms (Clause 1022). It must "contain all such information as investors and their professional advisers would reasonably require and reasonably expect to find in the prospectus for the purpose of making an informed assessment of:

(a) the assets and liabilities, financial position, profits and loses, and prospects of the corporation, and

(b) the rights attaching to the securities."

Clause 1022 does not specify matters which would need to be included in a prospectus but says that regard should be had to

* the nature of the securities and of the corporation

* the kinds of persons likely to consider buying or subscribing for the securities

* the fact that certain matters may reasonably be expected to be known to professional advisers whom those persons may reasonably be expected to consult,

* whether the recipients of offers to buy or subscribe for securities are already holders of shares in the corporation, and if they are, whether information already in their possession might be relevant to the investment decision to hand; and

* any information known to investors or their professional advisers by virtue of legislation.

9.27 The Deputy Chairman of the NCSC, Mr Charles Williams said that "self enforcement needs to be supported in this area by adequate rules about the extent of a prospectus and laws about the liability of parties to a prospectus which are somewhat more robust than the present ones. The Bill has got the latter about right in our view, but the question of content rules has not been tackled adequately. Indeed, in failing to provide for independent accountants' reports in prospectuses, the Bill is seriously defective".

9.28 Professor Walker of the shareholders Association said "preventive regulation is far more effective to protect investors than stop orders, which might be issued too late, or civil or criminal proceedings after the event. The NCSC in its submission said

(a) Stronger civil liability provisions will be ineffective because small investors cannot afford complex and lengthy commercial litigation, and

(b) The costs of producing prospectuses will rise, since without the comfort conferred by pre-vetting, and to lessen the risk of litigation, additional care and diligence will be required in preparing a prospectus.

In any event it is unlikely that investors would have the same degree of certainty that information contained in a prospectus was not false or misleading under a self-enforcing system compared to one where the ASC had cleared and registered the prospectus.

9.29 The Committee notes the reservations expressed about the less specific guidelines for prospectus contents. nevertheless, the Committee notes the Attorney-General's Department view that subclause 1021(7) of the Bill gives a regulation-making power in respect of prospectus contents, and the Committee expresses confidence that uncertainties and difficulties in this area can be satisfactorily resolved without the need to further amend the Bill.

9.30 The Committee recommends that prospectus provisions under the Bill be amended as follows:

(i) That Clauses 66(1)(b) and 66(2)(b), exempting offers to "professional investors" be removed;

(ii) That, in line with the Securities Information Review Committee's recommendation, the maximum number of offerees in Clauses 66(1)(e) and (2)(e) be reduced to 20.

(iii) That Clauses 66(1)(e) and (2)(e) be amended to prevent corporations from issuing securities of different classes so as to evade the intent of the "limited offerees" exemption;

(iv) That Clauses 66(1)(e) and (2)(e) be amended to exclude prescribed interest offers from this exemption.

(v) That Clause 66(1)(g) be amended to exclude from the exemption options relating to unlisted companies;

(vi) That Clause 66(1)(j)(ii) be amended so that the exemption for issues of shares upon the conversion of a convertible note relates only to listed companies.

(vii) That Clauses 66(1)(j)(i) and 66(2)(h)(i) be amended to make clear that :

(a) the offering of convertible notes to existing debenture holders is not exempt; and

(b) the offering of debentures to existing convertible note holders is not exempt

(viii) That the exemption from prospectus registration requirements in Clause 1017.N(3)(b)(ii) for offers by unlisted corporations of debentures to existing debenture holders be removed.

(ix) That the exemption from prospectus registration requirements in Clause 1017A(4)(a), for offers of prescribed interests under a listed unit trust be removed.

(x) That the exemption from prospectus registration requirements in Clause 1017A(4)(b)(i) for offers of unlisted

prescribed interests to existing holders under the same approved deed be deleted.

(xi) That the exemption from prospectus registration requirements in Clause 1017A(3)(a) for any shares or debentures of a listed corporation be restricted so as to apply only to securities that have been approved for quotation on the stock market.

(xii) That Clause 1020 be amended so as to allow prospectuses for debentures to include a "loose-leaf" application form.

(xiii) That Clause 1020A be amended to include a time limit, to be prescribed by regulation, within which the Commission shall register prospectuses.

**Pathfinder Prospectuses**

9.31 A pathfinder prospectus is one which is unaccompanied by an application form for purchase of or subscription to the securities described in the prospectus. The proposal of the Australian Stock Exchange is that, as an alternative to pre-vetting, the Pathfinder procedure be adopted under which the prospectus be issued for public perusal, and comment for a two week period, during which time investors would be unable to purchase the securities, but the press and other financial commentators, advisers and regulators would be able to scrutinise and criticise the proposal. During this period directors would not be liable for false or misleading statements contained in the prospectus, and the Commission would be able to issue stop orders in the event of concern about the legitimacy or soundness of the issue.

9.32 Problems with this proposal identified by Mr O'Callaghan of the Attorney-General's Department are that the unsophisticated investor may become aware of matters in the draft prospectus but receives no notice -of changes to the prospectus when formally lodged, and that a lot of promotional work would be done during the pathfinder period so that the issue could be tied up completely before formal lodgement. Mr O'Callaghan also expressed doubts about the extent to which financial journalists and analysts would be interested in prospectuses issued by unlisted corporations, whose issues could, although containing serious deficiencies pass unnoticed and unscathed during the pathfinder period. Another problem could be that a prospectus which was fundamentally sound could contain minor but embarrassing defects which received fanfare publicity which could ruin the prospects of the issue although the problems were corrected before formal issue of the prospectus.

9.33 The Committee finds that, although the proposal may be of benefit in some instances, these benefits would be uneven and unpredictable in their effects and accordingly declines to adopt the pathfinder prospectus as a viable alternative to pre-vetting.

**Secondary Trading**

9.34 Secondary trading in securities occurs when securities, after being issued to subscribers, are sold to subsequent buyers. The wording of Clause 1018(1) makes clear that secondary trading is covered by the prospectus requirements as if it were a new issue. Clause 1018(2) provides certain exemptions to the general rule, and, as it relates to secondary trading, the material conditions for exemption are that prior to the secondary trading taking place a prospectus in respect of those securities had been lodged and if necessary registered and that the corporation having become required to comply with prescribed listing rules, did comply with those rules before the making of the offer or issue of invitation. The exemption applies only in respect of secondary trading in listed securities.

9.35 The major problem with this identified by the Australian Stock Exchange is that a substantial number of securities currently listed on the Exchange obtained official quotation without a prospectus, which means that present holders of the securities will need to prepare a prospectus, or compel the company which issued the securities to prepare one, before they can legally be offered for sale. The ASX claims that this will cause havoc in the financial markets, and recommends at the least a 'grandfather clause', which would exempt securities currently listed from the prospectus requirement.

9.36 The NCSC is opposed to the insertion of a wide exemption in the Bill itself and claims that the ASC will have power to grant relief in cases where unnecessary costs are imposed and no offsetting increase in investor protection is achieved by

preparing a fresh prospectus, and such cases can be dealt with on their merits.

9.37 The NCSC says:

On the other hand there are a significant number of companies which though presently listed manage to avoid the need to register a prospectus and were admitted to listing during the stockmarket euphoria of 1986/87 without making adequate disclosures. The stockmarket crash of October 1987 has left many of these companies in significantly financial difficulty and has led to major changes in the nature of their activities and prospects.'

9.38 Regulation of secondary trading is necessary in most cases where the regulatory structure exempts certain categories of primary issues. If the form of the offer of securities to be the subject of secondary trading does not fall within one of exemptions to the prospectus requirements set out in Clause 66, then the only way the secondary trading in securities can be conducted without the inconvenience and expense of preparing a prospectus is to obtain waiver of these requirements by the Commission.

9.39 The Committee agrees that there may be companies whose securities are listed at present which would probably not qualify for listing under current arrangements. However, the Committee considers that any post-crash financial difficulty in which these companies may find themselves would be reflected in the market price for their securities, and the Committee does not consider it appropriate that securities which have been subject to secondary trading without hindrance in the past should suddenly have this status withdrawn at the Commission's discretion.

**Recommendation:**

**The Committee recommends that the legislation include a 'grandfather clause' to exempt from prospectus requirements all securities currently listed.**

**Role of the Stock Exchange**

9.40 Clause 1020A provides for the registration of registrable prospectuses, which entails pre-vetting of them. Clause 1017A(3) defines those prospectuses which are exempt from registration and the pre-vetting process. The significant exemption provided for the purposes of this section of the chapter is that to listed corporations. A listed corporation means a corporation that is included in the official list of the Stock Exchange.

9.41 The legislation envisages that prospectuses of listed corporations will be subject to scrutiny by the Stock Exchange and that accordingly the registration procedure is redundant.

9.42 A brief examination of the listing rules would appear to be called for because they set out the prerequisites for admission to the official list. One of these is that the company should have a sufficient shareholding spread as defined in Section 1 of the listing rules by reference to the nature of the company in question. The listing rules also provide that a company may be considered for admission to the official list if it proposes to issue a prospectus or an information memorandum. The National Listing Committee of the Exchange determines questions relating to listings. The Committee normally requires that the shareholding spread be obtained before it admits the company to the official list, however it has the discretion to make the decision to list the company prior to its reaching the shareholding spread, providing that certain other conditions are met. It will usually be difficult for a company to obtain the requisite shareholding spread without offering securities to the public or a section of the public as defined in the companies code which would entail issuing a prospectus. Under the Bill it will be impossible for a company to obtain the requisite shareholding spread without making an offer or issuing an invitation or issuing a form of application, none of which can be done without lodging a prospectus unless there is a relevant

exclusion such as the minimum parcel of $500,000 or maximum of 25 offerees in any 12 month period, etc.

9.43 It can be seen that if the Exchange continues to apply its present policy of not admitting the company to the official list until the shareholding spread has been achieved, the result will be that companies will be required to have a prospectus and to have it pre-vetted and registered. It would be possible for the Exchange to vary this policy and list companies which have not yet acquired the requisite shareholding spread, in which case companies could become listed and issue prospectuses without meeting the pre-vetting requirements. Clearly, unless the Exchange is prepared to relax its rules in this regard, or at least vary its practice, the reform will have little impact in practice. The Stock Exchange in its submission and its evidence did not give any indication of whether a variation in its listing practice is to be expected. It did confirm that the listing rules are entirely a matter for it; it has the power to make them and to vary them. It also has the power to waive them in particular instances.

9.44 It is usual for a listed company to lodge copies of prospectuses with the Corporate Affairs Commission for pre-vetting and simultaneously with the Stock Exchange to ensure that the Exchange's listing requirements have been met. The reason for this is that if the prospectus were lodged first with the Commission and then only after registration with the Exchange it would be possible for prospectus to obtain registration yet to attract the displeasure of the Exchange so that it failed to obtain listing. This would necessitate the company making changes to its prospectus to satisfy the Exchange and then having to go through the entire registration procedure again. Nonetheless it would not be correct to say that examination conducted by the Exchange prior to listing, is in any way comparable to the rigours of the present pre-vetting process. The Exchange does not undertake a general pre-vetting to ensure compliance with prospectus law, but only seeks to ensure that the prospectus complies with the listing rules. In order to discharge the former

function, substantial additional staffing resources would presumably be required, and in Professor Austin's opinion the Stock Exchange would be unlikely to seek this additional work and additional responsibility. However, it should be noted that the Exchange in its submission favoured the option of the Pathfinder Prospectus which the Committee does not accept. The Exchange did not foreshadow any amendment to its preference listing rule, so it would appear that the exemption from registration of prospectus requirements for listed companies will not greatly reduce the workload of the Commission except in cases where new issues are made by established listed companies. No change has been proposed in the Bill or elsewhere that power to determine the listing rules be taken from the Stock Exchange.

## CHAPTER 10

## OTHER FUNDRAISING ISSUES

### Debentures

10.1 The definition and nature of debentures has been spelled out in the foregoing Chapter. Section 9 of the Bill gives the definition of Debentures for the purpose of this legislation.

10.2 A submission has been received from the Australian Finance Conference (AFC) which criticises the approach taken in the new legislation to the regulation of fundraising by means of issuing debentures. The AFC points out the significant difference between shares and debentures, i.e. that debenture holders have priority over equity (or share) holders in the event of the company being unable to meet all calls upon its resources.

10.3 The submission criticises the provision in the Bill exempting from registration requirements prospectuses for debentures issued by companies which are listed on the Stock Exchange. The Conference sees this as inappropriate and cites as an example of one of the, in its view, undesirable consequences of such a provision, the prospect that a company such as Rothwells could make a debenture issue without having to satisfy registration requirements whereas a major Australian finance company with a very high credit rating would need to submit its prospectus to registration procedures.

10.4 The AFC believes that all prospectuses relating to the issue of debentures should be subject to registration procedures, and the Committee, in line with its recommendation for the retention of pre-vetting, expressed in the foregoing Chapter, agrees with this recommendation.

10.5 The AFC submitted that prospectuses be required for all debenture issues except for those cases where an issue of securities is exempted under Clause 66 of the Bill. The AFC suggests however that the present requirement of the Code re-expressed in Clause 1020 of the Bill that application forms be attached 'to the prospectus' should be abolished. This would enable the issuing companies to use a loose leaf application form with prospectuses. The reason for this is that, with continually fluctuating interest rates and the fact that prospectuses have a life of 6 months, it is, unrealistic to require that the application form be invariable and valid for the entire 6 months life of the prospectus.

10.6 The Committee accepts that it is desirable for all prospectuses for debenture issues to be subject to registration procedures. The Committee notes that prospectus provisions in Chapter 7 of the Bill relate to all issues of securities, including debentures. Accordingly, the recommendations for change to Chapter 7, and Clause 66, contained in the foregoing chapter of this report are sufficient to achieve this end.

10.7 The Committee recommends that Clause 1020 be amended so that loose leaf application forms can be included in prospectuses for debenture issues.

10.8 The AFC believes that contents of debenture prospectuses should be prescribed either in regulations made under Clause 1021(7) or by means of an explanatory memorandum detailing procedures.

10.9 The AFC further proposes that issuers which register a prospectus with the Commission and provide regular updates each 6 months to the Commission on further particulars of issuers financial status should be permitted to issue a permanent prospectus. Under this proposal, prospectus registration would lapse automatically once the accounts in the registered update statement became 12 months out of date. Another element of the proposal which should further enhance investor protection is the

suggestion that directors be under an obligation to advise the Commission of any material deterioration in the financial condition of the company. The Committee notes that discussions are being conducted at present between the AFC and the NCSC on a similar proposal and supports the adoption of this proposal subject to the outcome of the discussions.

10.10 The next proposal of the AFC concerns short form prospectuses. They were approved under the discretionary powers of the Code in 1984 and according to the AFC have resulted in considerable cost savings without any diminution in investor protection. A short form prospectus is in effect a summary or statement of the salient points of the registered prospectus which may not contain any matters not included in the registered prospectus. The Committee notes that matters approved under the discretionary powers conferred upon the Commission by the Code will continue to have approval under ' the transitional arrangements provided for in the new legislation. The Committee considers that circumstances do not warrant the express provision in the Bill for short form prospectuses.

10.11 The final substantial proposal from the AFC is that in certain restricted instances issuing companies could publish a discrete application form, i.e. an application form for debentures without any accompanying prospectus. The AFC envisages that in such cases which investors who were interested in it could obtain fuller particulars. The proposal is designed to ensure that debenture issuers are able to compete on an equal footing with building societies and credit unions in that the investing public would be able to respond more quickly to offers of debentures and would enable issuers of debentures to utilise electronic fund transfer systems as well as direct response advertising.

10.12 The AFC suggests that the following rigorous eligibility requirements be implemented to accompany this proposal:

(a) Restricted to corporations registered under the Financial Corporations Act

(b) Restricted to issues of debt securities (given the 'simple' nature of such securities);

(c) Restricted to corporations which had issued at least three prospectuses registered in the proceeding three years;

(d) Restricted to corporations in respect of which the Commission has formed the view that it would be appropriate to grant relief. For the time being the Commission would rely, among other things, on the credit rating of the securities. A rating of the securities 'A' or better at the time of application would be an important factor in the Commission's evaluation.

(e) Restricted to corporations which enter into a program of co-regulation approved by the Commission; and

(f) Restricted to corporations which establish a permanent disclosure register.

10.13 In the Committee's view the matter should be the subject of consultation between the Commission and the AFC, and the proposal should be implemented in such form and at such future time as appropriate given the competing demands of investor protection and the efficient functioning of the financial markets.

**Unit Trusts**

10.14 Unit Trusts are the collective investment vehicles providing avenues of investment for smaller investors to pool their resources to get the benefits that larger investors can obtain. They can take the form of cash management trusts which get the benefit of the professional money market rates; property

trusts whereby small investors can invest in large buildings; mortgage trusts; and share trusts whereby the investor can get a diversified portfolio.

10.15 Public unit trusts come under the definition of prescribed interest and are covered by the Corporations Bill in similar fashion to the way they are regulated by the present Companies Code. Nonetheless, there is a major departure from the existing legislation, in the approach taken under the Bill to the pre-vetting of trust deeds. Pre-vetting of deeds is a major form of investor protection. Section 166(1) of the present Code gives the Commission the discretion to grant its approval to deeds. The wording of the counterpart in the new legislation to this provision reduces the discretion to withhold approval - subclause 1067(1) says the Commission "shall grant its approval" of. Section 166(1) of the Code - the Commission "may... grant its approval". The change makes clear that the Commission's pre-vetting in future will be limited to ensuring that the legal requirements are met. No requirement is laid down that the terms of the deed be in accordance with good business practice and consistent with the trustee's fiduciary duty.

10.16 The Committee regards this as a major omission from the legislation. Guidelines published by the NCSC at present stipulate the requirements, in addition to the purely legal requirements which a deed must satisfy to obtain approval.

10.17 The Committee considers that it is appropriate for the Commission to look, in the interests of investor protection, beyond the bare bones of the legal requirement.

**Recommendation:**

**The Committee recommends that regulations be prescribed along the lines of the present NCSC guidelines ensuring that the matters proposed in the deed are in accordance with good business practice and consistent with the trustee's fiduciary duty.**

**The Committee recommends that the words "if any" appearing in brackets in subclause 1067(1) be deleted.**

10.18 The Unit Trusts Association of Australia made a submission to the Committee suggesting that the category of

prescribed interests is not adequately defined in existing companies legislation nor in the new Bill and that it would be appropriate for a separate body of legislation dealing with prescribed interests to be enacted. The reason for this is that the present and proposed legislation arrangements rely on legislation by reference with different divisions of the Bill incorporating by reference provisions from other Divisions and other Parts of it. The Association quotes the report of the Companies and Securities Law Review Committee dated August 1988 which found:

'A separate act would provide an opportunity to make the legislation more comprehensible than the existing legislation'

The Association considers that the introduction of the proposed new schemes constitutes just such an opportunity and urges that it be exploited. The Committee considers that the proposal has merit and refers it to the proposed Joint Committee.

10.19 The next proposal of the Association is that the Corporations Bill should contain protection for unit holders in public unit trusts analogous to that afforded to company shareholders from undisclosed takeovers of the fund managers. Under company takeover legislation, directors of the company are entitled to demand to uncover the identity of the beneficial owner of any shareholding of 5 percent or more of the company's capital, and any investor who buys 20 percent or more of the shares of a company is obliged to bid for the rest of the capital on terms at least as favourable. No such restrictions bind any would-be raider of a listed unit trust. The raider may acquire 51 percent of the trust units and so acquire control of the trust without incurring any obligation to buy out the remaining unit holders. The new controller of the trust may then administer the trust in a way which was to the benefit of the majority unit holder, possibly at the expense of the remaining minority unit holders. The passivity of unit trust holders is another feature which enable a person to get control of the trust by purchasing as little as 20 percent or perhaps 30 percent of trust units

because as Mr Lewis, the Solicitor acting for the Unit Trust Association of Australia advised

'It would be unusual if at a unit holders meeting of a trust you get more than 20% of the units voted - quite uncommon.'

**Recommendation**

**The Committee notes that, although the possibility of someone taking over the trust in this way was canvassed, no evidence was presented as to how commonly this occurs, nor were instances of detriment to unit holders cited. The Committee notes also that any new manager appointed must act as a fiduciary for all unit holders, and that even if the majority unit holder succeeds in appointing a new manager, taking over the role of trustee poses almost insurmountable problems and, according to the evidence, has never happened. The Committee further notes that the trustee will remain independent of the majority unit holder in any case, and that the trustee will continue to exercise its function of overseeing the interests of the unit holders. The Committee regards the proposal as important and recommends that it receive further consideration from the proposed Joint Committee.**

10.20 The Association also proposes that continuous issuers of prospectuses should be granted relief from the restrictions in Clause 1021(5) of the life of the prospectuses to 6 months in accordance to conditions to be agreed with the Australian Securities Commission. The arguments in favour of such a proposal are virtually identical to those presented by the Australian Finance Conference urging a relaxation in the prospectus requirements for issuers of debentures. For continuous offerors of securities such as public unit trusts the requirements to roll over prospectuses every 6 months is unnecessarily onerous both for the offeror and for the corporate affairs offices. It results, not infrequently in virtually identical prospectuses being filled in which only the accounting information has changed from that appearing in the previous prospectuses. The Committee supports this proposal.

10.21 The Association submits that Clause 1072 of the Corporations Bill should be amended to allow suspension of a unit trust manager's obligation to repurchase units under certain circumstances. The Association is of the view that this requirement could in certain circumstances be utilised by one or several of the unit holders to his or their own advantage at the expense of the interest of the remaining unit holders. The Association considers that in cases such as a run on the trust or where stock markets have closed around the world, it could be appropriate to amend buy-back provisions to preserve the value for all unit holders. The proposal of the Association is that in these circumstances it would be appropriate for the trustee or manager to apply to the Australian Securities Commission for approval to suspend the buy-back obligations for a predetermined period to enable either a proper valuation of the assets or a calling of a unit holders meeting to decide on the appropriate course of action.

10.22 The Committee considers that this proposal has merit and recommends that the legislation be amended to moderate the buy-back requirements in situations where their rigorous application could disadvantage certain unit holders.

10.23 The Association recommends that life insurance products be brought within the definition of prescribed interests in order to extend the protection of the Corporations Bill to their investors. Apart from the Association's interest in protecting purchasers of insurance bonds, it was clearly expressing concern that, in the capital market, insurance bonds are not competing with unit trusts on a level playing field. The unit trust offeror, to comply with the Companies Code, must produce a prospectus providing far more detail than is required of a company issuing an insurance bond. The Association feels that the level of disclosure should be the same for both the unit trust and the insurance bond, and that the interests of the investing public would be better protected if life insurance products were covered under the Corporations Bill as prescribed interests.

10.24 The Committee considers that this proposal has merit, however it notes that no submission has been received from insurance or other similar interests and considers that it would be inappropriate to make a specific recommendation without wider consultation. The Committee recommends that this matter be the subject of early consideration by the proposed Joint Committee.

10.25 The final proposal of the Association is that there should be consultation with the unit trust industry on regulation to be introduced governing the contents of prospectuses. These regulations should maintain the short form prospectus concept for money market and mortgage trusts, and not inhibit the extension of short form prospectuses to all public unit trust offerings. Again this proposal is similar to that of the Australian Finance Conference with respect to short form prospectuses issued by Issuers of debentures. Similar arguments have been raised in favour of it and the Committee recommends further consultation between the Commission and the Association without making a specific recommendation for amendment to the Bill at this stage.

**Liability of professionals, advisers and experts for statements made in prospectuses**

10.26 One of the key innovations of the new scheme, which is really a corollary of the move to de-regulation, or more properly described, greater self-regulation, of the securities market, is the expansion of the liability of persons associated with preparation and publication of prospectuses.

10.27 It would seem appropriate to resolve some confusion which emerged at the hearings as to the extent and nature of liability borne by different classes of advisers. For example there was the suggestion that a solicitor named, with his consent in a prospectus, might be liable for false or misleading statements made by, say a geologist. It does not seem sensible to impose liability upon one professional for statements made by another, where clearly the former has no expertise or qualifica-

tion for agreeing or disagreeing with the statement. A foreseeable practical consequence of such an interpretation of the law would be to discourage reputable professionals from being associated with the preparation of prospectuses at reasonable cost.

10.28 However, this interpretation of the law appears not to be correct. A proper reading of Parts 7.11 and 7.12 shows that a professional who contributes to the preparation of a prospectus can only be held liable for his own input. The relevant clauses are 1005, 1006, 1008, 1009 and 1022. The material parts of each clause are :

Clause 1005: Subject to the following sections of this Division, a person who suffers loss or damage by conduct of another person that was engaged in a contravention of this Part or Part 7.12 may recover the amount of loss or damage by action against that other person..."

Clause 1006: Imposes liability upon classes of persons specified, including directors, promoters, stockbrokers auditors, banks and solicitors named with their consent in prospectuses, for prospectuses relating to securities in a corporation in which there is a false or misleading statement or from which there is an omission".

Clause 1008(5): provides the defence of reasonable belief, and due diligence to directors against actions for misstatements or omissions.

Clause 1009(2): makes clear that experts (lawyers, bankers, auditors etc.) can only be liable for false or misleading statements purporting to be made by the person as an expert.

Clause 1022(2): Prospectuses must contain such information as to a company's financial state and the rights attaching to the securities on offer as is known to any director or expert as

listed in Section 1006, "or as it would be reasonable for such a person to obtain by making inquiries'.

10.29 The view that the legislation could hold the lawyer liable for the false statement of say, the geologist, can only be supported by a consideration of Clause 1006 in isolation, without

regard to the amplifications and defences contained in the other clauses referred to above.

10.30 Nevertheless, while some exaggerated views as to the liability of experts may be discounted, there is no doubt that they carry a heavier responsibility than applies under the Code. This is not due to any substantive changes in the law, which is essentially a restatement of the Code provisions, but rather due to the abolition of pre-vetting which should identify false or misleading statements or material omissions. With this safety net removed, and the Committee heard evidence of the frequency of changes made to prospectuses as a result of the pre-vetting process, it can be expected that more errors, false or misleading statements, and material omissions will appear in issued prospectuses, unless additional care is taken by the preparers of them.

10.31 Concern was expressed that liability on the part of persons responsible for preparation of defective or misleading prospectuses will be small consolation and of little benefit to investors who lose money. Professor Walker considered that the cost of litigation would be so high that even persons who had lost as much $50,000 could find litigation more expensive than its fruits could justify. In any event, the small investor would in most civil liability cases find the defendant replaced by an insurance company with great experience in an substantial resources for defending liability cases of that kind. Costs would be very high and delays could be ruinous for the small litigant. With this in mind the Committee has recommended the retention of pre-vetting.

10.32 the Committee is concerned that readers of prospectuses may not understand the particular liability attaching to each person and class of person referred to in paragraphs 1006(2), (e), (f), (fa) or (g), if that person's name appears at the front of the prospectus.

**Recommendation:**

**The Committee recommends that standard forms be prescribed by regulation setting out the liability attaching to each class of adviser who assists in the preparation of the prospectus and that these forms be included in all prospectuses.**

**Advertising**

10.33 Clauses 1025 and 1026 of the Bill regulate advertising of issues of securities. According to the Explanatory Memorandum, the new legislation is intended to relax advertising restrictions. The NCSC has submitted that the legislation has not been successful in realising this goal, and that the Bill be amended to deregulate advertising except to the extent that a prohibition should remain on publication of misleading or deceptive material, or matters inconsistent with the prospectus to which it relates. To ensure that investors' interests are not sacrificed, the NCSC proposes that the Commission have power to issue stop orders and to make rules in respect of advertising.

10-34 The Committee takes issue with the claim that Clauses 1025 and 1026 failed in their purpose of largely deregulating the advertising of securities. The NCSC point was leased on the definition in Clause 9 of the word prospectus as a written notice inviting applications for securities. Under this definition, the NCSC argues! even a newspaper advertisement could be a prospectus, and as such would have to satisfy prospectus requirements. Clause 1025 differs from Section 99 of the Code in that matters other than the particulars of the prospectus can be referred to, so long as the advertisement clearly is not itself soliciting applications for securities. The Committee does not consider further relaxation of the requirements of advertisements for securities to be appropriate at this stage.

10.35 The Committee considers that sufficient prohibition of, and protection against, misleading or deceptive conduct is contained in the general prohibition of misleading or deceptive

conduct in Clause 995 of the Bill. The Commitee notes that the Commission can seek an injunction from the Court under Clause 1324 of the Bill to stop misleading advertising, and can seek a corrective advertising order under Clause 1004. Accordingly, the Committee sees no need to invest the Commission with a stop-order power in respect of advertising.

**Hawking of Securities**

10.36 Clauses 1078 and 1079 restrict selling of securities by "door-to-door" methods, including telephone approaches to consumers. The NCSC has criticised the provisions and proposed that they be amended to enable share hawking where the shares of an issue which complies with prospectus requirements, or are listed securities being the subject of secondary trading.

10.37 The Attorney-General's Department disagreed with this proposal, arguing that consumers will not be properly protected form high pressure sales tactics even if the issue is covered by a properly lodged and registered (where appropriate) prospectus. The Committee agrees with this and does not propose any amendments to the share hawking provisions.

## CHAPTER 11

## CONDUCT OF THE SECURITIES INDUSTRY

### Introduction

11.1 An integral part of the new scheme will be provisions to ensure that participants in the securities industry such, as advisers and dealers, are reputable. To ensure that confidence in the financial markets, and participants in the market, is not undermined, the new scheme proposes a system of licensing of dealers and advisers in the securities industry. The provisions are found in Parts 7.3, 7.4 and 7.11 of the Corporations Bill.

### Participants in the securities industry

11.2 Part 7.3 of the Corporations Bill deals with participants in the securities industry, namely, dealers and investment advisers. It also deals with agreements with unlicensed persons; dealers' representatives; the liability of principals for representatives' conduct and the exclusion of persons from the securities industry.

11.3 **Clauses 780 and 781** require that persons and corporations obtain licences in order to act or purport to act as dealers and investment advisers in the securities industry. The provisions in the Bill differ from those which apply under the Code in that only dealers and investment advisers, but not their representatives, are required to obtain licences.

11.4 Differences between existing Co-operative scheme legislation and the provisions of the Bill are in part due to drafting devices employed to bring the subject matter of the

legislation within Commonwealth constitutional power. The Clauses relating to the granting of licences **(Clauses 783 and 784)** replace Section 48 of the Code and differ from it in the following respects: where the applicant is a natural person, convictions for serious fraud in the last 10 years will now be a factor the ASC must take into account before granting a licence, rather than an absolute bar to receiving a licence as at present An applicant's educational qualifications and experience are to be taken into account, whereas under the present Code the applicant needs only educational qualifications or experience.

11.5 The NCSC told the Committee that the ASC's effectiveness in assessing a person's suitability to hold a licence would be affected by the ability to consider a person's convictions for criminal offences and, in particular, offences such as fraudulent conduct. In its submission the NCSC noted that this question was plainly relevant to Clauses 783 and 784 as well as provisions in Parts 7.4 and 7.11 of the Bill. The Bill's definition of 'serious fraud', in Clause 9 of the Corporations Bill, is restricted to actions punishable by imprisonment for 3 months or more and does not include serious misrepresentations where pecuniary penalties apply (such as offences under certain State Fair Trading legislation and the Trade Practices Act 1974).

11.6 The Attorney-General's Department told the Committee that the ASC could, in fact, have regard to a number of matters when making a decision on criteria which are set out in (for example) Clause 783. Serious fraud is the one matter that the ASC must take into account.

11.7 The Department also pointed out that a number of matters which are offences under the Trade Practices Act, for example, do not necessarily involve fraud or dishonesty; matters such as failing reasonably to check statements.1

11.8 The Committee is satisfied with the explanation provided to it by the Department in respect of the matter and does not consider that any amendment of the Bill is necessary. The definition of 'serious fraud' in Clause 9 of the Bill should be retained.

11.9 The NCSC also drew the Committee's attention to Clause 794 of the Bill which appeared to have inadvertently excluded active investors in securities from certain investor protection provisions of Division 2 of Part 7.3. The NCSC noted that the Clause could be amended so as to only exclude from the concept of 'client' persons who are licensed or are required to be licensed dealers or investment advisers, or who are exempt dealers.

11.10 A problem would arise because the Clause would exclude from the operation of the Division a person who is a dealer. The Bill's definition of a 'dealer' includes persons who carry on securities business which does not have to be the sole, principal or even the substantial business of the person. Accordingly the concept would catch any person earning income from investments and securities.[2]

11.11 The Attorney-General's comment on that matter was that even assuming that, prima facie, such persons could be said to be carrying on a business of dealing in securities (which is doubtful) Clause 93(5) which applies to the purpose of determining whether, inter alia, a person is carrying on a securities business (thus making them 'a dealer') states:

'an act done on behalf of the person by the holder of a dealers licence or an exempt dealer shall be disregarded'

Therefore provides that retirees and small business persons generally act through licensed stockbrokers etc. which is likely, they would not be 'dealers' and accordingly would be entitled to the protection of the Bill.[3]

11.12 The Committee is satisfied with this explanation and does not believe any amendment of the clause is necessary.

11.13 Representatives will be required to hold a proper authority from a dealer or investment adviser, and to disclose the authority to their clients before acting on their behalf (see Clauses 806 to 816 of the Bill).

11.14 Dealers and investment advisers will be liable for the conduct of their representatives. Part 7.3 imposes on dealers and investment advisers, responsibility for the supervision, training and education of their representatives. The ASC will have power to ban persons from acting as representatives. There are some minor changes to the qualifications needed for obtaining a licence and the Bill introduces some related grounds for revocation and suspension of a licence. (There is a category of exempt investment advisers created by Clause 68 of the Bill). The Committee considers it to be unreasonable that the client of an unlicensed dealer should have the right to rescind agreements upon discovery of the dealer's lack of licence. This is in effect exposing the dealer to immense liability and gives the client an easy way out of purchases of securities which prove disappointing. It is more appropriate that the unlicensed dealer be simply required to refund his commission, as provided in Clause 804.

11.15 Where a corporation applies for a licence, the ASC must satisfy itself that the responsible officers of the applicant have both educational qualifications and experience and the ASC must have regard in relation to each responsible officer of the corporate applicant to the matters which apply where the applicant is a natural person, i.e. fraud convictions and qualifications and experience referred to above.

**Recommendation:**

**(a) The right of rescission of agreements relating to dealings and securities given to clients of unlicensed dealers by Clause 798 of the Corporations Bill should be removed; and**

**(b) Noting that dealers' clients would not have a right of rescission, the ASC should have the right to take action for disgorgement of profits such as brokerage, fees, commissions or benefits received on behalf of clients and paid to, an unlicensed dealer.**

**Conduct of securities business**

11.16 Clauses 848 to 853 deals with recommendations about securities. Clause 849 requires that advisers disclose any commissions or fees they may earn as a result of an investor following their recommendation. The adviser must also disclose any other pecuniary or other interest which he may have in the making of a particular investment decision. This represents an enlargement of the existing provision (Sections 65 and 65A of the Code) in that it will apply to exempt dealers, oral recommendations and to associates, to the extent that the clause will apply to principals, partners and directors of advisers if they act together with a partner in making recommendations, and not only in relation to particular recommendations. The meaning of ,associate' in Clause 849 is significantly wider than Section 65 of the Code in that the clause lays down a more relevant test for wider pecuniary and other interests.

11.17 Division 3 of Part 7.4 of the Bill, deals with recommendations about securities by participants in the securities industry. Clause 850 in particular, reflects Section 65 of the Securities Industry Code, and incorporates into the Bill requirements for the so-called 'Chinese wall' arrangements.

11.18 In respect of subclause 849(2), and the 'Chinese wall' defence provided by subclause 850(2), Mr O'Bryan of the Australian Stock Exchange told the Committee

It is possible to conceive of circumstances in which you could show that there was no knowledge of those things (i.e. the matters required by Clause 8491 and there was no opportunity to get knowledge of those things. In other words, you simply prove that the person involved was ignorant about the potential conflict of interest, and that would not be difficult in a large stock broking firm, for example, which may have some hundreds or thousands of employees, but it is more difficult to prove, I think, that you have got arrangements in place, or that the stockbroking firm has got those arrangements in place, to ensure that that could not happen, because the only way you could prove that you had arrangements to ensure it could not happen would be by showing that you did not allow your employees to communicate during the course of the day, which is manifestly absurd.4

11.19 Mr O'Bryan suggested that the best way to overcome the problem that he described, would be for the Bill to mirror existing requirements for 'Chinese walls' required by the rules of the Stock Exchange.

The existing Chinese walls rules require that people in the corporate advisory section of (e.g.) J.B. Were do not speak to those in the dealing room, for example, so that in so far as J.B. Were is organising, let us say, a placement of BHP securities, those in the dealing room are not permitted to know the details of that placement because of course, it is price sensitive and there would otherwise be allegations of insider trading, et cetera. So it is essential that the Chinese wall is kept in place so that those people who do not know, in fact, of the existence of that information otherwise there is a potential breach of other parts of the legislation. What this section says is that they must know, in fact, they must broadcast, within the firm

exactly what is going on in relation to all of their activities with BHP and then they must broadcast all that information to all of their clients. It would result in la complete breakdown of their business. They simply could not conduct business for a corporate client.[5]

11.20 The Attorney-General Department advised the Committee that, in respect of the matters raised by the Stock Exchange and were reflected in Mr O'Bryan's evidence, that the defence provided by Clause 850, and in particular subclause 850(2), is modelled to a large degree on subsection 128(7) of the Securities Industry Code which provides a 'Chinese wall' defence to insider trading. The Department made the point that in order to establish the defence dealers or advisers would have to prove amongst other things that they had in operation arrangements that would ensure that a recommender knew nothing about a conflict of interest and that no advice was given to the recommender by anyone knowing about the conflict. The Department believed that the arrangements which must be in place were 'designed or intended to' ensure the objective of the 'Chinese wall' defence.

11.21 The Committee shares this does not believe that any amendment of Clauses 849 or 850 are required.

11.22 The NCSC put to the Committee that Clause 851 amounted to an inadequate provision, in so far as the threat of revocation or suspension of the person's licence or a fine is an inadequate deterrent to deliberate deceit. It recommended that contraventions of Clause 851 should remain an offence as is presently under the Code.

11.23 In responding to this comment, the Attorney-General's Department stated that the Clause is intended as a supplement to the common law of negligence and is designed, by virtue of Clause 852, to enable a person suffering loss as a result of advice which is not appropriate to the person's particular circumstances, to recover that loss from the adviser. The Department stated

It would be inappropriate to transform an essentially civil remedy of this sort into a criminal offence particularly where, it is noted in the NCSC example, the Trade Practices Act (as well as general criminal law) covers the more serious cases of deliberate fraud or deceit.[6]

11.24 The Department finally noted that the ASC will have the power to revoke or suspend a security advisers licence or make a banning order on contravention of a securities industry law under Clause 826.

11.25 The Committee does not believe that any amendment of Clause 851 is required.

11.26 It should be noted that Clause 852 provides that where a person acts on the advice of a securities adviser who has contravened the provisions requiring disclosure of pecuniary interests and the investor suffers loss as a result of that failure to disclose, the securities adviser is liable to pay damages to the client in respect of that loss or damage. It should also be noted that the wording of this clause requires a causal connection between any damages and the contravention. If it can be established that a reasonable person in the client's circumstances could be expected to have acted in reliance on the recommendation even if the adviser had disclosed his interest, then an action under this clause will not lie.

11.27 The NCSC recommended deletion of the defence in subclause 852(3) that, if a reasonable person in the client's position would still have made the same investment had the dealer's interest been disclosed, the section won't apply. The reason for this recommendation is that this defence is not available under the corresponding Code provision. The Attorney-General's Department in its response, says the provision is to compensate the investor for loss, and should have no penal effect. If the investor would still have made the investment, and

consequently suffered the loss, even had the dealer's interest been disclosed, it is not appropriate to compensate the investor. The Department also points out that subclause 826(l)(c) makes it a criminal offence not to disclose an interest an that revocation or suspension of licence may ensue. The defence in subclause 852(3) applies only to the civil wrong and cannot be invoked in defence of a criminal prosecution. It would in any case be a difficult defence to prove with the onus on the dealer who sought to rely on it. the Committee accepts the Department's argument and does not recommend any amendment to Clause 852.

**Claims arising from misleading or deceptive conduct**

11.28 Clause 1005 provides for general civil liability for contraventions of Part 7.11 or Part 7.12. It provides that a person who suffers loss or damage by conduct of another person who was engaged in contravention of a provision in the parts of the Bill, governing market misconduct or fundraising, may recover the amount of the loss or damage by an action against that other person or against any person involved in the contravention.

11.29 The provisions dealing with civil liability in respect of contravention of prospectus requirements have been dealt with in the foregoing chapter. Clause 995, which may be regarded as a general 'catchall' provision is directed against the act of engaging in misleading or deceptive conduct, or conduct that is likely to mislead or deceive in any dealing in securities. The clause reflects the terms of Section 52 of the Trade Practices Act 1974. The explanatory memorandum in respect notes that

The provision applies to securities in relation to a corporation and to eligible securities in relation to a person. Both ‘securities’ and 'eligible securities' are defined in Chapter 1 (Clauses 126 and 114).

The clause is drafted along the lines of the Trade Practices Act 1974 Section 52 and will operate in addition to the specific prohibitions found in the Bill.

11.30 Without limiting the generality of paragraph 995(2)(a), paragraph 995(2)(b) specifies some instances of conduct where the clause may apply, namely: in the allotment or issue of securities; in the issue of prospectus; in the making of a takeover offer or announcement; or in the carrying on of any negotiation preparatory to those activities. Contravention of the provision will not be an offence. (see Clause 995(3)), but will give rise to civil liability.

11.31 Submissions and evidence to the Committee confirmed that Clause 995 constitute an important change, insofar as it makes it a civil offence to engage in misleading or deceptive conduct in connection with dealings in securities.

11.32 Clause 762 of the Bill provides wide definition as to what will constitute relevant conduct. The interpretation of Clause 995 will be a matter for the courts. A contravention of the Clause will not constitute an offence and accordingly the burden of proof to be applied will be a civil burden, i.e. the matter would need to be proved only on a balance of probabilities and not beyond reasonable doubt as required in cases for a criminal offence. In relation to penalties the Committee notes that the amount of damages recoverable against a person contravening the provision is limited to money lost or damages suffered as a result of the contravention (subc1ause 1005(1)).

11.33 The Australian Stock Exchange put the view that Clause 995 should be deleted as it may impose new and onerous liabilities on advisers. The ASX also proposed that Clauses 1005 and 1006 should be amended to make it clear that a party, found liable has the right to seek indemnity from other parties at fault. In respect of Clause 995, the Attorney-General's Department maintained the view that

The accepted view on present authority is that Section 52 of the Trade Practices Act 1974, which is the model for Clause 995 would presently apply to regular participants in the securities industry. This position is not, however, generally known or understood within the industry or among investors.

Clause 995 clarifies the position in the face of the Companies and Securities Legislation and it focuses the nature of the liability on the particular area of misconduct in relation to securities.[8]

11.34 In addressing the second point raised by the ASX, the Attorney-General's Department suggested that there was nothing in the legislation to prevent the operation of any general law right to seek contribution from among joint wrong doers. The position was similar, the Department suggested, under the Code with respect to liabilities of directors for breach of duty or statutory obligations.[9]

11.35 The Committee is not satisfied that the amendment, or deletion of Clause 995 from the Bill is warranted. Views put to the Committee have generally conceded that the clause will not amount to a substantial extension of the existing law, except that Clause 995 now makes it clear that the provisions in Section 52 of the Trade Practices Act extend to securities.

**Limitation of actions**

11.36 When considering the provisions of Clause 1005, the Committee noted that the time limit allowed for commencement of an action pursuant to the Clause, is 3 years. The Committee believes that the normal limitation period of 6 years should apply and recommends accordingly.

**Recommendation**

**That subclause 1005(2) of the Corporations Bill be amended so as to provide that action under subclause 1005(1) or paragraph 1013(1)(d) of the Bill may be begun within 6 years.**

**Endnotes**

1. Attorney-General's Department comments Pt.1, pp.82-83

2. Submission No.30, paras.215-217

3. Attorney-General's Department comments Pt.1, p.84

4. Evidence, pp-297-298

5. Evidence, p.299

6. Attorney-General's Department comments Pt.1, p.91

7. Submission No.30, pp.52-53

8. ibid, p.30

9. ibid, pp.36-37

## CHAPTER 12

## INSIDER TRADING

### Introduction

12.1 **Clause 1002** of the Corporations Bill prohibits insider trading. Clause 1002 is identical in the main with sections 128 to 130 of the Securities Industries Act. Clauses 1013 and 1015 provide for recovery of moneys lost through insider trading, and a means of determining the amount recoverable by a fund under Clause 1013.

12.2 In his comments to the Committee regarding insider trading, the NCSC Chairman, Mr Bosch, told the Committee

> I believe that there are two really central problems that we have. The first is the problem of definition. That comes to the first point that you are making [in answer to a point raised by Senator Macklin]. There have recently been studies by two Canberra academics of which you would be aware. I believe that they are using the term 'insider trading' to apply to something like trading while in possession of material non-public information. That is not the definition that is involved in our act. We relate the technical term 'insider trading' to circumstances directly associated with officers of a company.
>
> The second problem is that in practice it has been the case that we have felt it necessary to take these matters to criminal courts and we have been forced to use the test of beyond reasonable doubt. This is an extraordinarily difficult thing to do because these are very complex cases, almost by definition. Most juries and magistrates do not even understand them and to get those people to decide beyond reasonable 'doubt a matter that they do not understand, is again, extremely hard.[1]

12.3 Mr Bosch told the Committee that, as a result of a ,certain degree of activism' in prosecution of insider trading in the United States, pressure has been put on other countries with securities markets to pursue insider traders.

12.4 The NCSC commissioned a report on insider trading, and possible methods of policing it, in 1985. (the Anisman report). Mr Bosch's summary of the Anisman Report bears repeating:

... the Anisman report was written in an extremely convoluted and academic style, and the reaction from our business community was very hostile. We recognise that once that we would not be able to persuade Parliament to pass laws along the Anisman line; the opposition was going to make it impossible. So we dropped the Anisman proposals and buried them, and we have begun on two additional tracks. We said, we will commit resources to get cases into court to see what can be done about it and to learn possibly from our failures, and put ourselves into a better situation that we are now to make the arguments'. The second thing we did was to join with a group of the 10 leading nations of the world who are most experienced and expert in securities matters, and we meet together on enforcement questions at a place called Wilton Park in Britain, under the aus3ices of the Department of Trade and Industry.[2]

12.5 The NCSC provided the Committee with an options paper on insider trading. The paper noted that prevention of insider trading requires effective action in a number of areas

* Legislation defining insider trading must accurately reflect the range of activity that should be comprehended within the term.

* Arrangements to enforce compliance must ensure that insider trading can be detected and penalised.

* The penalties must deter insider trading; and

* Those who incur losses as a result of insider trading must be adequately compensated.[3]



12.6 Other evidence to the Committee has supported this summary of the matters that have to be properly addressed by effective insider trading laws. This Committee has received submissions of a limited nature regarding provisions of Clause 1002, and on the general issues raised by insider trading. If the Committee had received more detailed submissions on insider trading it would have considered a broader inquiry on the topic.

**Matters for future consideration**

12.7 The Committee notes that the House of Representatives Committee on Legal and Constitutional Affairs has recently commenced an inquiry into insider trading laws in Australia, and has called for submissions on the inquiry.

12.8 The Committee believes that a number of matters raised during the course of its inquiry have convinced it that these are several important issues which should be addressed by the House of Representatives Committee.

12.9 These matters are

**Definitions of insider trading**

The Committee received evidence that the lack of a sound definition of insider trading has been the cause of considerable difficulties in bringing successful prosecutions. The NCSC suggests an examination of the definitions of insider trading and 'tipping and disclosure' is important.

**Investigation and enforcement resources**

The Committee also received evidence from the NCSC, and from the ASX, that the NCSC had been able to apply only limited resources to insider trading because it has regard to its record in insider trading investigations, and it was required to devote scarce resources to other activities such as market regulation.

**Adequacy of compensation and penalties**

The Committee is convinced that the penalties attaching to insider trading activities should be

appropriate, and that insider trading activities should not realise profits that cannot be recovered by way of civil penalty. In this regard the Committee is satisfied that the provisions in the Bill (particularly Clauses 1013 and 1015) provide adequate means of recovering moneys realised as the result of an insider deal from a person convicted of insider trading.

12.10 However, The Committee regards the penalties for conviction of an offence as wholly inadequate. The penalty provided by Schedule 3 of the Bill (a fine of $20,000 or imprisonment for 5 years, or both) would not approach likely profit from insider trading deals. Equally, the Committee believes that imprisonment of offenders against insider trading laws is a wasted penalty. The Committee also believes that the question of possible multiple remedies should be addressed by the House of Representatives Committee.

**Recovery of gains from insider trading**

12.11 There is one matter that the Committee does believe can be immediately addressed in the Bill. The Committee considers that the ASC should be empowered to recover the amount of gain realised by an insider trader from a deal. The Committee recommends that the Bill be amended to provide the ASC with such a power.

**Recommendation:**

**That provision be made in Clause 1013 of the Corporations Bill to enable the ASC to take action against a person engaged in insider trading for the recovery of any profits realised as a result of that trading.**

Endnotes

1. Evidence, pp.1417-1418
2. ibid.,
3. ibid., pp.1435-1438

## CHAPTER 13

## TAKEOVERS

### Introduction

13.1 Chapter 6 of the Corporations Bill will govern the acquisition of shares and will replace the Companies Acquisition of Shares Act (CASA) and Division 4 of Part IV and Division 4 of Part V of the Companies Act.

13.2 The Committee has received a number of submissions and evidence relating to Chapter 6 of the Bill. The Committee addresses the question of broad investor protection to be provided by the Chapter and processes by which the ASC will be able to affect the course of takeovers so as to ensure investors continue to be protected and an efficient and informed securities market is maintained.

13.3 The Committee notes that the House of Representatives Standing Committee on Legal and Constitutional Affairs is due to report on its inquiry on takeovers, mergers and acquisitions in the near future.

### Scheme of Chapter 6

13.4 Chapter 6 reflects the basic concept of CASA in relation to takeovers. There is a prohibition (Clause 615) on the acquisition of shares in certain companies, if the entitlement of a person acquiring shares in the company in specified circumstances will be greater immediately after the acquisition than it was immediately before the acquisition. There are then exemptions provided which permit such acquisition in specific circumstances.

13.5 The concept of acquisition of shares is the same as that under CASA. The concept of entitlement is retained with the qualification that where an association arises by virtue of an agreement by one person to acquire particular shares from another person, the association will be regarded as existing only in relation to those shares. This change is consistent with the scheme of the legislation in providing that shares in a body corporate to which a person is entitled include the shares in which that person has a relevant interest and shares in which a person who is an associate of that person has a relevant interest.

**Matters considered by the Committee**

13.6 The Committee has focused on several areas of reform in Chapter 6 of the Bill. These matters are:

* Extension of the definition of 'associate' to include executive officers

* Pre-vetting of Part A statements and takeover offers

* Compulsory Acquisition

* Declarations of unacceptable conduct

* Proposed powers of the Corporations & Securities Panel

* Executive Officers and Associates

13.7 In its submission to the Committee, the NCSC noted that several of the concepts that are the 'building blocks' of takeover legislation, have been redefined in the Bill. The NCSC made the point that the amendments may be technical, but appear

to have unintended consequences that distort the results achieved under CASA.

13.8 Clause 11 extends the concept of 'associate' so that all executive officers of a body corporate, or its subsidiaries and holding companies are deemed to be associates of the body

corporate itself and not merely its directors and secretaries, as under CASA. The concept of 'executive officer' is broad and embraces any person who is part of an organisation's management. The NCSC points out

The effect is that a body corporate's entitlement to shares in another company will include all shares in which any managerial staff in the corporate group had a relevant interest and these shareholdings will have to be ascertained and publicly disclosed. Companies will have to set up procedures under which all their 'management staff notify them each time they buy or sell shares and publicise such information whenever the substantial shareholding provisions apply.[1]

13.9 The NCSC suggests that this change will involve significant extra administrative costs and possible invasion of privacy without adding significantly to investor protection. In particular, the NCSC makes the point that the extension of the definition of associate to include executive officers will impose unnecessary costs on business and some further imposition on privacy without significantly adding to investor protection. The NCSC has suggested that the Committee consider recommending that the clause be altered so as to remove the extension of the definition of 'associate'.

13.10 In its advice to the Committee, the Attorney-General's Department responded to this comment by advising that the intention of the amendment is to correct an apparent anomaly in CASA in so far as persons involved in the management of a company" such as general managers, were not included as associates. The argument that, if an executive officer in fact acts in concert with his company, he or she would be classified as an associate by virtue of Clause 15 of the Bill 'ignores the difficulties in proving action in concert', which was the reason for the deeming provision in the first place.

13.11 The Committee has no other evidence before it on this point, but considers that the suggestion raised by the NCSC has some merit. The Committee can see no difficulty with the

definition suggested by the NCSC, and agrees that the extra administrative costs and invasion of privacy appear not to offer the investor further protection. The Committee recommends accordingly.

**Recommendation:**

**That Clause 11 of the Corporations Bill be amended so as to remove the extension of the definition of associates to include executive officers.**

**Part A Statements and takeover Offers**

13.12 The Bill will remove routine vetting of Part A statements. The NCSC's view was that the result of such change would have an adverse impact on the efficiency of takeovers. Likely consequences could include increased business costs and a reduction of investor protection. The NCSC and others recommend some form of pre-vetting of Part A Statements be retained.

13.13 **Clause 644** of the Bill provides for the automatic ,registration' of Part A Statements and takeover offers by the ASC, thereby dispensing with the existing requirement under CASA that the NCSC vet such documents for non-compliance with CASA provisions. The NCSC view was that pre-registration and vetting of takeovers should continue because

* Shareholder protection is provided, particularly in respect of 'friendly' offers

* Pre-registration vetting is more cost-effective than relying on 'after the event' litigation

* It provides the regulatory authority with bargaining power in relation to disclosures or prevention of suspect bids.[3]

13.14 4.15 The NCSC view is that pre-registration of takeover documents is critical, and emphasises the importance of shareholders' role in a company targeted for a takeover bid. Shareholders need reliable information so as to decide whether to accept an offer or hold shares in the expectation that a

company's performance may improve following a bid. Takeover offers- are only open for a limited period of time and the share price usually falls significantly afterwards if the offeror gains or consolidates control of a target.

13.15 Secondly, takeovers are controversial events with competing claims made by opposing parties during a takeover bid. Supporters of the abolition of pre-registration vetting, see this as a way by which false claims are tested and more accurate information flushed out. The NCSC maintains, however, that such events often cause confusion among target shareholders who conclude that opposing parties in a takeover make claims purely out of self interest.[4]

13.16 The Attorney-General's Department replied to this view and to other views opposing the removal of pre-vetting by noting that, under the present pre-vetting system, the average time for registration of a Part A Statement ranged from 18 working days to approximately 4 weeks. There have been continued queries from business, the Department said, as to whether the registration system actually achieves what it was originally intended to achieve, namely, presentation of timely, accurate and relevant information which can enable shareholders to decide on the benefits of a particular offer.

13.17 The Department made three specific comments

(a) The registering authority has to basically rely on information supplied by the offeror, and such statements in any event usually carry a disclaimer by the NCSC and its delegate CACs that the Commission takes no responsibility as to contents.

(b) Where the regulatory authority asks for more information, it is questionable whether this assists the shareholders as it may add to 'information overload'.

(c) It is difficult to judge what the benefits are that arise from regulatory vetting given the resource costs and

delays in getting bids out to shareholders particularly as misstatements or omissions are likely to be picked up by the market.[4]

13.18 The following comment by the Department was that the legislation has been drafted on the basis that

Such a system which requires the regulatory authority to engage in vetting for every takeover is inefficient given that the same result could be achieved by a combination of more selective post-registration vetting by the regulatory authority and scrutiny by the market.[5]

13.19 When considering the question of cost effectiveness, the NCSC noted, that whilst the current system of pre-registration vetting appears to be close to budget neutral, and accordingly of no excessive costs to the revenue, under the system proposed by the new scheme there will still be some resource costs which will largely be generated by

* offerors seeking informal advice from the ASC on draft Part A statements as they prepare Part B, Part C and Part D statements;

* some examination of draft documents will be necessary where the ASC considers associated applications for modifications to the legislation (a large percentage of all Part A statements are now accompanied by at least one request for such modifications);

* an additional cost to the ASC is increased post-registration vetting costs, which in some cases will obviously involve at least the threat of an investigation and of litigation in the situation where the offeror is already committed to the authenticity of claims.[7]

13.20 The Department's comment was that the ASC's powers to .take action against false or misleading statements in Part A statements (under **Clause 704**) and against general misleading or

deceptive conduct (under Clause 995) will take the place of pre-vetting scrutiny. In addition, the Panel, on the application

of the ASC, will be able to make declarations of unacceptable conduct and a wide range of remedial orders (under **Clauses 732 to 734**)

13.21 The Department also noted that, under Clause 739, the ASC, the offeror, the target or a member of the target company (including a shareholder) can apply to the court for a range of orders where a Part A has been served and the legislation has not been complied with.[8]

13.22 The threat of such remedies, in the Department's view, should ensure that takeover documents comply with the legislation. It may be necessary for the ASC to resort to court proceedings on occasions but this would be expected to be in the exceptional cases where the threat of action is insufficient to prompt corrective action.[9]

13.23 The Department said

such litigation could be expected to continue supplemented in the short term by any selective ASC litigation necessary to establish precedence or deterrent value. Given the delays inherent in court proceedings it would be surprising if offerors, who are likely to lose the most in such a delay, were prepared to risk ASC action, or in fact an unacceptable conduct declaration by deliberately preparing misleading Part A's or any material information'.[10]

13.24 In relation to 'unfriendly bids', the NCSC pointed out that, it is the fact of refusal to automatically allow registration of Part A documents that allows for more adequate disclosure, or cause a 'suspect' bid to be aborted. The NCSC gave a number of examples including

* Bond Corporation Holdings bid for the Bell Group;

* Equity Corp Tasman Limited's bid for ACII Limited;

* Ampersand Limited's bid for Ariadne Australia

13.25 The Department submitted to the Committee that detailed pre-registration vetting is not justified even in the case of 'friendly' bids. The basis for the Department's submission was that

* The Bill retains the same requirements as under the Code that independent experts report on the fairness and reasonableness of a bid must accompany a target's Part B statement to shareholders or the offeror already holds 30 percent of the target shares

* Any target director colluding with the offeror at the expense of the target company and other target shareholders would clearly be in breach of a duty to act honestly at all times and not to make improper use of his or her position to gain personal advantage (Clause 232)

* In most large companies institutional shareholders have significant shareholdings, therefore making it likely that disclosure will in fact be more than adequate.

* Any suspicious unopposed offer would be one of the areas where selective post-registration vetting could take place by the ASC.[11]

13.26 The NCSC's recommendation to the Committee was that the essence of the existing scheme be retained, but that the Bill be made 'more deregulatory, less costly, more efficient and faster' by reducing the unnecessary rigidity of the existing registration test while avoiding the reliance on the court entailed in the Bill. The NCSC's recommendation to the Committee was that

The Bill be amended to provide that the ASC may refuse to register a Part A statement unless it is satisfied that the statement complies with the legislation and does not contain any matter that is false and misleadinq in the form and context in which it appears.[12]

This is a recommendation echoed in a number of submissions, particularly those from the State CAC's.[13]

Conclusions

13.27 The Committee notes that the ASC's proposed function under the Corporations Bill will be simplified when compared with the NCSC's present responsibility. It will be limited to examination of formal matters to ensure that Part A Statements appear to have been signed by the appropriate persons and, where documents contain a report by an expert, the consent of the expert has been furnished.

13.28 Arguments put to the Committee in favour of removing the requirement for pre-vetting are to the effect that there will be no relaxation in the criminal and civil liability attaching to persons responsible for omissions or false or misleading statements in Part A statements or other takeover documents (in particular see Clause 995). The Committee believes that, in balancing pre-vetting as a means of investor protection against reliance on civil liability proceedings, the Committee must be convinced overwhelmingly of two things. First, that cessation of pre-vetting would not lead to any significant reduction in protection for small shareholders, and secondly, that alternative means of preventing misleading takeovers offers from being circulated are adequate and reliable.

13.29 The Committee appreciates that general liability provisions, such as Clause 995, are intended to be utilised against those making false or misleading statements in a variety of documents, including Part A statements. However, the Committee believes that individual shareholders, or target companies, should not have to rely on those means or on the ASC to protect their situation if a cheaper effective means can be provided.

13.30 The Committee is not convinced that pre-vetting of Part A Statements should be completely abolished. It believes that the Bill should be amended to continue the pre-vetting of Part A Statements.

**Recommendations:**

**That Clause 644 of the Corporations Bill be amended so as to require the ASC to refuse to register a Part A statement if it believes the statement does not comply with the Corporations Act, and contains any matter that is false or misleading.**

13.31 This is a recommendation with which Senators Alston and McMullan disagree.

**Compulsory Acquisitions**

13.32 Under present provisions relating to compulsory acquisitions (**Section 42** CASA) an offeror in a takeover must acquire 90 percent of the total of the shareholding before the end of the offer period. If more than 10 percent of the shares are owed at the time of service of the Part A statement, the offeror must, for a compulsory acquisition, become entitled to 90 percent of the remaining shares, and 75 percent in number of the other shareholders must have sold shares to the offeror in order to be able to use the provisions of **Section 42.** The provision has been found to be ambiguous and difficult to apply, particularly where a target is listed and where there is extensive market activity in the target shares during the course of a takeover bid.

13.33 **Clause 701** of the Bill replaces the '75 percent of offerees' formula with two alternatives

(a) that during the takeover period the offeror obtains 75 percent of the shares to which it was not entitled before the bid was made; or

(b) at least 75 percent of the persons who had registered as shareholders immediately before the day of service of the Part

A statement are = so registered at the end of one month after the end of the offer period.

13.34 Under (a) above, the emphasis thus shifts from the number of shareholder participating in the offer, to the size of shareholding participating in the offer. Under (b) above, the emphasis shifts from the number of shareholders participating in the offer, to the number of shareholders selling out regardless of whether to the offeror or to a rival bidder.

13.35 The NCSC stated that the benefit to acquirers under the clause is effected at the expense of the rights of minority shareholders under the new formula. The NCSC's experience had been that a significant number of complaints about compulsory acquisitions have been made under the current formula, particularly following the 1987 stock market crash.

13.36 Its concern was that acquirers of shares are now taking advantage of relatively low share prices to take full ownership of companies so as to be able to freely use the latter's assets or cash flow. Shareholders, it is suggested, are being forced to sell at a loss or under value; an experience unlikely to encourage further participation in investment.

13.37 In recognising the economic facilitation role played by the compulsory acquisition provision in commercial activity, the NCSC noted that the provision will prevent the occurrence where a person attempts to gain full ownership of a company by making a takeover bid, but is frustrated in doing so by shareholders who collectively hold a small percentage of the shares (i.e. less than 10 percent). That is because such shareholders may not have received the offer through no fault of the offeror, or because they refused the offer in an attempt to attain a higher price for their shares. In such a situation, it may well make takeovers unattractive to prospective offerors with a resulting loss of benefit that takeovers bring to shareholders.

13.38 The NCSC also noted that the Bill replaces the requirement that an overwhelming majority of shareholders should find the offer acceptable with the concept under which it is the

decisions of the major shareholders that matter. The NCSC noted that its experience suggested many small shareholders would be likely to resent such a change. By comparison, the present compulsory acquisition provision attempts to find a balance between the advantages of permitting compulsory acquisitions and not eroding the property rights of shareholders to the degree that it discourages investment participation in the sharemarket. To achieve this it restricts the opportunity for compulsory acquisitions to circumstances where

(a) an offeror becomes entitled to 90 percent or more of the target as a result of the takeover; and

(b) if the offeror had 10 percent or more of the target before the takeover bid (which is almost always the case), then 3/4 of the target shareholders had accepted the offer.[14]

13.39 In evidence to the Committee, Mr Bosch spoke in support of the NCSC's submission

If you relax the test to increase the market efficiency, then it follows that an increased number of shareholders are going to have their property compulsorily acquired, and they are going to be unhappy. I do not think there is a compromise position. You have to come down one way or another. But we have said that we think from having observed this process over a number of years, you will causing more anguish than is justified. Perhaps I could say one point about it by telling you how we actually operate in this sort of case. It usually occurs when a company has brought more than 90 percent of the shares of a target, but less than 75 percent of the shareholders have accepted. The company then comes along and says 'please allows us to force the other 25 percent - or whatever percentage it is - to sell to us at our price'. They often say 'we did not meet the 75 percent figure because some of the shareholders were dead, or some were uncontactable, or some of them did not understand the arguments or whatever'. We say 'here is a program that we have worked out with other people in the past; you follow it. Put these advertisements in these newspapers; write these letters to these people; and bring us back the responses that you get.

That quite frequently led them, in fact, to get more acceptances than they had and the problem goes away. Sometimes it leads us to come to the view that there really are a lot of shareholders who have disappeared from the record. In one case I can particularly remember, shareholding had been fragmented in the past and it turned out that the reason the people were not accepting this offer was that it was uneconomic for them to do so.[15]

13.40 Mr Bosch also noted

Following a decision in the Victorian Supreme Court, the NCSC had attempted to give more weight to the argument in favour of economic efficiency in compulsory acquisition matters.[16]

13.41 In further discussions with the Committee, Mr Bosch and Mr Schoer of the NCSC conceded that small shareholders often chose to hold onto shares - whatever an offer price might be and that the institutional investor, who often makes up the large majority of shareholders or represent the large majority of shareholdings in a company are the target of takeover bids.[17]

13.42 The NCSC provided the Committee with the following analysis of compulsory acquisitions under CASA and an analysis of likely trends under the Bill.

Under the Bill, an additional 2% to 5% of bids could have proceeded to compulsory acquisition (2). (Those that could not were largely those that did not end up with an entitlement to 90% of more of the target.)

Indeed, under the Bill, the vast majority of bids that result in the offeror being entitled to 90% of the target will trigger the compulsory acquisition provisions.

This is based on two observations. First, nearly all offerors hold between 10% and 60^ of the target at the start of the bid

(4). Second, in attaining 90% of the target such offerors would automatically meet the second requirement of acquiring 75% of the shares offered for (3).[18]

13.43 In its comments on this question and on the NCSC submission, the Attorney-General's Department noted that in circumstances of active market trading, (which are usually the case in takeovers) it is almost impossible to determine whether the test under the existing provision is satisfied. Some companies have indicated they rely on an educated guess, rather than figures. The Department noted that

The problem stems from the fact that original offerees can sell some or all of their shares on the market, i.e. not accept the takeover offer in respect of those shares but sell on the stock Exchange. By virtue of Section 25 of CASA these transferees become deemed offerees who can subsequently accept the takeover offer in respect of those shares. In such a process it is impossible to keep track of a proportion of offerees accepting a takeover offer.[19]

13.44 The Department believed that the change to the test in Clause 701 produces greater certainty while protecting the interests of minority shareholders. If, in fact acceptances, are received for over 75 percent of the outstanding shares, it is very difficult to argue that the price is not fair and reasonable. The Department noted also that the change to the test in no way alters the requirement that the offeror actually holds over 90 percent of the target as a result of the takeover offer.

13.45 The Department also invited the Committee to consider whether the Clause might be altered, so as to provide either

(a) deletion of the 75 percent of the shares part of the test (subparagraph 701(2)(i) and rely on the modified. 75 percent holders' test in subparagraph 701(2)(c)(ii); or

(b) amend the Bill to allow for an increase in the percentage of outstanding shares required to be purchased, e.g. to 90 percent.

13.46 In evidence to the Committee, Mr Davies of the Attorney-General's Department suggested that shareholders 'will always be dissatisfied with any form of compulsory acquisition and that is understandable to a certain extent', and

The difficult situations is while you need the extra tests if you like over and above the 90 percent threshold, where the offeror starts from a base much closer to the 90 percent. You can have a situation where, say, if they are starting from a base of 85 percent there can be one holder that accounts for maybe 20 percent of the outstanding shares. If he decides not to accept, then it may be that the compulsory acquisition provisions are not triggered, and the 75 percent in value of shares was designed to [overcome the problems with the existing provisions] and designed to equate with the concept that if 75 percent of the value of shares is accepted, then that means that the offer in general would have been fair and reasonable.

The extra element to that test of 3/4s of the offerees actual leaving the register, is again designed to stop the one major institutional shareholder having too much of a say in the compulsory acquisition process. It is a difficulty area because you will always have shareholders saying 'I want to hold on to my shares'. It is a balance that we have tried to strike between the interests of the company and the interests of shareholders.[20]

Conclusion

13.47 Arguments about the present and proposed statutory formula for allowing compulsory acquisition indicate that certainty is of prime importance. The Committee is concerned that the provisions in Clause 701 should not lead to confusion or difficulty of application of the legislature's intention. The proposal put to the Committee regarding a possible

re-wording of Clause 701 by the Attorney-General's Department does not answer the Committee's concern. In view of the fact that any form of

compulsory acquisition will offend a minority of shareholders in the company, the percentage of shares that an offeror must obtain before compulsory acquisition allowed must have regard to a minority's interests. The Committee concludes that the provision of Clause 701 should be amended.

**Recommendation:**

**Clause 701 of the Corporations Bill should be amended so as to provide that**

**(a) where an offeror begins with 10 percent or more of a target, the offeror must have received acceptances from at least 75 percent of the target shareholders, and**

**(b) that 75% of the shareholders who were on the share register at the time of the offer are no longer there at the end of one month after the offer period.**

13.48 The Committee also received evidence that holders of current outstanding options and convertible notes may, according to statutory requirements, require an offeror to acquire their interests. Evidence suggested that an offeror should have the ability to compulsorily acquire options and convertible notes.

13.49 Evidence to the Committee from the Attorney-General's Department indicated that this matter had not been addressed by the Bills. The Committee has not considered this matter in detail but believes that the question should be examined by the Advisory Committee.

**Substantial Shareholding**

13.50 Under **Clauses 707 to 716** of the Bill (Part 6.8), shareholders with 5 percent or more of shares in a company must notify the ASC and the market of their shareholding. The provisions give the ASC the power to verify whether proper and complete disclosure has in fact been made, and can apply in any

situation where parties are subject to the substantial shareholding provisions.

13.51 Under the provision, only the ASC will have the power to acquire information from persons holding voting shares or a relevant interest in voting shares as to beneficial ownership of the shares. The reduction in threshold for substantial shareholdings from 10 percent to 5 percent has been described as a trade-off for the removal of the present investigative power, possessed by the company. In a commentary on this provision, one writer has noted that

There may be some substance in the observation made in the explanatory memorandum to the Bills that tracing provisions have been open to abuse by members and companies seeking to obtain strategically important information. On the other hand there is something to be said in favour of shareholders being entitled to know who is ultimately behind the registered holder of the shares in the company. Language of the provisions have been changed, but the structure appears to be much the same as was found in Section 261 of the Companies Act.[21]

13.52 In a submission to the Committee, Lloyds Corporate Advisory Services made the following points concerning the change

* A Company's ability to investigate, instigate and operate Section 261 (of the Companies Code) process will be lost leading to breaches of rights;

* The new provisions mean that detection of substantial breaches will be slower and less effective and will make 'warehousing' of shares undetectable.

* Blocks of shares will be warehoused in lots of 4.9 percent instead of lots of 9.9 percent at present (the submission also noted that warehousing is a very lucrative exercise)

* The suggested tradeoff between the substantial shareholding provisions in the Bill and Section 261 suggest superficial tradeoff.[22]

13.53 Lloyds also suggested that a 'campaign' to determine the nature and extent of substantial shareholding needs to be well organised and - presumably - well funded. The difficulty the NCSC has experienced with Section 261 proceedings has been caused by a lack of resources and funding. To leave the initiation of such proceedings in the hands of a 'poorly funded body with limited resources and funds' is contrary to the intentions of the legislation; namely to ensure that 'warehousing' of hidden substantial shareholdings are not accumulated without proper information being provided to the markets.

13.54 In its submission, the Business Council of Australia (BCA) noted that the proposed amendment goes too far 'away from the public policy objectives of requiring disclosure of beneficial ownership, and will put a substantial burden on the regulatory authority. The BCA recommended that Part 6.8 be amended so as to give the ASC duty to obtain information as to beneficial ownership in circumstances where

(a) the company or a shareholder has requested it;

(b) the requesting party has provided the prescribed fee (which contributes towards the ASC's cost of the request); and

(c) the ASC is not of the view that it would be unreasonable to request the person to whom may notice would be addressed to respond to those matters.[23]

13.55 The Committee is of the opinion that the provisions, as drafted are not adequate to properly allow for a fully informed market. It will lead to difficulties for companies who believe they may be a prospective target for takeover or acquisition,

particularly in determining the extent of shareholding by others.

13.56 The Committee is concerned that the market should continue to be fully informed of substantial shareholdings, particularly when the holdings may fall just below the statutory requirement to inform the ASC and the market.

**Recommendation:**

**(a) The Corporations Bill be amended so as to provide a company with similar powers to those currently provided by Section 261 of the Companies Code;**

**(b) The Corporations Bill also be amended so as to provide that the ASC shall require information as to beneficial ownership at the request of the company or a shareholder in the company on the condition that**

**(i) the requesting party has provided the prescribed fee (which contributes to the cost of the request by the ASC of the shareholder);**

**(ii) the ASC is not of the view that it is unreasonable to request the person to whom a notice may be addressed to respond to those matters.**

**Unacceptable conduct**

13.57 **Clauses 732 to 736** of the Corporations Bill set out the powers of the ASC and the Panel in relation to the acquisitions of shares in unacceptable circumstances. Unacceptable acquisition has regard to the same factors which are equivalent to those referred to in Section 60 of CASA.

13.58 Briefly, the effect of Clauses 732 to 736 are to:

(a) Reduce the normal time available for an ASC investigation of possible unacceptable conduct, from 90 to 60 days after the alleged misconduct.

(b) Transfer from the NCSC to the Companies and Securities Panel the power to make declarations of unacceptability;

(c) Circumscribe the Panel's ability to make declarations, in a number of ways which do not now exist;

and

(d) Transfer from the Courts to the Panel, the jurisdiction to make remedial orders.

13.59 In its submission to the Committee, the NCSC raised a number of specific objections to these changes. It submitted they would substantially restrict the ASC's ability to protect the integrity of the market. The NCSC noted that the current 'two-step' process of decision by the NCSC and then referral to the Court would be replaced by a 'three-step' process of investigation by the ASC, and report by the ASC, investigation by the Panel and possible reference to the Court.[24]

13.60 The NCSC saw its power to make unacceptability declarations (Section 60 declarations) as a fundamental weapon in the regulation of acquisitions and the protection of investors. It noted that while Section 60 declarations had only been made on 14 occasions, current takeovers practice is conditioned by the deterrent effect of the potential use of its powers by the NCSC to such an extent that to maintain the present level of investor protection without those powers would involve a very significant increase in the resources needed by the ASC and a substantial extension of the scope of 'black letter law'.[25]

13.61 The NCSC also referred the Committee to its practice of reaching commercial settlements with parties involved in takeover offers, and against whom Section 60 proceedings may have been contemplated. To support this method of regulation of market conduct - which is underpinned both by Section 60, and by the NCSC's detailed guidelines (designed to prevent undesirable practices in relation to acquisitions) the NCSC publicises details of declarations, and settlements, as an indication to the market of the parameters of unacceptable conduct.

13.62 Reliance on published reasons and the possibility of Section 60 actions is summarised as follows

The combination of these two factors gives the NCSC considerable tactical advantages' in dealing with avoidance of the Code, so much so that of late there have been many cases where parties whose conduct has been called in question have resolved the matter before a declaration is made. They do so by taking action to remove any disadvantage that the minority shareholders may have incurred as a result of the conduct. In a most significant recent matter, Bond Corporation Holdings Limited agreed to make a bid for all the outstanding shares in the Bell Group Limited at a price of $2.70 per share - the same price paid to Holmes a 'Court at a time when the market price was only about $1.70.'[26]

13.63 As the Committee has noted in Chapter 6 it favours the establishment of the Panel. However, there are a number of areas where the Committee considers that the provisions of Part 6.9 should be explained. These areas relate to the proposed relationship between the ASC and the Panel, and the ability of the ASC to reach commercial settlements and to publicise the referral of matters to the Panel.

**Relationship between the ASC and the Panel**

13.64 The NCSC view on this matter was that the power to make a declaration of unacceptability can be relevant where an opinion has been formed that substantive provisions of the legislation have been breached, but the NCSC - or the ASC - is unable to gather sufficient admissible evidence to be confident of being able to prove a contravention. The NCSC told the Committee that to obtain admissible evidence of understandings between parties is often difficult because market participants have developed a wide range of practices to avoid the creation of incriminating documentation, amongst other things and so as to avoid the need for direct communication.

13.65 The NCSC noted that presently the situation arises where the NCSC has gathered sufficient information, much of it technically hearsay and therefore inadmissible, but which confirm its suspicions of unacceptable conduct, but which make the chances of successful litigation based solely on the evidence of a breach of Section 11. Such matters lend themselves to a Section 60 declaration. It also pointed out that under the present provisions, all proceedings are dealt with by the court, where proceedings are public and any party affected by the outcome can join the proceedings and all evidence is dealt with together. The exception to this is 'in camera' hearings conducted by the court when matters of commercial confidence are being dealt with.

13.66 The NCSC drew a distinction between the present situation and that proposed by the Bill where reliance must be placed by other parties on a breach of Clause 615 (which allows a target company or aggrieved shareholder to take proceedings in relation to a transaction).

13.67 Further, in relation to **Subclause 733(3)** not only must the Panel find that the matters set out in Clause 731 have occurred, but that it is in the public interest to make a declaration of unacceptable acquisition or conduct. The NCSC noted

It is difficult to see what the insertion of this additional criterion adds to current practice since the NCSC takes public interest criteria into account. Its express inclusion on the other hands provides parties seeking to upset a Panel declaration with an additional ground for challenge.'[27]

This was a view which was supported by Mr John Green in his evidence to the Committee.

13.68 The Committee refers to the comments by the Attorney-General's Department on this clause

As noted in the NCSC submission, the NCSC currently takes public interest criteria into account. The addition of the public interest requirement simply make explicit what the NCSC and other players regarded as largely implicit, that a declaration should not be made unless it is in the public interest to do so.[28]

13.69 A further constraint on the effective pursuit of unacceptable conduct cases, suggested by the NCSC was that the Panel is expressly obliged by Clause 733(5) to give each person to whom a declaration relates an opportunity to appear at a hearing before the Panel and to make submissions and give evidence to the Panel. This obligation represents an additional obligation to that imposed by Clause 734(6) to give such an opportunity to persons whose interests would be adversely affected by an order. The NCSC's view was that 'in practice the process of getting to the stage of making a declaration (which does not itself adversely affect property or similar rights) is likely to be much more protracted, unwieldy and expensive than at present. This may well act as a considerable disincentive to the ASC bringing matters before the Panel matters unless they have a very high likelihood of success.[29]

13.70 Related to this point was the suggestion by the NCSC that, because the ASC will be unable to integrate investigations with use of unacceptable declaration powers, its disability may prove to be significant. In evidence to the Committee, Mr Bosch described the use made of integrated investigation and litigation by the NCSC

In such cases the companies were engaged in conduct which concerned us. We approached them the use of the power was threatened and the behaviour was changed, in both cases, I believe, to the substantial benefit to the shareholders. But I have said I think that on average the power is used in that sort of way about 50 times a year. It gains its effectiveness I suppose because the people who we approach believe there is a high probability that something very nasty will happen to them if they do not conform to what we ask. Under the arrangements in the Bill that will no longer be possible. What would happen would be

that the staff would identify the matters that concerned them, they would approach the parties and they would say 'If you do not conform we will tell the Commission and we believe that it may be minded to make a recommendation to the Panel'. The parties receiving such comment would then know two things on the assumption that the staff would be reflecting the Commission's view, and that is fair because it is exactly the way it happens now, then two things would be certain, firstly, delay because if the Commission decided to make a recommendation that the Panel use its powers, there would inevitably be several weeks delay, possibly a couple of months. Secondly, there would be a degree of uncertainty as to what the result would be.[30]

13.71 In its comments to the Committee, the Attorney-General's Department, when addressing the two issues of the tactical advantage and possible reduction in investor protection due to the introduction of more formal procedures, proposed by the Bill, noted that there was widespread concern in the business community about the NCSC's present use of its powers. The Department noted

This can be gauged by the fact that the Panel proposal was originally put forward by the Attorney-General's Consultative Group, and has received business support.[31]

13.72 The Department also noted that while the deterrent effect of the Section 60 declaration power has been removed, a fairer system will be introduced in its place so as to remove the perception that NCSC investigators were influenced to recommend a declaration based on extraneous factors (such as the degree of co-operation given by a company or its advisers) as well as evidence. In answering questions regarding integrated investigation and litigation, the Department rejected the suggestion that the ASC will have difficulty in deciding whether to apply to the Panel for a declaration, or commence court proceedings. The Department suggested that where the ASC had sufficient evidence - whether or not it was admissible - to justify a declaration of unacceptable conduct it could put the evidence before the Panel and seek a declaration.

13.73 In relation to the suggestion that situations will arise where the ASC was conducting unacceptability proceedings before the Panel while the target company or aggrieved shareholder was taking proceedings under Clause 615, the Department noted that such proceedings occur under the current scheme. The Department noted that

Such problems are normally resolved in appropriate cases by one court or a tribunal staying its proceedings until the competing proceedings are complete.[32]

13.74 The thrust of the submissions made to the Committee by the NCSC, both in writing and in evidence, in relation to the ASCs powers when compared to the NCSC, was to the effect that the powers given to the ASC by the Bill were so limited when compared to the NCSC powers that they would seriously erode investor protection. In this regard the NCSC recommended to the Committee that it should consider extending the power to make a declaration under Clause 733 (of unacceptable conduct) to the ASC and remove it from the powers to be given to the Panel.

13.75 This is a view with which the Committee agrees. The provisions in the Corporations Bill are intended to allow the ASC powers of investigation of matters which arise in the course of takeover activities. The Committee observes that the principles of unacceptable conduct are the same as those in the present CASA legislation. The NCSC's argument that existing power of investigation and adjudication on declarations of unacceptable conduct amount to a more effective form of regulation of market conduct, by integration of litigation and investigation, has persuaded the Committee that the power to make a declaration should be vested in the ASC and not in the Panel. The Committee finds it desirable that the ASC not only have an investigatory role, but also the role of deciding what is unacceptable and that the Panel should have the role of reviewing the declaration and of deciding whether and what orders should be made.

13.76 The Committee recommends accordingly.

**Recommendation:**

**That Clause 733 of the Corporations Bill be amended so as to provide that the power to make declarations of unacceptable acquisition or conduct be vested in the Australian Securities Commission.**

13.77 A number of members of the Committee do not agree with this recommendation. Their reasons are set out in a dissent to this Report.

**Commercial Settlements and Publicity**

Commercial Settlements

13.78 In his evidence to the Committee, Mr John Green noted

The ability of the Commission to do deals is a very important one in the process. Anything which inhibits unreasonably the ability for it to do that has to be carefully scrutinised because it is cheap to the Community; it means that you are not tying up courts on these sorts of matters for a long - and it could be quite a long time. It is fast because of the threat of publicity - everyone wants the circumstances to be fixed up quickly - and I think it ought to be encouraged bearing in mind the defects attached to do deals.[33]

13.79 Mr Green also noted that the salutary effect of reaching commercial settlements, was that such deals resulted in an element of penalty, which acted to ensure that those members of the securities community affected regarded the ability of the regulatory authority with some respect.

13.80 The submission of the NCSC to the Committee was that the power to effect commercial settlements, which is presently based

on the NCSC's ability to foreshadow Section 60 proceedings, will be lost under the new legislation. In evidence to the Committee,

Mr Bosch and Mr Schoer, maintained that any threat by the ASC to refer matters to the Panel for a declaration of unacceptable conduct was not as powerful a tool as the present power. Mr Williams of the NCSC summed up the current situation as follows

Therefore when they talk to somebody and say if we told the Commission there is a high probability that something nasty will happen to you, they are usually right. Not always, but usually. I do not believe that they could say that with any confidence if there is a two-stage business of first of all convincing the Commission, then convincing a Panel with its changing membership.[34]

13.81 The ability to effect commercial settlements which can have the effect of substantially altering the terms of takeover offers, is regarded by the Committee as a very important ability in the authority which is charged with regulating the securities market. The examples which were given to the Committee by the NCSC, have convinced it that the ability to affect commercial settlements should be continued.

13.82 The Committee believes that if the ASC foreshadows reference of a matter to the Panel, in much the same way as the NCSC staff foreshadow referral of a matter to the full NCSC, it should have similar effects to the existing power of the NCSC.

13.83 However, the Committee is concerned should there be any doubt that the ASC possesses this power, and accordingly believes that the Government should examine the Bill and ensure that the ASC Bill provides the power to effect commercial settlements to the ASC.

**Recommendation**

**The Committee recommends that the Government review the terms of the legislation to ensure that the Bill provides the ASC with the power to effect commercial settlements in matters involving unacceptable conduct proceedings.**

Publicity

13.84 The corollary of commercial settlements, and ensuring that the market is aware of the parameters of acceptable, and unacceptable conduct, relies on the threat of being involved in a declaration of unacceptable conduct.

13.85 A number of witnesses to the Committee confirmed that publicity of the terms of commercial settlements were of assistance to the market, in providing indication to market participants of the attitudes of the NCSC. Mr Bosch confirmed this for the Committee in the following words

I think the essential thing is, first, publicity and second, a tradition of market acceptance of the significance of a declaration.[35]

13.86 The NCSC submitted to the Committee that the ability to publicise such matters would be lost under the new scheme. The Committee cannot see how this would occur, but is strongly of the view that the ASC should be able to publicise two matters; namely, that it has made declarations and referred matters to the Panel, and, secondly, that should the ASC reach commercial settlements, it should be in a position to publish the terms of such commercial settlements in the same way as the NCSC now publishes terms of commercial settlements.

13.87 The Committee is concerned, that there not be any doubt that the ASC will have this power.

**Recommendation**

**The Committee recommends that the ASC have the ability to publish any declarations of unacceptable conduct and referrals to the Corporations and Securities Panel.**

13.88 The minority members of the Committee who dissent from the recommendation that the ASC be given the power to make declarations of unacceptable acquisition or conduct, recommended that the ASC should have the ability to publish applications to the Corporations and Securities Panel.

**Limitation on Investigations**

13.89 In its submission and in evidence, the NCSC suggested to the Committee that the ASC has only 60 days in which to gather sufficient evidence to justify making a case for reference to the Panel, rather than the 90 days currently allowed to the NCSC. While the Bill, in Clause 733(2), there is no indication in the Bill as to what matters the Panel could take into account in allowing such an extension of time. In its response to this comment, the Attorney-General's Department suggested that while the time period is 'obviously arbitrary' it was considered necessary in the interests of timely intervention for a declaration to be no more than 90 days within the occurrence of the conduct, or in exceptional cases (under Clause 733) 120 days, pursuant to subclause 733(4). The Department added

To allow for a reasonable Panel to consider the matter, it is necessary to curtail the investigative phase to 60 days. To give the Panel some flexibility the Panel has the discretion to extend the investigative phase by 30 days in cases it considers appropriates.[36]

13.90 In his evidence to the Committee, Mr Bosch suggested that 60 days was inadequate based on the experience of the NCSC over a number of years. In addition, unacceptable conduct can often evidence itself in phases to the extent that particular activities can be effected within a 60 day period in phase, and subsequent activity may be effected very close to the 60 day period in the second phase, or even beyond the 60 day period. The Committee notes Mr Bosch's to the effect that

This 60-day matter is not a matter of prime importance for us. We point it out and we say 'What reason is there? What benefit is gained by coming back from 90 days to 60V Even if we cannot be certain that a very large number of matters would not be followed through, why block any?[37]

13.91 As the Department has noted the legislation needs to strike a balance between allowing comprehensive investigation and consideration of possible conduct, and allowing timely intervention in unacceptable market activity. The Committee is of the same view, and believes that the time allowed by the Bill is adequate.

**Endnotes**

1. Submission No.30, para.6

2. ibid., paras.8-10

3. ibid., paras.55-59

4. ibid., paras.59-62

5. Attorney-General's Department comments Pt.1, pp.67-68

6. ibid., p.68

7. Submission No.30, paras.64-66

8. Attorney-General's Department comments Pt.1, p.69

9. ibid.

10. ibid.

11. ibid., p.91

12. Submission No.30, para.77

13. Submission No.10, p.6

14. Submission No.30, paras.90-93

15. Evidence, p.1410

16. ibid.

17. Evidence, p.1412

18. Supplementary evidence to the' Committee.

19. Attorney-General's Department comments, Pt.1, p.72

20. Evidence, pp.1353-1355

21. See "Takeovers and substantial holdings' A.R. Emmett, Q.C.) Bulletin No.12, Butterworths Co. Law Bulletin, August 1988, para.277

22. Submission No.55, p.3.

23. Submission No.49, p.8.

24. Submission No.30, para.118

25. ibid., para.119

26. ibid., para.134

27. ibid., para.151

28. Attorney-General's Department comments Pt.1, p.

29. Submission No.30, para.123

30. Evidence, p.1379

31. Attorney-General's Department comments Pt.1, p.

32. ibid., p.

33. Evidence, p.1517

34. Evidence, p.1390

35. Evidence, p.1395

36. Attorney-General's Department comments Pt.1, p.81

37. Evidence, p.1407

## CHAPTER 14

## OTHER ISSUES

### Futures

14.1 Futures can be understood broadly as agreements to purchase or sell commodities, at some future time for a specified price, regardless of movements in market price for that commodity. In this way traders can reduce their exposure to risk of price fluctuations. It can also be a vehicle for speculators. Trading in futures contracts is attractive to speculators because of the possibility of extremely high returns for a relatively small outlay. This is because of the high risks involved, which has as its corollary that large losses can also be sustained, to the extent that a speculator may be bankrupted by a single trade. This risk is little understood outside the futures industry and, prior to the introduction of the Futures Industry Code, a number of fraudulent operations flourished.1

14.2 The Code seeks to overcome possible abuses by requiring (i) that futures trading be transacted at approved futures markets, (ii) that all futures brokers and advisers be licensed, and (iii) that participants in the industry be subject to detailed regulatory requirements.

### New framework for future regulation

14.3 As with other aspects of the new scheme, changes to the Co-operative scheme will see a devolution of responsibility for ensuring compliance with requirements from the regulatory agency to the industry. Elements of this devolution of responsibility are:

* representatives of a principal need not be licensed with the Australian Securities Commission (the ASV) (though of course the principal must be).

* A representative will be required to hold a "proper authority" from the broker or adviser he or she represents (Clauses 1172 and 1173).

* The broker or adviser represented ("The principal") must keep a register of representatives and copies of the proper authorities, and the principal must notify the ASC of the location of the register within 14 days of its establishment. As is the case in the securities industry, brokers and advisers will be responsible for the training of their representatives, and will be liable for their actions (Clauses 1150 and 1187).

* Agreements entered into with an unlicensed person relating to a dealing in or advising on a futures contract may be rescinded within a reasonable period (Clauses 1160 and 1163).

* The ASC will have power to make banning orders against representatives, and to revoke licences of principals (see Division 5 Clauses 1190-1200).

* In Clauses 1124-1127 the offence of dealing on an unauthorised futures market is created. 'Futures exchanges will have to be approved by the ASC.

14.4 These points summarise the major elements of the new scheme as it applies to futures. The description is not exhaustive and only salient points have been covered. The submissions from the NCSC and the Sydney Futures Exchange Limited give an amplified description of the changes proposed.

14.5 The Futures Exchange noted in its submission and in discussion during the Committee's hearings, that the new scheme will put an increased burden on the Exchange and on industry

participants. Nevertheless it considers that the benefits outweigh the disadvantages and supports the legislation. It comments on the interpretation provisions and suggests a number of amendments in its submission. Some of the points raised on technical drafting matters have been considered by the Attorney General's Department and referred to the drafter.

14.6 The Committee notes that the Sydney Futures Exchange believes the proposed arrangements in the new scheme will prove satisfactory. On the evidence available to the Committee, it is satisfied that the provisions relating to futures are appropriate and accordingly makes no recommendation for amendment.

**Winding-up and insolvency**

14.7 Chapter 5 of the Corporations Bill sets out provisions which regulate companies in financial difficulty, and prescribes rules regarding their management and, if necessary, winding-up.

As the Western Australian Opposition Group noted in its submission, the provisions of the Corporations Bill dealing with arrangements and reconstructions, receivers and managers, official management and winding up are virtually identical to the provisions with respect to these matters under the Co-operative scheme.

14.8 The WA Group notes that the Commonwealth Law Reform Commission's General Insolvency Inquiry very recently published its report (The Harmer Report).[2] That report recommended substantial reform in the area of insolvency. The WA Group submission expressed disappointment that none of the recommendations for reform have been adopted in the drafting of the Corporations Bill.[3]

14.9 It is unfortunate that this Report became available after the Bills were presented to Parliament. (The Harmer Report did not become public until it was tabled in the Senate on 13 December 1988). However, equally it cannot be a matter for surprise or criticism that the recommendations have not yet been acted upon. The Committee believes that realistically there is no alternative for the drafters of the new legislation than to adopt the provisions of the Code virtually unaltered, given that at the time of drafting, the Law Reform Commission was completing an inquiry.

**Recommendation:**

**The Committee recommends that the reforms proposed by the Harmer Report receive early attention and that necessary amendments to the insolvency provisions in the Corporations Bill be proposed as soon as possible.**

**'Shield of the Crown'**

14.10 The 'Shield of the Crown' or 'Crown immunity', is a concept which allows the Crown - or the 'State' - a number of immunities from suit at law.

14.11 The 'Shield of the Crown' is not generally removed by the Bills (see Clause 3). In the context of the Bills before the Committee, attention was drawn to powers which are to be given to the ASC to require disclosure of beneficial ownership, pursuant to Clauses 707 to 727 of the Corporations Bill. In its submission to the Committee, the NCSC noted that the power of the ASC to ascertain beneficial ownership pursuant to Part 6.8 and the substantial shareholding provision in Part 6.7 in the Bill did not apply to the trading and financial activities of trading and financial corporations that are agents or instrumentalities of the Crown in right of the Commonwealth, the States and Territories.

14.12 The NCSC maintained that the policy reason for the substantial shareholding provisions in the Corporations Bill, is that members of a company and those considering investing in it are entitled to know the identity of persons or companies that have a sufficiently large stake to influence the course of a company's affairs, or who may prove significant in any contest for control. This matter is now of some importance as the identity of substantial shareholders can significantly influence the price of a company's shares to the extent that share prices include an element, or premium, for control. Such a premium often relates to the market's perception of the stability and financial security of major shareholders in a company.

14.13 In its submission, the NCSC noted :

Over the past few years it has become more common for bodies which enjoy the Shield of the Crown, such as Government Insurance Offices to amass stakes for a variety of reasons. Such bodies are under no obligations to make timely disclosure to the market of the type required to be made by any other market participants, although often some disclosure is made on a voluntary basis. Further, in at least some circumstances, it could be argued that associates of such crown bodies are immune from the obligation to make disclosure (see Bradken Consolidated Limited v. BHP [19791] 53, ALJR 452).[4]

14.14 The NCSC suggested that Parts 6.7 and 6.8 of the Bill should bind the Crown in right of the Commonwealth, a State or Territory in relation to the trading and financial activities of trading and financial corporations that are agencies or instrumentalities of the Crown.

14.15 This proposal, and other matters that were put to the 'Committee led to discussion of the Shield of the Crown concept by the Committee during the course of its hearings with a number of witnesses, particularly with the Victorian and South Australian Attorneys-General.[5]

14.16 The Attorney-General's Consultative Group, in its submission to the Committee, noted that it had recommended to the Attorney-General that the Shield of the Crown should be removed under the new scheme. This recommendation was not accepted.[6]

14.17 The Committee recognises that the Shield of the Crown in this context, and in particular when it relates to State Government Insurance Commissions or State Banks, or the other State investment vehicles, involves difficult issues of policy, law and constitutional interpretation.

14.18 The Committee believes that this question is now a matter of some importance, given matters raised by the NCSC during the Committee's hearings, and the noticeable and important

growth of the activities of public corporations, such as State public corporations in investment and the securities market. The Committee has not formed a view on what form of statutory alteration might be required in this area, but believes that the question should be further examined, and recommends accordingly.

14.19 The evidence before the Committee did not establish why State or Federal statutory agencies should have available to them the immunity of the Shield of the Crown in respect of their trading or financial activities.

**Recommendation:**

**That the matter of 'Shield of the Crown' be referred to a Parliamentary Committee for further examination in the near future.**

**Adequacy of Penalties**

14.20 In the course of the inquiry a number of submissions particularly from the NCSC and the Australian Stock Exchange, emphasised the inadequacy of the penalties prescribed by the Bill. The submissions were that, in particular, penalties that may be imposed under the takeover provisions, (such as Clause 615 of the Corporations Bill) were inadequate and should be increased.

14.21 The Committee notes that in Schedule 3 to the Corporations Bill, for example, a conviction under Clause 615 allows a Court to impose a fine of $2,500 or six months imprisonment or both. The NCSC noted that in its experience, such penalties do not serve as an adequate deterrent to unlawful conduct, in view of the 'very large rewards that can accrue to the perpetrators and of the low risk of successful criminal prosecution'.[7]

14.22 A similar comment was made in respect of the inadequacy of penalties which may be imposed for breaches of the insider trading prohibitions contained in Clause 1002 of the Bill.

Schedule 3 of the Corporations Bill provides that upon conviction for offences under Clause 1002, a court may impose a penalty of a fine of $20,000 or imprisonment for 5 years, or both.

14.23 The examples it has given above, are examples only but notes that the provision for large pecuniary penalties (not necessarily providing an option of imprisonment) which could be recoverable by the ASC as civil debts for contraventions of such provisions as Clause 615 or 1002 would bring the prosecutions area of the Corporations legislation within the general policy area of regulation of complex, commercial conduct. In this regard, the Committee draws attention to Part IV of the Trade Practices Act 1974, which provides for large pecuniary penalties which may be recovered by a regulatory authority as a civil debt.

14.24 The Committee notes that in relation to penalties there is a disparity between the amount of the fines available and the prison terms. For example, for most cases of fraudulent conduct, the penalty is $20,000 or 5 years imprisonment or both. While these may not be regarded as inadequate, the maximum fine is in no way comparable to the prison term. The Committee considers that in cases of moderate seriousness the low level of fine available may leave judges little choice but to impose a custodial sentence, whereas a higher financial penalty of $100,000 or even $250,000 would allow more flexibility in sentencing without making recourse to custodial sentences unavoidable. The Committee recommends that the adequacy of financial penalties be reviewed.

**'Plain English'**

14.25 During the inquiry several witnesses commented on the unduly complex nature of the Bills and the benefits that would flow if the legislation were redrafted using the 'Plain English' drafting style.

14.26 'Plain English' involves the use of plain, straightforward language which avoids the major drafting defects of traditional legislative drafting and conveys its meaning as clearly and simply as possible, without unnecessary pretension or embellishment.

14.27 Professor Kelly of the Law Reform Commission in advocating a 'plain English' drafting style argued that:

Drafting in a plainer style does not mean getting rid of legal concepts, or drafting inaccurately and with less precision. Plain English drafting proceeds on the assumption that the legal effect of a particular piece of legislation should be the same whether it is written in plain English or in the traditional way. All that it seeks to do is to get rid of the obscurity, repetition and surplusage that is endemic in the traditional Commonwealth drafting style.[8]

14.28 In this regard the Committee notes that some moves have been made towards the adoption of plain English in the Corporations legislation. The chapter dealing with the Acquisition of Shares, (Chapter 6) in particular, has adopted a number of the structural improvements suggested by the Victorian Law Reform Commission in its report, Plain English and the Law (1987).

14.29 Other advantages of plain English drafting were pointed out to the Committee. Professor Kelly suggested that the volume of legislation could be reduced by up to 60 per cent if rewritten using the plain English drafting style.[9]

14.30 It was also emphasised that a drafting style that is difficult to understand imposes substantial costs on the Government and the community. It makes the passage of legislation more difficult and adds to administrative costs in implementing the legislation as well as often needless and expensive compliance costs for business.

14.31 Some evidence presented to the inquiry, however, questioned the appropriateness of the use of plain English in the legislative drafting. For instance, it was suggested that in some cases plain English may be incompatible with precision and therefore the reason why even well-drafted law may be difficult to understand is that the law has to be unambiguous. In addition, the NSW Business and Consumer Affairs Agency argued that the substitution of colloquial for legal language would lead to uncertainty through the loss of technical legal concepts and words and phrases with settled legal meanings.[10]

14.32 By way of explanation if not defence, of the at times complicated drafting employed in various clauses of the Bill, it should be noted that it was necessary to employ drafting devices which brought the subject matter within Commonwealth constitutional power. This would not have been necessary if the Commonwealth had had plenary power in the field of corporations legislation. It should also be noted that the difficult and highly technical subject matter of much of the Bill lead to an irreducible level of complexity in the legislation notwithstanding the desire of the drafters for a simple and uncluttered style.

**Conclusion**

14.33 The Committee considers the issue of plain English drafting one of some importance. It notes the arguments advanced by its proponents and the benefits that would flow if the drafters of legislation and other legal documents adopted a clearer and simpler style than is currently the case. It is mindful that there are moves towards the adoption of plain English in several overseas countries, especially the United Kingdom and encourages this development in Australia.

**Endnotes**

1. Submission No.35, p.4

2. Australian Law Reform Commission, Report No.45, General Insolvency Inquiry, Canberra, 1988

3. Submission No.24, p.73

4. Submission No-30, paras.104-107

5. Evidence, pp.791-792

6. Submission No-21, p.7

7. Submission No-30, para.165

8. Submission No.32, p.1.

9. Evidence, p.478

**CHAPTER 15**

**CLOSE CORPORATIONS**

**Introduction**

15.1 One of the principal Bills in the Commonwealth's companies and securities legislative package, and the only Bill in the package that does not have a counterpart in the existing Co-operative scheme, is the Close Corporations Bill. The Bill introduces a new corporate entity to be known as a 'close corporation'. The objective of the legislation is to cater specifically to the needs of small business enterprises, by providing for the setting up of small incorporated business entities that do not have to comply with the extensive controls and reporting requirements contained in the Companies Code.

15.2 The Bill is based on the recommendations of the Companies and Securities Law Review Committee's (CSLRC) Report to the Ministerial Council on Forms of Legal Organisation for Small Business Enterprises (September 1985).

**Main Features of the Close Corporation**

Structure of the Close Corporation

15.2 **Clause 16** of the Bill provides that a close corporation may be formed by an individual or not more than 10 natural persons. The corporation is formed after the lodgement of a simple founding statement which contains basic information similar to a memorandum of association and is signed by the subscribers. With the founding statements there must be lodged an activity statement. If the requisite documents are lodged, the name (if any) has been reserved, and the Commission is satisfied that the requirements of the Bill as to membership are

met, the Commission is required to register the close corporation and to

issue a certificate of registration, substantially similar, and with similar incidents and effects, to the certification of incorporation of a company.

15.3 The essential features of a close corporation are that it contains 10 or fewer members, with trust holdings counted separately; the shares in a close corporation must be fully paid up, to the same value and having the same rights, and shares cannot be allotted at a premium or discount. With minor exceptions, only natural persons may be members of a close corporation, and a purported acquisition by a body corporate of a share or a unit of a share in a close corporation is void. In addition, a close corporation cannot act as a trustee or as a holding company nor can a close corporation offer its shares to the public.

Reporting Requirements

15.4 Under Clause 82 a close corporation is required to keep such accounting records as correctly record and explain the transactions of the corporation and its financial position, those records to be kept in such a manner as will enable preparation of true and fair accounts. Since the close corporation cannot be a holding company and shares cannot be held by a company, the complexity provided by group accounts is avoided.

15.5 The corporation does not have to lodge its accounts but is required to provide an annual certificate of compliance, certifying that it has kept the records required by Clause 82. The corporation must in addition, file an annual activities statement, the function of which is to provide a basis for the statutory regulation of close corporations under the corporations power. The annual activities statement will indicate whether the corporation is engaged in trading activities as a substantial part of the corporation's activities, and if the corporation is dormant on the day on which the statement relates, the statement will give particulars of its dormancy. If the close corporation is not a trading corporation, the Commission will have a

statutory duty under Clause 27 to take proceedings for winding up.

Internal Management

15.6 The relationship between the members of a close corporation is fundamentally a matter of agreement between them. The internal agreement of a close corporation may be governed by an association agreement, which may be modified by a supplementary association agreement entered into by a 'decisive majority of members', that is, if there are between three and seven members, one less than all of them or if there are eight, nine or 10 members, two less than all - no account is taken of the number of shares held by the various members. Clause 68 provides for the provision, by regulation, of a model association agreement which would apply in the absence of an association agreement between members. Subject to an association agreement (or other agreement between members):

* a close corporation is bound to indemnify its members against liabilities which he incurs in the ordinary and proper conduct of the affairs of the corporation or to preserve its business or property;

* a member who lends to the corporation is entitled to interest at the prescribed rate;

* every member is entitled to participate in management;

* there may be no allotment of shares without the consent of all members;

* members are not entitled to remuneration for acting in the affairs of the corporation;

* differences may be decided by vote of a majority of members but there is to be no change in the principal function of the corporation without the consent of all members.

15.7 The partnership analogy continues in the provision dealing with the mutual obligations of members and the corporation. The members are to give true accounts and full information; they are to account for benefits derived, without the consent of other members, from any transaction concerning the corporation or from the use of its property, name or business connections; they may not compete with the close corporation, without the consent of the other members; and they must compensate the corporation if it suffers loss through their dishonesty, improper use of information or lack of reasonable care and diligence.

External relationships and creditor protection

15.8 Clause 85 provides that each member of a close corporation is an agent of the corporation for the purposes of any business of the corporation. Consequently, acts done by a member in the course of carrying on the business of the corporation in the usual way will bind the corporation, unless there is some contrary provision in the association agreement or some other agreement and the person with whom the member dealt knew about that provision, or was not aware that the member was a member of the corporation.

15.9 The personal liability of members for the corporation's debts is dealt with in Part 15 of the Bill. Clause 107 provides that if the number of members exceeds 10 and the corporation is subsequently wound up, the members at that time are jointly and severally liable to discharge the corporation's obligations to the extent of any insufficiency. Members are also personally liable for debts if the corporation has failed to lodge a certificate of compliance or to Comply with the accounts provisions, and the corporation is unable to pay a debt incurred by it during the financial year of that default.

15.10 There are also provisions rendering members of the corporations personally liable if it becomes a holding company and is wound up with an insufficiency, or if the corporation becomes unable to pay its debts when they become due and does not cease to carry on business or take certain other steps. Clause 111 also imposes personal liability if the corporation acquires its own shares and subsequently commences to be wound up, and the court declares that when the relevant declaration of insolvency was made the corporation was not able to pay its debts when they fell due. Similarly, if the corporation acquires its own shares or units of shares in contravention of the legislation and as a result of the acquisition, it is unable to pay a debt the members of the corporation are personally liable. Though some of these provisions bear some similarity with provisions of the Companies Code, the potential personal liability of members of close corporations is considerably more extensive than under the Companies Code or Corporations Bill.

**Support for Close Corporations**

15.11 Evidence received by the Committee from the NCSC, Mr Peters of the Companies and Securities Consultative Group, Messrs Clarke and Kann; the Business Council of Australia and others, supported the general aims and objectives of the close corporations legislation.

15.12 Other evidence, however, questioned the overall usefulness of the concept arguing that this form of incorporation may not in practice be extensively used by small business.

15.13 Evidence supportive of the legislation suggested that a close corporation was undoubtedly a simpler structure than the traditional company. The incorporation procedures and financial reporting requirements in particularly, would be considerably simplified. Clarke and Kann commented that:

The reduced documentation required upon incorporation is to be commended. The flexibility provided by the entry by members into an "Association Agreement" together with the choice members have as to whether they will in fact operate the entity as a quasi-partnership will be of great advantage to owner-operated or '$2 Company' businesses.[1]

They also argued that because there was no statutory financial reporting requirements imposed on a close corporation other than the requirement for a 'certificate of compliance' to be lodged each year, this represented a significant advantage to smaller enterprises and would facilitate on-going cost savings.[2]

15.14 Despite the less onerous nature of the financial and other reporting requirements for a company incorporated under the proposed Close Corporations Bill, evidence presented to the Committee suggested that the Bill was unlikely to be extensively used in practice. Mr Knox of Feez Ruthning argued that for companies that did not need the protection of limited liability, it was more advantageous to become a partnership which gave much more flexibility. For those that did need the protection of limited liability, the possible deterrent of losing it would lead companies to have a standard exempt proprietary company.[3]

15.15 Mr McDonough of Clarke and Kann also questioned the overall usefulness of the Bill. He argued that while Close Corporations are prima facie entrusted with all the powers of a natural person this was negated by three notable exceptions under the Bill: namely that Close Corporations cannot act as trustees; are prohibited from being holding companies; and whose membership is limited to natural persons, except in limited circumstances. They suggested that these restrictions imposed severe limitations on the practical usefulness of close corporations.[4]

15.16 Evidence submitted by the NSW Business & Consumer Affairs Agency, Feez Ruthning and others suggested that as the Bill stands, Close Corporations may only be useful to small businesses owned and managed by a very limited number of people, who need a single structure only (with no subsidiaries or trusts)

and who will raise capital, to the extent that they do not provide for it from their own resources, only by borrowings from financial institutions. Persons falling within those limited criterion may not bother with incorporation in any event.

15.17 The Australian Society of Accountants also believed there was no clearly demonstrated need, especially from the practitioner's point of view, for the close corporation. In evidence they argued that the excessive bureaucratic regulation of small business has been lessened in recent decades. The introduction of word-processing, standardised formats and other innovations has simplified considerably the administrative workload involved.5 Experience overseas also suggests that the close corporation is not a particularly attractive option. In the United States, the Florida Close Corporations Act 1963 was repealed in 1975 and the South African Close Corporations legislation was little used.[6]

15.18 Several submissions to the inquiry, including submissions from the Institute of Directors in Australia, the Confederation of Australian Industry, the NSW Business and Consumer Affairs Agency and Clarke and Kann, argued that the Bill goes too far in exposing the members of the close corporation to personal liability, and that this will be a substantial disincentive to the use of the new form of incorporation. Clarke and Kann in its submission to the Committee, in echoing these sentiments, argued that

The most significant detriment to the attractiveness of the simplicity of Close Corporations is the extended circumstances in which, often inadvertently and without serious fault, members of such entities may incur personal liability for debts of the company.

The Bill significantly increases exposure to personal liability of persons incorporating as a Close Corporation as compared to the traditional proprietary company. We believe that the risk will be sufficiently alarming to deter the section of the community to which they are 7 directed from using Close Corporations.[7]

## Conclusion

15.19 While the Committee notes the criticisms made in relation to the Close Corporations Bill, it believes the Bill will provide a simplified corporate structure for small business. In particular, it sees the requirements as to documentation and the overall machinery for a close corporation as significantly less onerous than for a company incorporated under the current Companies Code or under the Corporations Bill. It acknowledges however, a number of concerns raised during the course of the inquiry, especially in relation to the exposure of members of the ,close corporation to personal liability, and the fact that the close corporation may be a less than suitable mechanism as far as share structure, capital raising, membership size and relationships with other companies are concerned. The Committee believes that these factors may discourage, to a certain extent, the use of this new form of incorporation. Nevertheless, it believes the Bill represents an innovation in company law, the benefits of which may only become apparent after the legislation has been in operation for some time.

Ron Edwards
Chairman

Parliament House
Canberra
April 1989

Endnotes

1. Submission No.6, p.23

2. ibid.

3. Evidence, p.711

4. Submission No.6, p.24

5. Evidence, p.469

6. Evidence, p.108 & p.656

7. Submission No.6, p.25

**ADDENDUM**

**SENATOR BARNEY COONEY**

Expression of Concern By Senator Cooney

In my view there is need to express concern about the powers given to the Australian Securities Commission under the package of legislation dealing with companies and securities now before Parliament.

The Commission is to have a variety of functions, one of which is to investigate certain matters specified in the legislation. As an investigative tool the legislation has given the Commission power to force evidence and documents out of people under threat of fine and imprisonment. It is a power not given to the police. It is a power foreign to the common law.

Under the provisions of the Australian Securities Commission Act people can be compelled to present themselves before an investigator (Clause 19) and to be examined on oath (Clauses 21 and 68) about books of corporation (Clause 39), about their affairs (Clauses 43(3)) about dealings in securities (Part 3 Division 4). They can be compelled to give self-incriminating evidence (Clause 68).

The Commission can without a warrant or court order force the production of books and documents (Part 3 Division 3).

The Commission can initiate criminal prosecutions (Clause 49) and bring civil proceedings on behalf of others (Clause 50). It cannot use the self incriminatory evidence it has forced from a person in the criminal action (Clause 68(3)), but it can in the civil one. It can use that evidence in obtaining a declaration that conduct is unacceptable. It can be used by the Disciplinary Board under Division 2 of Part 11 of the Act.

The Commission can of its own volition hold investigations in public (Clause 52(1)). Accordingly a body with no obligation to act judicially can examine people under oath and force answers from them. The examination will be available to the media for publication and comment.

The Vice Chancellor Sir J.C. Knight Bruce in Pearse v. Pearse (1 DE G + S.M.12) said:

"The discovery and vindication and establishment of truth are main purposes certainly of the existence of Courts of Justice; still, for the obtaining of these objects, which, however valuable and important, cannot be usefully pursued without moderation, cannot be either usefully or creditably pursued unfairly or gained by unfair means, not every channel is or ought to be open to them. The practical inefficacy of torture is not, I suppose, the most weighty objection to that mode of examination, nor probably would the purpose of the mere disclosure of truth have been otherwise than advanced by a refusal on the part of the Lord Chancellor in 1815 to act against the solicitor, who, in the cause between Lord Cholmondeley and Lord Clinton, had acted or proposed to act in the manner which Lord Eldon thought it right to prohibit. Truth, like all other good things, may be loved unwisely-may be pursued too keenly-may cost too much."

Pearse v. Pearse was a civil action.

The Australian Securities Commission will be an instrument with many functions (See Clause 11) only one of which is investigative (Part 3 Division 1). Further its members (Clause 9(4)) will have limited if any training and experience in interviewing suspects. Yet it will have stronger inquisitorial and discovery powers than the police force.

It will bear none of the restraints placed on litigants who want to interrogate and get discovery of each other in civil actions. Apparently it is assumed that the men and women appointed to it all from occupations not specifically devoted to investigation

will by virtue of that appointment become able to fairly handle inquisitorial powers much wider than those possessed by the

police. In exercising those powers they will not be subject to the supervision of the courts as are civil litigants in interrogating and obtaining discovery of each other. Yet they will have greater powers than those litigants to interrogate and obtain discovery.

The Australian Securities Commission is based on the National Company and Securities Commission. The fact that there is precedent for the powers given to it under the Bill does not of itself make them acceptable.

At common law people cannot be compelled to incriminate themselves. At common law one person is not entitled to interrogate another on oath before issuing civil proceedings. The Australian Securities Commission Bill changes all this.

It is in the public interest to protect citizens from malpractice by companies, their directors and managers. It is essential to protect shareholders to, to protect buyers of securities, to protect the integrity of the market. That protection can be sought at too high a price. A liberal and humane society will set limits to the investigative powers it gives its police and its regulatory agents. It will set limits to the way evidence can be gained for both criminal and civil proceedings. If it does not then its liberal and humane character is put at high risk.

# DISSENTING REPORT

## INTRODUCTION

The Committee's terms of reference cover the 16 Bills in the Corporations Legislation package. The two major Bills are the Australian Securities Commission Bill 1988 and the Corporations Bill 1988.

This dissenting report relates to the ASC Bill only. Although we have some differing views on various parts of the Corporations Bill, these are not the subject of major dissent.

We recognise that there is a need for some significant changes in the legislative framework for the regulation of the Companies and Securities industries in Australia. These are contained essentially in the Corporations Bill.

The fundamental question at issue is whether these desirable changes can be made within the existing structural framework or whether that framework needs to be changed.

Although the Joint Select Committee was established in October 1988, it was unable to commence hearings until late-January 1989. It quickly became apparent from the range and depth of the submissions that there was very real controversy surrounding the need for, and desirability of, Commonwealth legislation to replace the existing Co-operative Scheme.

The submissions to the Committee of over 1,000 pages, and evidence contained in some 1,500 pages of Hansard, is an indication of the extremely detailed nature of this inquiry, and of its significance.

At the outset of this dissent, we would like to pay tribute to the very courteous, even handed and effective manner in which the Chairman of our Committee, Mr Ron Edwards, MP, conducted the business of the Committee at all times.

## LACK OF CONSULTATION

The strong weight of evidence to the Committee indicated clearly that very little genuine consultation had taken place prior to the introduction of the legislation into the House of Representatives, other than with a few privileged market players from the eastern states.

Vital material on the original proposals had been circulated on a confidential basis, so that proper feedback was impossible to obtain. The full consultative group met only once and achieved little except an agreement to sub-divide into more manageable groups. Only the legal sub-committee could be described as having been active, but there was no indication that it made any genuine attempt to canvass issues outside its own professional circle, let alone explore the views in the smaller states.

As knowledge of the contents of the proposed legislation became more widespread, support for the proposals eroded rapidly. Similarly, State Governments had little involvement in the consultative process as indicated by the evidence of the Victorian Government that it did not see the Bills until after they had been introduced into the Parliament.

As a result, once the Committee commenced to take evidence outside Sydney, it quickly became apparent that there was a very high level of concern and unease about the inadequacy of the consultation process as well as very substantial opposition to the legislative scheme in contemplation.

Far from the business community being solidly in favour of the proposals, as the consultative group had indicated, it became apparent to us that it was mainly the professional corporate advisers from Sydney, and to a lesser extent Melbourne, who favoured the Scheme.

Such was the extent of the misgivings about the need for a new scheme, that we strongly supported the Chairman of the Committee, Mr Ron Edwards, who, when asked if the Committee was going to look at whether it was a good idea in practice for the Commonwealth to take over companies and securities law, told the Australian Financial Review on January 17, 1989:

"Without going outside our terms of reference we are going to have to answer the question of whether it is a commercially effective way of -managing companies in Australia."

This decision not to take a narrow approach to the Committee's Terms of Reference enabled the Committee to explore the merits of a new national scheme with a number of witnesses including representatives of State Governments. The latter were presumably encouraged to present their views to the Committee as a result of an indication given by the Commonwealth Attorney-General to the Ministerial Council on December 1, 1988, that he:

"had no objection to States making submissions generally to the Committee because of their special positions through their participation in the existing co-operative scheme."

As a result of such submissions, it became clear that although several states were prepared to make tactical concessions to the Commonwealth, none of the states shared the Commonwealth's view that a national takeover was necessary or desirable or free from constitutional doubt.

## UNREALISTIC TIME FRAME FOR COMMITTEE REPORT

Despite concerns expressed in many submissions and by Committee members themselves, there has still been no adequate explanation as to why the government has insisted on what is an utterly unrealistic and unnecessarily tight deadline for reporting to the Parliament. We do not consider that the Committee task involves merely hearing evidence, discussing it and reducing our impressions to writing. The Committee was told that the gestation period for the co-operative scheme was in excess of 5 years, thus allowing ample opportunity to test proposals, refine arguments and assuage concerns. Yet the attitude of the Federal Government in relation to these bills seems to have been that a uniform national scheme must be fully implemented as soon as possible, irrespective of the validity of any objections. Such was the tightness of the deadlines faced by the Committee that it was necessary for the Secretariat to commence drafting the report on the basis of written submissions, before having heard the relevant oral evidence.

One outcome of the Government's granite determination to insist on the report being completed in an unreasonably short period of time was that the Committee was unable to give proper consideration to a number of important issues such as the report of the investigation into Rothwells and the transcript of the NCSC hearing into the Bell/Bond/SGIC matter, both of which-would have thrown considerable light on the practical operations of corporate regulation in Australia. Furthermore, the shortness of time meant that the Committee was unable to deal with a number of issues raised in the submissions or to ensure the technical adequacy of some of the recommendations.

Even if the Government is implacably committed to comprehensive national legislation and is determined to confront the States and the many opponents of the Scheme, it still has provided no public explanation or justifications for what we regard as indecent haste.

**TRANSITIONAL ARRANGEMENTS**

In the event of the introduction of a new national scheme it will obviously be necessary to ensure that adequate transitional arrangements are in place. Yet no draft provisions have been prepared, so that it has not been possible to assess the adequacy of the regime which would govern corporations outside the national scheme. It is not clear whether the co-operative scheme will be kept alive to any and what extent or whether some other arrangements will be necessary.

**CQNSTITUTIONAL DOUBT**

The legal opinion of Sir Maurice Byers has been much relied upon by the Government as the basis for its contention that the bulk of the package of Bills can be brought within the "corporations" power. Indeed, evidence from the Attorney General's Department indicated that no private opinions had been sought on the issue of constitutionality, instead preferring to take the view that the Byers' 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".

It is quite clear that the States' Solicitors General do not take the same view and there would appear to be good reason for doubting the accuracy of the Byers opinion. It seems clear that the question of whether a company is a "trading corporation" or a "financial corporation" as required under Constitution para.51 (xx) will need to be determined on a case by case basis, even though the Byers opinion concedes that the ambit would not extend to recreational, scientific, educational or charitable companies. Considerable doubt would also surround listed companies which are merely holding companies.

However the Law Institute of Victoria (LIV) submission also casts serious doubt on another central element of the Byers opinion, namely the proposition that "a law which makes provision for the incorporation within the Commonwealth of trading and financial corporations.... is one with respect to trading and financial corporations formed within the limit of the Commonwealth". According to the LIV there is at best a very tenuous basis for such a conclusion.

It is now clear that many reputable lawyers and commentators have very real doubts about the breadth of the corporations power. In particular, witnesses before the Committee were in agreement that the High Court would not be able to resolve the issue without a series of separate test cases being brought, thus ensuring that considerable uncertainty will continue to surround the constitutional validity of the proposed scheme for perhaps years to come. This is in stark contrast to the current situation where no doubt surrounds the constitutionality of the co-operative scheme.

Despite the extensive ambit of the Byers opinion it is clear that there will continue to be companies which will be governed by state laws. The LIV also suggests that the status of bodies corporate formed under state legislation other than the Companies Act such as unincorporated associations, building societies and friendly societies is likely to give rise to difficulties in the context of a Commonwealth Companies Act.

One of the more impressive witnesses before the Committee was John Green. Whilst conceptually in favour of a national scheme, he had this to say:

"If I can deal first with the Bowen plan, I must say that I regret that his radical, but I believe well conceived, plan for Australia's corporate regulation has gone off the rails ....

"If the Bowen plan means that the new federal laws are brought in with State opposition I would, I must say, withdraw my support for it ...

"if some sensible compromise is not reached between the Commonwealth and the States and the Bowen plan becomes law I fear that corporate Australia will be besieged by what I believe will be an era of greater uncertainty."

We believe that this account eloquently and succinctly elaborates the dangers and difficulties which lie ahead if the Government pursues its proposed takeover.

## THE CASE FOR THE GOVERNMENT'S PROPOSALS

Before proceeding to canvas the arguments contained in the submissions which argue against the need for a complete restructure of the present scheme, we believe it is important to address the arguments commonly advanced by proponents of the Commonwealth approach.

### Argument 1: If Australia is to compete effectively in the international arena, a national scheme for companies and securities law is necessary

The high water mark of this claim is exemplified by a submission to the Committee by the BCA:

"To continue a situation where our corporate life is regulated on the basis of 8 separate jurisdictions, protecting relevant sovereignties in each of those 8 jurisdictions, multiplying inefficiencies and cost is basically unrealistic in an international business environment."

While such sweeping assertions may be superficially plausible, no evidence was forthcoming to justify this criticism of the co-operative scheme or to indicate the nature and extent of the impact of current arrangements in the international arena.

We find talk of the internationalisation of the financial community in this context to be essentially sloganistic and misleading. Australia already has a national scheme via the co-operative arrangements. The tiny percentage of listed Australian companies active in overseas markets have never suggested that their activities have in any way been hampered by a lack of a truly national scheme, nor made any suggestions about the necessity to improve on current federal arrangements.

The trend towards internationalisation of business activities has been underway for many years, and will continue apace. It is imperative that more Australian companies should be looking to operate in global markets. Many already do so and face a range of uncertainties, including the vagaries of world markets, fluctuating exchange rates, language and cultural barriers and adequate capital investment resources. But none have suggested that the present co-operative scheme has any relevance to their present or future activities on the world stage. This argument can therefore be dismissed as largely a red herring. It is noticeable that the present arrangements do not seem to have restricted the international activities of Australian futures operators. As the Sydney Futures Exchange Limited said in its evidence:

"The existing legislative arrangements have been acknowledged and accepted by international authorities as being satisfactory and effective for the regulation of the Exchange and the industry in a world wide context where acceptance of the integrity of futures markets is the key to successful

operations and development ... in recent years the Exchange has become a major world exchange capable of responding to changes in the global markets as they develop."

Argument 2: The existing scheme's collegiate decision-making structure disburses Ministers' and officials' responsibilities and accountability to Parliament

Much of the criticism revolves around the ability of the Commonwealth Parliament to amend the Co-operative scheme legislation. The view of the Senate Standing Committee on Constitutional and Legal Affairs was that as the Commonwealth Parliament was not a party to the scheme no legal obligations or restrictions were placed upon it. The better view seems to be that the Federal Government is legally free to amend or reject the legislation. The real issue is the extent of the political as opposed to the legal consequences. But it would be open to one or more of the States to withdraw from the scheme if they considered that it was imposing unacceptable legislative amendments.

But while such a discussion may be of great legal and constitutional interest the debate to date has been marked by a conspicuous lack of examples of any actual or proposed changes which either the Commonwealth or the States have sought which have been unacceptable to the other. There are those who argue that there is little role for the Parliament to play in the present process. The same can be said of State Parliaments but, parliamentarians apart, there does not seem to be any community concern on this score.

At present the Ministerial Council has the ultimate responsibility for supervision of and amendment to the Co-operative scheme. The NCSC represents both the Commonwealth and the State crowns and is required to comply with Ministerial Council directions with respect to the

performance of any of its functions or the exercise of any of its powers. The Ministerial Council may delegate any functions or powers to the NCSC.

We do not regard this dispersal of power as unhealthy. On the contrary, it constitutes a valuable and necessary safeguard to protect the integrity and independence of the regulatory authority.

Under the proposed scheme the authority would be directly answerable to the Attorney-General, and in practice to the Attorney-General's Department. Whilst the Minister is precluded from giving directions about a particular case, he may give written directions about policies which should be pursued, or priorities to be followed. In practice we would regard these arrangements as giving the Commonwealth unlimited opportunities to exert political influence which is not available under the present scheme.

The spread of responsibility amongst State Attorneys-General of different political persuasions makes it infinitely harder to subvert or deflect the corporate watch-dog and the at times anguished criticism of the NCSC by certain affected persons is eloquent testimony to its independence and effectiveness. A cogent example of the potential for political considerations to influence the conduct of corporate regulation occurred in the wake of the provisional liquidation of Rothwell's.

Despite having the power to order a special investigation, the Attorney General, Mr Bowen, declined to do so in the lead up to the Western Australian election. His suggestion that it was a matter for the States was disingenuous and was directly at odds with the thrust of the present legislation. Indeed, the decision by the NCSC not to disclose the name of Mr Laurie Connell in the wake of the October crash seemed to

have been taken as a result of pressure being brought to bear by a person, whom Mr Bosch described as having "considerable political connections".

These examples highlight the necessity to avoid placing sole discretion in the hands of any politician. If the NCSC had been represented in Western Australia then it would not have been subject to the dictates of the Western Australian CAC. Any decision then taken by the NCSC would be subject to review by the Ministerial Council.

A much more sensible proposal would be to make the regulatory authority accountable to a Standing Committee of the Parliament.

Despite the very limited resources made available to it by Government we consider the NCSC to have performed very creditably under difficult circumstances.

We are particularly concerned that the current proposal will result in a significant weakening of the powers of the corporate watch-dog. In its nine years of operations it has achieved some notable results, particularly in the last two years and against some of the biggest corporate names in the business. It has established an impressive record and is widely respected both in Australia and overseas.

The shoe-string budget on which the NCSC' has been forced to operate has undoubtedly been a factor in making commercial settlements on occasions more attractive than costly and protracted litigation.

However the recent Federal Government decision to provide an increase of 40 staff is ample testimony to the fact that funding difficulties have had much more to do with Government reluctance to provide the necessary resources than with any structural or institutional inadequacies. In this context we

regard the self-funding proposals advanced to the Committee as worthy of support. A minimum $10,000 fee for takeovers instead of the current $1000 together with access to the proceeds of fines and penalties and more realistic pre-vetting charges would be acceptable to the commercial sector. They would also provide a secure financial base which would enable the regulator to pursue its activities even more vigorously and effectively.

We note with concern the evidence of the NCSC that it has an average annual staff turnover of 30 per cent which the Chairman, Mr Bosch, described as "quite devastating". It is clear that many talented staff are quickly poached by corporate head-hunters. We further note that, as Mr Bosch pointed out, in the United States the Securities and Exchange Commission has an annual budget of $205 million and a staff of 3013 to deal with securities and futures only - company matters continue to be dealt with by separate State Securities commissions.

This inability to pay market rates is a great disadvantage in attracting and retaining quality staff. But it is largely the result of inadequate financial resources being made available. Under the current NCSC Act there is no ceiling on recruitment and the terms and conditions of employment are determined by the Commission, although subject to a Public Service Commission veto. However there is no requirement that Commission employees should be public servants and the Commission is also empowered to engage private sector consultants on its own terms.

What is required is an office with well paid and well qualified persons with ample private sector experience. What the ASC Bill offers is a closed shop full of career bureaucrats.

Under the proposed new arrangements all ASC staff would be appointed or employed under the Public Service Act

1922 and all terms and conditions of employment would be subject to Ministerial approval. There would be power to engage consultants but the Commonwealth will have a veto over such engagements.

It is imperative that the regulatory authority should be staffed by capable and enthusiastic persons with a commitment to excellence. Unless a quality culture can be quickly engendered there is little prospect of top-grade graduates seeing a stint at the authority as a desirable page in their CV's, as well as a contribution to public service.

The proposed ASC Bill will simply make matters worse. Whilst it might represent a significant victory for public service unions it will inevitably result in a downgrading of effective supervision of the corporate sector.

The ASC bill would result in the present autonomy of the NCSC as an independent watch-dog being replaced by an ASC tame cat which will be totally under the direction and control of the Federal Government. This would be a disastrous and retrograde step which would represent a massive victory for those corporate players and advisors who have fallen foul of the NCSC and would now be provided with a golden opportunity to wield political influence via a fast track to Canberra instead of the infinitely more difficult task of convincing a majority of members of the Ministerial Council.

Argument 3: The distribution of functions between the NCSC and its State and Territory delegates causes administrative duplication and general inefficiency

Despite a welter of generalised assertions to this effect there were very few specific examples provided to the Committee as to the manner in which alleged administrative duplication is disadvantaging the corporate sector.

Mr McComas, on behalf of the BCA stressed the need to be able to obtain a quick and accurate response to requests for search and process of company records in any State. But when it was pointed out that it was not a difficult matter to fax across Australia in a matter of minutes, he conceded that it was not a major problem. He then suggested that small consumers sometimes have trouble with traders who are incorporated interstate thus posing difficulties for checking credit worthiness. We regard this objection as trivial, especially as all credit agencies operate on a national basis.

Moreover, the computerisation of the public corporate database is nearing completion, thus removing one of the major criticisms of the current arrangements. The Ministerial Council is already committed to ongoing effective implementation and the current debate has certainly provided added impetus to this goal.

Proponents of the national scheme stress the need for uniformity of administration across the country, presumably meaning that the same administrative advice and approaches should be adopted. But this very situation continually causes difficulties to practitioners and clients seeking guidance from State offices of the ATO and TPC, who find that everything must be referred to Canberra.

Perhaps the most important challenge is to integrate the regulatory structure in such a way that there is consistency and co-operation between State offices and an adequate career structure. This could just as easily be accomplished within the existing NCSC arrangements. Well paid and well qualified staff would do much to overcome consumer frustration with administrative costs and delays especially in areas such as the registration of prospectuses.

We were impressed by witnesses in States other than Victoria and NSW who were concerned that under the proposed scheme, local decision making for other than routine matters was likely to be replaced by the practice of referring questions to the Central Administrative Office of the ASC, perhaps necessitating interstate travel to press the issue.

There does seem to be a widespread impression that the new regime will be administered centrally. We note however that the legislation does not deliver line control and full integration of the State CAC's and their financial and human resources into the ASC.

Section 102(4)(c) of the ASC Bill requires that where delegations have been made to State or Territory based authorities and officers, national scheme laws are to the greatest extent practicable to be administered locally. This would seem to be a clear acknowledgement of the legitimacy of widespread concerns voiced to the Committee and the desirability of a continuation of present arrangements as much as possible. In these circumstances, we do not see that an ASC, acting according to its charter, would be properly able to assume a much greater degree of central control in day to day administration. It is therefore difficult to see a justification for a change in current arrangements which are judged to work effectively by all except the representatives of a few large corporations.

Irrespective of the wording of the ASC Bill, in practice there will be enormous pressures for administrative decisions to be made locally as at present, and enormous dissatisfaction if they are not. There is no good reason why any ongoing administrative difficulties cannot be solved within the framework of the existing scheme.

The proposed national scheme does not provide for control and co-ordination of branch delegates. The fundamental requirement for successful administration is adequate funding and there is nothing in the proposed scheme to encourage the belief that the Government will be any more generous than it has been in relation to the NCSC. The establishment of a panel independent of the regulatory authority for unacceptable conduct hearings would enable the regulator to devote more resources to administration.

## THE CASE AGAINST THE ASC BILL PROPOSALS

The Committee received a total of 58 submissions. Of these, 25 commented specifically on the desirability or otherwise of the Government's, proposals to replace the Co-operative Arrangements with a centralised scheme. Seventeen favoured retention of the Co-operative Scheme, while eight supported the concept of a centralised scheme.

State Governments, and the Northern Territory Government, were amongst the strongest critics of the proposals. Every State Government was opposed. The strength of their opposition is well demonstrated by the following quotes from the South Australian Labor Government and the New South Wales Liberal National Party Government:

the South Australian business community, which expresses its view to me through a -consultative group that we have established in this State and which is a broad cross-section of the business community, is in fact strongly opposed to the Federal Parliament assuming powers in this area".

"We believe that legislation such as you are considering does impact very directly on our regional economy. It is important that there be an effective means for the local community, business and others, to have an input into the decision making process. That is the philosophical basis for the original Co-operative scheme".

"I think the great achievement of the Co-operative scheme has been the achievement of uniformity in legislation and securities area throughout the whole of the nation. I think it would be a great pity if anything happened to detract from uniformity".

(Hon Chris Sumner, SA Attorney General and Chairman of the Ministerial Council)

" there is no need for the Commonwealth to take over in the manner it proposes. ... we belong to a Federation in this country. The corporate affairs powers have needed to have some uniformity between States over a long period of time for obvious reasons. The manner of addressing that need for uniformity was the Co-operative scheme. I believe that the Co-operative scheme has managed this operation of achieving uniformity very well indeed, having regard to the growing complexity of corporate law and corporate operations in this country".

" It is vitally important that (we) recognise the needs in a democratic country for checks and balances in all that we do. The proposals by the Commonwealth in effect centralise power not only over corporations but effectively over business, in Commonwealth hands".

(Hon G B P Peacocke, NSW Minister for Transport and Consumer Affairs)

Other important representative bodies also expressed strong opposition to the Government's proposals. For example:

" the Confederation of Australian Industry, which represents, through its affiliated organisations, something like 100,000 Australian firms - some

incorporated, some not, but the majority incorporated is opposed to the Federal Government's assuming control of corporations and securities regulation. We would prefer to see the implementation of a number of the reforms included in that proposed national legislation carried out within the existing Co-operative scheme ... our current position is the result of long, deliberate and careful consideration of the options".

(Mr Daryl George, Chief Executive, Confederation of Australian Industry)

"First, the Institute supports, in principle, initiatives to overcome demonstrated deficiencies in the present Co-operative Commonwealth-State scheme of companies and securities legislation by the Senate Standing Committee on Constitutional and Legal Affairs in its report on the role of Parliament in relation to the national companies scheme. Secondly, the Institute believes that the paramount requirement of companies and securities law is that it be uniform throughout Australia. Thirdly, because of the constitutional limitations placed on the Commonwealth Parliament, it is inevitable that uniformity cannot be achieved by unilateral action of the Commonwealth and can only be achieved by co-operation of the States. Fourthly, the overwhelming advantage of the present scheme, which is based on co-operation, is that it is legally within powers. That would be lost in unilateral Commonwealth action.

Fifthly, it is therefore submitted that the Co-operative nature of the present scheme should be retained and changes should be made to the present scheme only in so far as they are necessary to overcome demonstrated, as opposed to perceived, shortcomings; involving as little change as possible to the present law; and to interfere as little as possible with the existing NCSC and State administrations".

(Mr Thomas Bostock, Chairman Companies and Business Organisations Committee, Law Institute of Victoria)

During the Committee's hearings many witnesses were asked whether there were any necessary changes to the Corporations Bill which could not be encompassed within the existing Co-operative Arrangements. Not one witness answered in the affirmative. Their attitudes were well encapsulated in the following example:

"During my nine years of experience in the corporate affairs areas, I have not seen a single instance of a matter that could not be adequately coped with within the Co-operative scheme context. Certainly over the last five years there has been increasing centralisation of functions, for example, the growth of the Australian Stock Exchange. There has been a dramatic growth in the futures industry and new legislations to cope with that. There has been increased internationalisation of business and new challenges coming from overseas. The Co-operative scheme, from my reflections and viewpoint, has coped remarkedly well with that.

I think there has been a real ability within the Co-operative scheme to respond to national and international issues in a manner that is entirely appropriate, and the States have worked very well with the NCSC in ensuring that occurs".

(Mr M P O'Connor - Acting Commissioner, Corporate Affairs Department, Western Australia)

We believe there are several compelling reasons for not adopting the Government's proposal to replace the Co-operative Arrangements, based as they are around the NCSC and the Ministerial Council, with a centralised scheme with an ASC.

1. There are severe doubts about the Constitutional validity of the proposal. We have addressed this matter earlier in this dissenting report. Nevertheless, it bears repeating that it is certain the legislation would be challenged in the High Court; the challenges would take a lengthy period to be resolved; and in the meantime there would be destablising and damaging uncertainty in the companies and securities industries.

2. The staff of the ASC would be composed mainly of public service bureaucrats removed from the practical market place. It would take a long time to build up the level of skill, expertise and experience currently contained within the NCSC. This matter has also been covered in more detail earlier.

3. The ASC inevitably and inexorably would be controlled to a major extent by Canberra-based officers of the Attorney General's Department. This would further remove the operations of the ASC from the essential realities of the market place. It would also guarantee progressively increased bureaucratisation of companies and securities regulation in Australia.

4. Somewhat paradoxically in the light of 2 and 3 above, we received substantial evidence to suggest that the powers of the proposed new corporate watch-dog (the ASC) would be significantly weakened relative to those of the NCSC. This would have adverse effects on investor confidence at the very time there is unanimous agreement that investor confidence needs strengthening.

5. The proposals would concentrate Ministerial power into the hands of one Minister (the Attorney-General) and one (Federal) Government. By contrast, the existing Co-operative Scheme ensures a desirable diffusion of Ministerial power. Even the existing system is not totally free from the possibility of political inter-

ference either in respect of general operation or investigation of particular cases. We have already mentioned the example of the Federal Attorney-General hindering the conduct of an investigation into Rothwells Limited. Under the Government's proposals, however, the ASC would be much more open to the dangers of political interference and influence.

One of the arguments advanced by some critics of the existing Co-operative Arrangements is that the existence of the Ministerial Council renders decision making unduly slow and cumbersome. We are not persuaded to this view, although we acknowledge that decisions may well be taken more speedily if only one Government is involved. We consider, however, that on such important and sensitive matters as companies and securities regulation, a mechanism which restricts precipitate decision taking may well have positive advantages.

some critics of the existing arrangements also argue that Australia does not have a national regulatory scheme. Such criticism is illfounded. Indeed, it is a virtue of the arrangements that decisions taken by the Ministerial Council have to be reflected uniformly in minor legislation in the Federal, State and Northern Territory Parliaments. The argument that Australia needs the Government's ASC proposals because of increasing globalisation of financial markets is a straw man, and has been discussed in more detail above.

**DESIRABLE CHANGES**

We readily acknowledge that the Co-operative Scheme that was established in the late 1970s could be improved by various changes. The Scheme has evolved for the better over its life to

date in the light of experience gained. We have no doubt it will continue to evolve.

MAs part of this process we consider there would be advantage in the Federal Attorney-General being the permanent Chairman of the Ministerial Council. It may also be desirable for him to have a weighted vote on the Council, but we make no specific recommendation on this.

We also consider that the NCSC should be funded in such a manner as to ensure it has adequate resources for the important tasks it is required to perform. New funding procedures, including greater cost recovery, for both the NCSC and State Corporate Affairs offices, should be implemented as a matter of urgency.

As well, we recommend that the NCSC be provided with greater powers to co-ordinate and direct the activities of constituent offices in the States and Northern Territory.

There are other changes, for example in the areas of management and staffing, that would be desirable. It would not be appropriate to go into these in detail here. Rather, they should be discussed by the Ministerial Council.

**PARLIAMENTARY COMMITTEE**

We support the recommendation in the Report for the establishment of a Parliamentary Standing Committee on Corporations and Securities.

**SPLTT SCHEME**

We are opposed to any suggestions for a "split scheme". Such proposals were born out of a tactical desire to preserve a position for the States in face of the unilateral moves by the

present Commonwealth Government to legislate for all matters in the company and securities field.

In view of the fact that the existing Co-operative Scheme works satisfactorily - although its effectiveness can be enhanced - we do not believe there is any point in now considering major structural changes such as those that would necessarily be involved in the split scheme.

## CONCLUSION

The Co-operative Scheme has served Australia well since its inception nine years ago. In particular, the NCSC has built up an impressive record, and is widely regarded and respected both within Australia and overseas.

We recognise that there are improvements that can and should be made to the regulation of the corporations and securities industries in Australia. Many of these are contained in the Corporations Bill now before the Parliament. We generally support the views on this Bill outlined in the main body of this Report.

In our view, however, no compelling case has been produced to support the need for major structural change to the regulatory framework as proposed in the Australian Securities Commission Bill. There are, on the contrary, strong arguments against such wide ranging structural change.

Any deficiencies in the present arrangements can be rectified without difficulty. To address these deficiencies by a totally new structure which is opposed by every State and the Northern Territory, and by many other organisations, and which detailed examination shows clearly to be found wanting, would be to embark on a legislative adventure of monumental folly.

Accordingly, we recommend that the ASC Bill be totally rejected, and that the existing Co-operative Scheme be retained and strengthened.

Richard Alston  Peter Fisher  Jim Short  Warwick Smith

**DISSENTING REPORT OF SENATOR R. ALSTON, SENATOR B. COONEY SENATOR M. MACKLIN, SENATOR R. McMULLAN AND MR D. KERR M.P. WITH RESPECT TO DECLARATIONS OF UNACCEPTABLE CONDUCT,**

1. A majority (upon the casting vote of the Chairman) has recommended that the power to make a declaration (of unacceptable conduct under Clause 733 be exercised by the ASC and the Panel.

2. This is a view with which the minority cannot agree. The provisions in the Corporations Bill are intended to allow the ASC powers of investigation of matters which arise in the course of takeover activities. The minority observes that the principles of unacceptable conduct are the same as in the present CASA legislation. The NCSC's argument that the existing power of investigation and adjudication on declarations of unacceptable conduct amount to a more effective form of regulation of market conduct, by integration of litigation and investigations, has not persuaded the minority that the power to make a declaration should be vested in the ASC. The minority finds it desirable that the ASC have an investigatory role, and that matters should be referred to the Panel for adjudication.

3. We believe that the NCSC has greatly overstated the extent to which its capacity to police the securities market will be undercut by vesting the power to make declarations of unacceptable conduct in the Panel. The minority is of the view that the impact of a publicised referral of a matter by the ASC to the Panel will have an equivalent impact upon market operations as the NCSC has at present. The Chairman of the NCSC in oral testimony to the Committee (see Evidence p.1397) conceded as much. The minority also notes that the overwhelming weight of evidence given to the Joint Committee by the business community also favoured this power residing in the

Panel. Finally, we note that we have a fundamental objection to giving the same body the right to be both prosecutor and jury when other equally effective and convenient alternative mechanisms are available. Accordingly, we do not recommend any alteration to the powers of the ASC or the Panel in this regard.

1987-88-89

THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

THE SENATE

**AUSTRALIAN SECURITIES COMMISSION BILL 1988**

(*Amendments and new clauses recommended by the Joint Select Committee on Corporations Legislation*)

[Note: The amendments are grouped by subject matter, but within each group are arranged according to the order of the provisions amended.]

COMMISSION'S OBJECTIVES

(1) Page 2, clause 3, lines 17 and 18, leave out "the securities markets and futures markets", insert "companies, and of the securities markets and futures markets,".

COMMISSION'S ADVISORY FUNCTIONS

(2) Page 8, clause 11, after paragraph (2) (b) insert the following paragraph: "(c) on its own initiative or when requested by the Minister, to advise the Minister, and to make to the Minister such recommendations as it thinks fit, about any matter of a kind referred to in section 148.".

MEMBERSHIP OF COMMISSION

(3) Page 7, clause 9, lines 30 and 31, leave out subclause (1), insert the following subclause:

"9. (1) The Commission shall consist of 7 or 8 members.".

(4) Page 7, clause 9, lines 34 to 36, leave out subclause (3), insert the following subclause:

"(3) Of the members, 3 shall be appointed as full-time members and the others shall be appointed as part-time members.".

(5) Page 8, clause 9, lines 4 to 8, leave out subc1ause (5), insert the following subclause:

"(5) The performance of the functions or the exercise of the powers of the Commission is not affected mere1v because its membership is not as prescribed by subsections (1) and (3), unless a continuous period of 3 months has elapsed since its membership ceased to be as so prescribed.".

TABLING OF MINISTER'S DIRECTIONS

(6) Page 9, clause 12, lines 19 to 22, leave out subclause (5), insert the following subclause:

"(5) The Minister shall cause a copy of an instrument under subsection (1):

(a) to be published in the Gazette within 21 days after the instrument is made; and

(b) to be laid before each House of the Parliament within 15 sitting days of that House after the publication:

but failure of the Minister to do so does not affect the instrument's validity.".

REPORTS ABOUT SERIOUS CONTRAVENTIONS

(7) Page 10, clause 16, line 40, before "contravention" insert "serious".

(8) Page 11, clause 18, after subclause (1) insert the following subclause:

"(2A) Where a report, or part of a report, under this Division relates

to a serious contravention of a law of the Commonwealth or of a State or Territory, the Commission may give a copy of the whole or a part of the report to:

(a) the Australian Federal Police;

(b) the National Crime Authority;

(c) the Director of Public Prosecutions; or

(d) a prescribed agency.".

COMMISSION'S POWER TO BEGIN CIVIL PROCEEDINGS

(9) Page 25, clause 50, lines 22 and 23 of the Bill and Amendment No. 6 on page 1 of the Schedule of the Amendments made by the House of Representatives, leave out all the words from and including "the Commission" to the end of the clause, insert the following:

"the Commission:

(c) if the person is a company-may cause; or

(d) otherwise-may, with the person's written consent, cause;

such a proceeding to be begun and carried on in the person's name.".

SELF-INCRIMINATION

(10) Page 31, clause 68, lines 26 to 33, leave out subclause (2), insert the following subclause:

"(2) Subsection (3) applies where: (a) before:

(i) making an oral statement giving information;

(ii) signing a record; or

(iii) producing a book;

pursuant to a requirement made under this Part, Division 3 of Part 10, or Division 2 of Part 11, a person claims that the statement, signing the record, or production of the book, as the case may be, might tend to incriminate the person or make the person liable to a penalty; and

(b) the statement, signing the record, or production of the book, as the case may be, might in fact tend to incriminate the person or make the person liable to a penalty.".

(11) Page 31, clause 68, line 35, after "nor" insert ", in the case of the making of a statement or the signing of a record,".

(12) Page 31, clause 68, line 37, leave out ", signing the record or producing the book,", insert "or signing the record,".

POWERS OF COMMISSION'S CHAIRPERSON

(13) Page 42, clause 94, line 16, leave out "Chairperson", insert "Commission".

(14) Page 43, clause 97, line 6, leave out "Chairperson", insert "Commission".

(15) Page 43, clause 99, line 25, leave out "Chairperson", insert "Commission".

(16) Page 49, clause 120, line 5, leave out "Chairperson", insert "Commission".

ANNUAL REPORT OF COMMISSION

(17) Page 54, clause 138, at the end of the clause add the following subclause:

"(2) A report by the Commission, under section 63M of the *Audit Act 1901*, of its operations during a year ending on a particular 30 June shall:

(a) describe the specific goals the Commission has pursued, and the priorities it has followed, during that year, in performing its functions and pursuing the objectives referred to 'in subsection 3(2);

(b) describe what progress the Commission has made during that year towards achieving those goals; and

(c) describe any matters that, during that year, have adversely affected the Commission's effectiveness or have hindered the Commission in pursuing any of those goals and objectives.".

CORPORATIONS AND SECURITIES PANEL

(18) Page 62, clause 172, line 6, after "members" insert ", not fewer than 5,".

(19) Page 62, clause 172, lines 8 and 9, leave out subc1ause (2), insert the following subclauses:

"(2) The Governor-General shall appoint the members on the nomination of the Minister.

"(2A) At least 1 of the members shall be appointed as a full-time member and each of the remaining members may be appointed as a fulltime member or as a part-time member.".

(20) Page 62, clause 172, at the end of the clause add the following subclause:

"(4) The performance of the functions or the exercise of the powers of the Panel is not affected merely because its membership is not as prescribed by subsections (1) and (2A), unless a continuous period of 3 months has elapsed since its membership ceased to be as so prescribed.".

(21) Page 62, clause 173, line 17, leave out "member", insert "full-time member".

(22) Page 62, clause 175, at the end of the clause add the following subclauses:

"(2) A person who has attained the age of 65 years shall not be appointed as a full-time member.

"(3) A person shall not be appointed as a full-time member for a term extending beyond the day on which he or she will attain the age of 65 years. ".

(23) Page 63, clause 178, after paragraph (a) insert the following paragraphs:

"(ba) is a full-time member and engages without the Minister's consent in paid employment outside the duties of the member's office;

(bb) is a full-time member and is absent from duty, except on leave granted in accordance with section 179A, for 14 consecutive days, or for 28 days in any period of 12 months;".

(24) Page 63, clause 178, at the end of the clause add the following subclause:

"(2) The Governor-General may, with the consent of a full-time member who is an eligible employee, retire the member' from office on the ground of incapacity.".

(25) Page 63, after clause 179 insert the following new clauses:

**Leave of absence**

"179A. The Minister may grant to a full-time member leave of absence from duty on such terms and conditions as to remuneration or any other matter as the Minister specifies.

**Other terms and conditions**

"179B. A member holds office on such terms and conditions (if any) in respect of matters not provided for by this Act as the Minister determines in writing.".

(26) Page 67, clause 190, line 31, leave out "2', insert "3'.

ESTABLISHMEINT OF PARLIAMENTARY COMMITTEE

(27) Page 2, clause 3, lines 13 and 14, leave out "and an Accounting Standards Review Board", insert ". an Accounting Standards Review Board and a Parliamentary Joint Committee on Corporations and Securities".

(28) Page 5, clause 5, before the definition of "information" insert the following definition:

"'House' means a House of the Parliament:".

(29) Page 5, clause 5, line 11, leave out "or 12.", insert ", 12 or 12B,".

(30) Page 5, clause 5, line 13, leave out "or the Review Board", insert the Review Board or the Parliamentary Committee".

(31) Page 5, clause 5, at the end of the definition of "member" add the following paragraph:

"(f) in Part 12B or in relation to the Parliamentary Committee-a member of the Parliamentary Committee;".

(32) Page 5, clause 5, after the definition of "Panel" insert the following definition:

"'Parliamentary Committee' means the Parliamentary Joint Committee on Corporations and Securities;".

(33) Page 81, before Part 13 insert the following new Part:

**"PART 12B-THE PARLIAMENTARY COMMITTEE**

**Establishment and membership**

"230FA. (1) As soon as practicable after the commencement of this Part and after the commencement of the first session of each Parliament, a joint committee of members of the Parliament, to be known as the Parliamentary Joint Committee on Corporations and Securities, shall be appointed.

"(2) The Parliamentary Committee -shall consist of 10 members, of whom:

(a) 5 shall be senators appointed by the Senate; and

(b) 5 shall be members of the House of Representatives appointed by that House.

"(3) The appointment of members by a House shall be in accordance with that House's practice relating to the appointment of members of that House to serve on joint select committees of both Houses.

"(4) A person is not eligible for appointment as a member if he or she is:

(a) a Minister;

(b) the President of the Senate;

(c) the Speaker of the House of Representatives;

(d) the Deputy-President and Chairman of Committees of the Senate; or

(e) the Chairman of Committees of the House of Representatives.

"(5) A member ceases to hold office:

(a) when the House of Representatives expires by effluxion or time or is dissolved;

(b) if he or she becomes the holder of an office referred to in a paragraph of subsection (4);

(c) if he or she ceases to be a member of the House by which he or she was appointed; or

(d) if he or she resigns his or her office as provided by subsection (6) or (7), as the case requires.

"(6) A member appointed by the Senate may resign his or her office by writing signed and delivered to the President of the Senate.

"(7) A member appointed by the House of Representatives may resign his or her office by writing signed and delivered to the Speaker of that House.

"(8) A House may appoint one of its members to fill a vacancy among the members of the Parliamentary Committee appointed by that House.

**Powers and proceedings**

"230FB. All matters relating to the Parliamentary Committee's powers and proceedings shall be determined by resolution of both Houses.

**Duties**

"230FC. The Parliamentary Committee's duties are:

(a) to inquire into, and report to both Houses on:

(i) activities of the Commission or the Panel, or matters connected with such activities, to which, in the Parliamentary Committee's opinion, the Parliament's attention should be directed; or

(ii) the operation of any national scheme law, or of any other law of the Commonwealth, of a State or Territory or of a foreign country that appears to the Parliamentary Committee to affect significantly the operation of a national scheme law;

(b) to examine each annual report that is prepared by a body established by this Act and of which a copy has been laid before a House, and to report to both Houses on matters that appear in, or arise out of, that annual report and to which, in the Parliamentary Committee's opinion, the Parliament's attention should be directed; and

(c) to inquire into any question in connection with its duties-; that is referred to it by a House. and to report to that House on that question.".

Printed by -Authority by the Commonwealth Government Printer (235 87)

1987-88-89

THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

THE SENATE

**CORPORATIONS BILL 1988**

(*Amendments and new clauses recommended by the Joint Select Committee on Corporations Legislation*)

[Note: The amendments are grouped by subject matter, but within each group are arranged according to the order of the provisions amended. Further consequential amendments may be required.]

ASSOCIATES OF BODIES CORPORATE

(1) Page 43, clause 11, line 32, leave out executive officer".

(2) Page 43, clause 11, line 34, leave out executive officer".

EXCLUDED ISSUES, OFFERS AND INVITATIONS

(3) Page 63, clause 66 of the Bill and Amendment No. 19 on pages 3 to 6 of the Schedule of the Amendments made by the House of Representatives, before subclause (1) insert the following subclause:

"(1A) In this section:

‘class', in paragraphs (1) (e) and (2) (e), has a meaning affected by subsections (3) and (4);

'listed corporation' means a corporation that is included in an official list of a stock exchange within the meaning of Chapter 7;

‘prospectus' means a prospectus:

(a) that was lodged under Part 7.12 or a corresponding law; and

(b) if that Part or law, as the case may be, required the prospectus, or a copy of it, to be registered under that Part or law-that, or a copy of which, as the case may be, was so registered.".

[48]-7/13.4.1989-(48/88) Amdt

(4) Page 63, clause 66 of the Bill and Amendment No. 19 on pages 3 to 6 of the Schedule of the Amendments made by the House of Representatives, leave out paragraph (1) (b).

(5) Page 63, clause 66 of the Bill and Amendment No. 19 on pages 3 to 6 of the Schedule of the Amendments made by the House of Representatives, insert in paragraph (1) (e) "except in the case of prescribed interests or units of prescribed interests -" before "both".

(6) Page 63, clause 66 of the Bill and Amendment No. 19 on pages 3 to 6 of the Schedule of the Amendments made by the House of Representatives, leave out of sub-subparagraph (1) (e) (ii) (B) "25", insert "20".

(7) Page 63, clause 66 of the Bill and Amendment No. 19 on pages 3 to 6 of the Schedule of the Amendments made by the House of Representatives, insert in paragraph (1) (g) "by a listed corporation" after "allotted".

(8) Page 63, clause 66 of the Bill and Amendment No. 19 on pages 3 to 6 of the Schedule of the Amendments made by the House of Representatives, insert in subparagraph (I ) (h) (ii) "the corporation is a listed corporation and" before "the shares".

(9) Page 63, clause 66 of the Bill and Amendment No. 19 on pages 3 to 6 of the Schedule of the Amendments made by the House of Representatives, leave out paragraph (1) 0), insert the following paragraphs:

"(ja) in the case of an issue of debentures (other than convertible notes) of a corporation-it is made to existing holders of debentures (other than convertible notes) of the corporation;

(jb) in the case of an issue of convertible notes by a corporation-it is made to existing holders of convertible notes issued by the corporation;

(j) the securities are debentures of an excluded corporation;".

(10) Page 63, clause 66 of the Bill and Amendment No. 19 on pages 3 to 6 of the Schedule of the Amendments made by the House of Representatives, leave out paragraph (2) (b).

(11) Page 63, clause 66 of the Bill and Amendment No. 19 on pages 3 to 6 of the Schedule of the Amendments made by the House of Representatives, insert in paragraph (2) (e) "except in the case of prescribed interests or units of prescribed interests -" before "it is made or issued".

(12) Page 63, clause 66 of the Bill and Amendment No. 19 on pages 3 to 6 of the Schedule of the Amendments made by the House of Representatives, leave out of subparagraph (2) (e) (ii) "425", insert "20".

(13) Page 63, clause 66 of the Bill and Amendment No. 19 on pages 3 to 6 of the Schedule of the Amendments made by the House of Representatives, leave out paragraph (2) (h), insert the following paragraphs:

"(ha) in the case of debentures (other than convertible notes) of a corporation-it is made or issued to existing holders of debentures (other than convertible notes) of the corporation;

(hb) in the case of convertible notes issued, or to be issued, by a corporation-it is made or issued to existing holders of convertible notes issued by the corporation;

(h) the securities are debentures of an excluded corporation;".

(14) Page 63, clause 66 of the Bill and Amendment No. 19 on pages 3 to 6 of the Schedule of the Amendments made by the House of Representatives, leave out' subclause (3), insert the following subclauses:

"(3) For the purposes of paragraphs (1) (e) and (2) (e):

(a) a share in a corporation is of the same class of securities as any other share in the corporation; and

(b) a debenture of a corporation is of the same class of securities as any other debenture of the corporation.

"(4) For the purposes of subsection (3):

(a) a unit of a share in a corporation shall be taken to be a share in the corporation; and

(b) a convertible note issued, or to be issued, by a corporation, or a unit of such a convertible note, shall be taken to be both a share in, and a debenture of, the corporation.".

REGISTRATION OF PART A STATEMENTS AND OFFERS

(15) Page 468, clause 644, lines 23 to 37, leave out subclauses (2) and (3), insert the following subclauses:

"(2) Subject to subsections (3) and (3A), the Commission shall register the copies.

"(3) The Commission shall refuse to register the copies if:

(a) it appears that the statement or the proposed offer does not comply, or that neither complies, with the requirements of this Act; or

(b) the Commission is of the opinion that the statement or the proposed offer contains, or that both contain, matter that is false in a material particular or materially misleading.

"(3A) The Commission shall refuse to register the copies unless, in relation to each report that, because of clause 18 in Part A in section 750, is set out in the copy of the statement, there is lodged a notice, signed by the person or persons by whom the report is made, to the effect that the

person, or each of the persons, consents to the inclusion of the report in the statement in the form and context in which it is included.".

DISSENTING SHAREHOLDERS

(16) Page 506, clause 701, lines 23 to 28, leave out subparagraph (2) (c) (i), insert the following subparagraph:

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

POWER TO OBTAIN INFORMATION ABOUT BENEFICIAL OWNERSHIP OF SHARES

(17) Page 522, line 26, leave out "OF COMMISSION".

(18) Page 522, clause 717, line 33, leave out "Commission", insert "body giving the notice".

(19) Page 523, clause 717, line 18, leave out "Commission", insert "body giving the notice".

(20) Page 523, clause 718, at the end of the clause add the following subclauses:

"(2) A company that is a corporation, or a member of such a company, may by writing request the Commission to give notices

under this Part in relation to specified voting shares in the company.

"(3) On receiving a request under subsection (2), the Commission shall, unless it considers that in all the circumstances it would be unreasonable to do so, give to the holder of the shares a primary notice in relation to the shares.

"(4) A company that is a corporation may give to the holder of particular voting shares in the company a primary notice in relation to the shares.".

(21) Page 524, clause 719, lines 3 and 4, leave out all the words from and including "the Commission" to the end of the clause, insert the following:

"the Commission:

(a) if subsection 718 (3) or this subsection required the notice to be given-shall, subject to subsection (2); or

(b) otherwise-may;

give to the other person a secondary notice in relation to the first-mentioned shares.".

(22) Page 524, clause 719, at the end of the clause add the following subclauses:

"(2) The Commission need not comply with subsection (1) if it considers that in all the circumstances it would be unreasonable to give such a secondary notice to the other person.

"(3) Where a company that is a corporation receives, pursuant to a primary notice or secondary notice given to a person in relation to particular shares in the company, information that:

(a) another person has a relevant interest in any of the shares; or

(b) another person has given relevant instructions in relation to any of the shares;

the company may give to the other person a secondary notice in relation to the first-mentioned shares.".

(23) Page 524, after clause 719 insert the following new clause:

**Withdrawal of request under subsection 718(2)**

"719A. (1) A person may by writing withdraw a request made by the person under subsection 718 (2), even if the Commission has already given at least one notice because of the request.

"(2) After a request is withdrawn under subsection (1), neither of subsections 718 (3) and 719 (1) requires the Commission to give a notice or further notice because of the request.".

(24) Page 524, clause 720, lines 5 to 9, leave out the clause, insert the following clause:

**Commission may provide information obtained pursuant to a notice**

"720. Where the Commission receives information pursuant to a primary notice or secondary notice in relation to shares in a company that is a corporation, the Commission:

(a) in any case-may provide the information to the company; and

(b) if, because of a request made by a person under subsection 718 (2), subsection 718 (3) or 719 (1) required the notice to be given-shall provide the information to the person, other than such of the information as the Commission considers that it would be unreasonable in all the circumstances so to provide.".

(25) Page 524, clause 721, lines 15 to 17, leave out paragraphs (1) (a) and (b), insert the following paragraphs:

(a) the information should not be given to the body that gave the notice;

(b) if the Commission gave the notice-the information, if given to the Commission, should not be provided under section 720, or should be so provided only in a particular form; or

(c) if the company gave the notice-the information should only be given to the company in a particular form.".

(26) Page 524, clause 721, lines 18 to 28, leave out subclause (2), insert the following subclause:

"(2) Where the Commission is satisfied that there are special reasons why:

(a) particular information should not be given to the body that gave the notice;

(b) if the Commission gave the notice-particular information, if given the Commission, should not be provided under section 720, or should be so provided only in a particular form; or

(c) if the company gave the notice-particular information should only be given to the company in a particular form;

the Commission may give to the person a certificate referring to the information and stating that:

(d) the information need not be given to that body;

(e) the information, when given to the Commission, will not be provided under section 720, or will be so provided only in a specified form; or

(f) the information need only be given to the company in a specified form;

as the case may be.".

(27) Page 524, clause 722, line 37, leave out "to the company".

(28) Page 524, clause 722, at the end of the clause add the following subclause:

"(2) Where a company that is a corporation gives to a person a primary notice or secondary notice in relation to shares in the company, the person shall, forthwith after lodging a request under subsection 721 (1) in relation to particular information

that the notice requires the person to give, notify the company in writing of the request.".

(29) Page 524, clause 723, fines 39 to 42 and page 525, lines 1 to 17, leave out the clause, insert the following clause:

**Consequences of Commission's decision on a request**

"723. Within 2 business days after the day on which the Commission notifies a person of its decision on a request that the person lodged under subsection 721 (1) in relation to a primary notice or secondary notice in relation to shares in a company that is a corporation, the person shall:

(a) if the Commission has given to the person pursuant to the request a certificate under subsection 721 (2):

(i) except as provided in the certificate, comply with the notice;

(ii) if the company gave the notice and the certificate states that specified information need only be given to the company in a specified form-give the information to the company in that form; and

(iii) if the company gave the notice-give a copy of the certificate to the company; or

(b) otherwise-comply with the notice.".

(30) Page 526, clause 727, line 40, leave out "to the Commission".

(31) Page 526, clause 727, line 42, leave out "to the Commission".

(32) Page 539, clause 742, line 1, leave out "to the Commission".

INTERIM ORDERS MADE BY THE PRESIDENT OF THE PANEL

(33) Page 532, clause 735, lines 19 and 20, leave out "may, if in the opinion of the Panel it is desirable to do so, before considering the application, make", insert "or the President of the Panel may, if in the opinion of the Panel or President, as the case may be, it is desirable to do so, make, before the Panel considers the application,".

(34) Page 532, clause 735, lines 22 to 25, leave out all the words from and including "application," to the end of the subclause, insert “application.”.

(35) Page 532, clause 735, after subclause (2) insert the following subclauses:

"(2A) The provisions of subsections 734 (3), (4), (5) and (7), of subsections (3), (4),, (5) and (6) of this section, and of section 736, apply in relation to an interim order under subsection (2) of this section as if such an order were an order under subsection 734 (2).

"(2B) In addition to, and without limiting, their application as mentioned in subsection (2A), the provisions referred to in that subsection apply, as so mentioned, as if the President were the Panel.".

AGREEMENTS WITH UNLICENSED DEALERS AND

INVESTMENT ADVISERS

(36) Pages 585 to 587, clauses 798 to 804 of the Bill and Amendment No. 107 on page 13 of the Schedule of the Amendments made by the House of Representatives, leave out the clauses, insert the following clauses:

**Non-licensee not entitled to recover commission**

"802. The non-licensee is not entitled to recover by any means (including, for example, set-off or a claim on a *quantum meruit*) any brokerage, commission or other fee for which the client would, but for this section, have been liable to the non-licensee under or in connection with the agreement.

**Recovery of commission paid to non-licensee**

"804. (1) The client may recover from the non-licensee as a debt the

amount of any brokerage, commission or other fee that the client has paid to the non-licensee under or in connection with the agreement.

"(2) The Commission may, if the Commission considers it to be in the public interest to do so, bring an action under subsection (1) in the name of, and for the benefit of, the client.".

REGISTRABLE PROSPECTUSES

(37) Page 704, clause 1017A of the Bill and Amendment No. 147 on pages 17 to 19 of the Schedule of the Amendments made by the House of Representatives, leave out of subclause (1) the definition of "declared institutional investor", insert the following definition:

'exempt recipient' means:

(a) the trustee of a superannuation fund constituted by or under a law of the Commonwealth, of a State, of a Territory or of a foreign country;

(b) a holder of a dealers licence acting as principal;

(c) a corporation registered under the Life Insurance Act 1945 or the Financial Corporations Act 1974;

(d) an investment company within the meaning of Part 4.4;

(e) the trustee of a trust that is declared by the Commission to be an equity unit trust for the purposes of this section and

in respect of which there is an approved deed for the purposes of Division 5; or

(f) a person declared by the Commission, by notice published in the Gazette, to be an institutional investor for the purposes of this section;".

(38) Page 704, clause 1017A of the Bill and Amendment No. 147 on pages 17 to 19 of the Schedule of the Amendments made by the House of Representatives, leave out of sub clause (1) the definition of "'listed unit trust".

(39) Page 704, clause 1017A of the Bill and Amendment No. 147 on pages 17 to 19 of the Schedule of the Amendments made by the House of Representatives, leave out subclauses (3) and (4), insert the following subclauses:

"(3) A prospectus in relation to shares in, or debentures of, a corporation is exempt from registration under section 1020A if:

(a) the shares or debentures, as the case may be, are in a class of shares in, or debentures of, the corporation that are listed for quotation on a stock market of a stock exchange; or

(b) the relevant allotment, issue, offer or invitation is proposed to be made or issued:

(i) in the case of shares-to existing members of the corporation;

(ii) in any case-to an exempt recipient; or

(iii) if the corporation is a listed corporation, or is an approved unlisted corporation in relation to shares in the corporation, or debentures of the corporation, as the case may be-to employees of the corporation.

"(4) A prospectus in relation to prescribed interests made available by a corporation is exempt from registration under section 1020A if the relevant issue, offer or invitation is proposed to be made or issued:

(a) in any case-to an exempt recipient; or

(b) if the corporation is a listed corporation, or is an approved unlisted corporation in relation to prescribed interests made available by it-to employees of the corporation.".

EXEMPTION FOR SECONDARY TRADING IN ISSUED SECURITIES IN A CLASS LISTED FOR QUOTATION AT COMMENCEMENT OF PART 7.12

(40) Page 703, clause 1016, lines 20 to 24, leave out paragraph (3) (a), insert the following paragraphs:

"(aa) subsection 1018 (1) were omitted and the following subsection substituted:

'(1) A person shall not, by the use of an eligible communications service, offer for subscription or purchase, or issue invitations to subscribe for or buy, securities of a body corporate unless:

(a) a prospectus in relation to the securities has been lodged;

(b) the prospectus complies with the requirements of this Division; and

(c) if the prospectus is a registrable prospectus-it has been registered under section 1020A.';

(a) a reference to a corporation in any other provision of section 1018 were a reference to a body corporate;".

(41) Page 704, clause 1018 of the Bill and Amendment No. 148 on pages 19 and 20 of the Schedule of the Amendments made by the House of Representatives, after subclause (1) insert the following subclauses:

"(1A) Subsection (1) does not apply in relation to an offer for purchase of, or an invitation to buy, issued securities that are in a class of securities of a corporation, if, throughout the period beginning immediately before the commencement of this section and ending immediately after the offer is made, or the invitation is issued, as the case may be, securities in that class were listed securities.

"(1B) In subsection (1A):

'issued securities' means securities issued before, at or after the commencement of this section;

'listed securities' means securities listed for quotation on a stock market of a stock exchange.

"(1C) Subsection (1A) does not apply in relation to:

(a) an offer to which section 1030 relates; or

(b) an invitation that, because of subsection 1030 (7), is deemed to be such an offer,".

LOOSE-LEAF FORM OF APPLICATION FOR DEBENTURES

(42) Page 703, clause 1016 of the Bill and Amendment No. 145 on page 17 of the Schedule of the Amendments made by the House of Representatives, leave out paragraph (a) of the substituted section 1020, insert the following paragraphs:

"(aa) if the securities are debentures-the form is attached to, or accompanied by, a copy of a prospectus;

(a) otherwise-the form is attached to a copy of a prospectus;".

(43) Page 704, clause 1020 of the Bill and Amendment No. 149 on page 20 of the Schedule of the Amendments made by the House of Representatives, leave out paragraph (a), insert the following paragraphs:

"(aa) if the securities are debentures-the form is attached to, or accompanied by, a copy of a prospectus;

(a) otherwise-the form is attached to a copy of a prospectus;".

(44) Page 708, clause 1025, lines 28 and 29, leave out "and attached to a copy of the prospectus; and", insert the following:

"and:

(i) if the securities are debentures-attached to, or accompanied by; or

(ii) otherwise-attached to;

a copy of the prospectus; and".

(45) Page 722, clause 1047, line 38, after "to" insert", or accompanied by,”

TIME LIMIT FOR REGISTRATION OF PROSPECTUS

(46) Page 704, clause 1020A of the Bill and Amendment No. 150 on page 20 of the Schedule of the Amendments made by the House of Representatives, before "unless" insert "within the prescribed period".

PROSPECTUS TO SET OUT LIABILITY OF PERSONS NAMED

(47) Page 705, clause 1021, after subclause (6) insert the following subclause:

“(6A) The prospectus shall set out, in relation to each of the kinds of person respectively referred to in the paragraphs of subsection 1006 (2):

(a) the name of each person of that kind; and

(b) the prescribed statement about the liability that a person of that kind has in relation to the prospectus.".

BUY-BACK COVENANT IN APPROVED DEED

(48) Page 751, clause 1074, after paragraph (1) (b) insert the following paragraph:

"(c) without limiting the generality of paragraph (b), in the opinion of the trustee or representative, the management company has contravened, or is about to contravene:

(i) a buy-back covenant contained in the deed; or

(ii) a covenant contained in the deed under paragraph 1069 (1) (d);".

(49) Page 751, clause 1074, line 34, after "set out" insert "in".

Printed by Authority by the Commonwealth Government Printer

Appendix 1

Individuals and organisations who made a written submission to the Committee

| | Submission Number |
|---|---|
| Arthur Robinson & Hedderwicks, Solicitors & Notary, Melbourne, Vic | 39 |
| Association of Investment & Financial Planners, Spring Hill, Qld | 9 |
| Australian Automobile Dealers Association, Canberra, A.C.T. | 29 |
| Australian Finance Conference, Sydney, N.S.W. | 19 |
| Australian Friendly Societies Association, Deakin, A.C.T. | 47 |
| Australian Public Service Federation, Carlton, Vic | 3 |
| Australian Shareholders' Association Ltd, Sydney, N.S.W. | 25 |
| Australian Society of Accountants, Melbourne, Vic. | 41 |

Appendix 2

Individuals and organisations who appeared before the Committee

| Individual or Organisation | Represented by | Page |
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| Attorney-General's Department<br>Adelaide, S.A. | Mr J J Doyle | 758 |
| Attorney-General's Department<br>Canberra, A.C.T. | Mr D Davies | 1263 |
| | Mr B O'Callaghan | 1263 |
| | Mr S Skehill | 1263 |
| | Mr M Starr | 1263 |
| Australian Accounting Research Foundation | Mr M Sadhu | 421 |
| Australian Finance Conference | Mr J M Bills | 1246 |
| Australian Shareholders Association | Prof R G Walker | 112 |
| Australian Society of Accountants | Ms E Alexander | 421 |
| | Mr M F McKenna | 421 |
| Australian Stock Exchange Ltd | Mr J G Campbell | 246 |
| | Mr R L Coppel | 246 |
| | Mr N O'Bryan | 246 |

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| Business Council of Australia | Mr | M A Besley | 1150 |
| | Mr | R T Halstead | 1150 |
| | Mr | W R McComas | 1150 |
| | Mr | C Speed | 1150 |
| | Mr | R A St John | 1150 |
| Clarke & Kann, Solicitors, Brisbane | Mr | D McDonough | 738 |
| Companies and Securities Consultative Group | Mr | M Burrows | 39 |
| | Mr | C Peters | 39 |
| | Mr | A E Vrisakis | 39 |
| Company Directors' Association of Australia, Sydney, N.S.W. | Mr | C Peters | 39 |
| Confederation of Australian Industry | Mr | R C Gardini | 1193 |
| | Mr | D S George | 1193 |
| | Warren, Mr R K | | 1082 |
| S.A. Corporate Affairs Commission | Mr | S T Lane | 758 |
| | Mr | C J Sumner | 758 |
| Queensland Corporate Affairs Commission | Mr | J V M Green | 635 |

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| A.C.T. Corporate Affairs Commission | Mr J D Pinkerton | 1263 |
| Victoria Corporate Affairs Commission | Mr R C Trevethan | 331 |
| W.A. Corporate Affairs Department | Mr J M P Hein | 1018 |
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| | Mr J G Lightowlers | 1018 |
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| | Mr M P O'Connor | 1018 |
| | | 1082 |
| Council of Small Business Organisations of Australia | Mr R A Bastian | 1187 |
| Feez Ruthning, Solicitors & Notaries | Miss E Feros | 699 |
| Brisbane | Mr A E Knox | 699 |
| Freehill, Hollingdale & Page, Sydney, N.S.W. | Mr J M Green | 1106 |
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| in Australia | Mr V A Prosser | 421 |
| | Mr M J Ullmer | 421 |
| Institute of Directors in Australia | Mr D F Wicks | 823 |

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| Institute of Directors in Australia | Mr J McG Florence | 724 |
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| | Mr L J S ervington | 854 |
| | Mr A G Thompson | 854 |
| Western Australian Parliamentary Liberal Party | Mr I G Medcalf | 1063 |
| | Mr A Mensaros | 1063 |