Parliament of the Commonwealth of Australia

House of Representatives
Standing Committee on Legal and Constitutional Affairs

FAIR SHARES FOR ALL

INSIDER TRADING IN AUSTRALIA

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FOREWORD

Insider trading has become a matter of increasing concern within the securities industry and among the wider community in the last few years. With the October 1987 share market crash still in our minds, the need to promote investor confidence in the securities markets has seen greater attention focussed on the extent and effects of practices such as insider trading. This report presents the findings of an inquiry by the House of Representatives Standing Committee on Legal and Constitutional Affairs into the adequacy of the existing legislative and administrative controls over insider trading.

The Committee thanks all interested individuals and organisations for their assistance and support during the inquiry. It is also grateful for the specialist advice provided by Professor Roman Tomasic and Mr Brendan Pentony.

As Chairman, I would like to thank the Deputy Chairman, Mr Warwick Smith, MP, and my fellow Committee members for the time and effort they devoted to the inquiry. Thanks are also due to the Secretary of the Committee, Mr Jon Stanhope, as well as to Mr Andres Lomp, principal research officer for the inquiry, and Ms Natalie Raine.

This report seeks to introduce significant reforms in relation to the prevention of insider trading in Australia. Adoption of the recommendations will be an important and much needed step towards ensuring the integrity of Australia's securities markets.

ALAN GRIFFITHS, MP
Chairman

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TERMS OF REFERENCE

To examine, inquire into and report on the adequacy of existing legislative controls over insider trading and other forms of market manipulation, with particular reference to:

(1) the extent of insider trading and other forms of market manipulation, and steps necessary to safeguard public and investor confidence and market efficiency;

(2) the adequacy of existing or proposed legislation; and

(3) the role and effectiveness of the National Companies and Securities Commission and its State delegates in implementing the relevant sections of the *Securities Industry Act 1980* and the *Companies Act 1981*.

ABBREVIATIONS

AMP	Australian Mutual Provident Society
Anisman report	P. Anisman, *Insider Trading Legislation For Australia: An Outline Of The Issues and Alternatives*, AGPS, Canberra, 1986
ASC	Australian Securities Commission
ASX	Australian Stock Exchange Limited
BCA	Business Council of Australia
Campbell Committee	Committee of Inquiry into the Australian Financial System
Committee	House of Representatives Standing Committee on Legal and Constitutional Affairs
Corporations Committee	Joint Select Committee on the Corporations Legislation
Hooker Investments case	*Hooker Investments Pty Ltd v Baring Bros Halkerston and Partners Securities Ltd & Ors* (1986) 10 ACLR 524
ICAA	Interstate Corporate Affairs Agreement
ICAL case	*ICAL Limited v County Natwest Securities Australia Limited & Anor* (1988) 13 ACLR 129
LCA	Law Council of Australia
Macquarie Bank	Macquarie Bank Limited
Ministerial Council	Ministerial Council for Companies and Securities
NCSC	National Companies and Securities Commission
Rae Committee	Senate Select Committee on Securities and Exchange
SEC	Securities Exchange Commission, United States of America

Scope of the legislation

The broad thrust of the evidence indicated a need to redraft the insider trading provisions, and, in so doing, to simplify the legislation. Much of the uncertainty which currently exists can be contributed to the confusing language and format of the provisions. Minor amendments to the legislation would be insufficient to overcome the range of deficiencies identified.

Recommendation 1

The Committee recommends that the existing insider trading provisions be redrafted and simplified, with clear and practical definitions of the offence of insider trading. (paragraph 4.2.12)

Definition of an insider

It is the use of information, rather than the connection between a person and a corporation, which should be the basis for determining whether insider trading has occurred. Concurrently, it should be put beyond doubt that the provisions extend to corporations as well as to natural persons. However, there needs to be an exception in relation to the entering into of underwriting agreements.

Recommendation 2

The Commitee recommends that the insider trading provisions be amended to provide that a person (including a corporation) who is in possession of inside information, and who knows or ought reasonably to know that it is inside information, shall not use that information to trade in or subscribe for the securities of the company or an associated company which is the subject of the information. There should be an exception to this rule to permit an underwriter to subscribe for and sell any securities which it is required to take up as a consequence of an underwriting agreement. (paragraph 4.3.7)

Inside information

To be relevant to the offence of insider trading, the information used as the basis for such trading must be likely to affect the price of the securities in a material way. However, as the existing provisions offer no guidance on how the question of materiality should be resolved, the Committee supports the enactment of a statutory definition of materiality.

The Committee sees merit in establishing the concept of 'inside information' in the legislation, as it would assist in simplifying the language of the provisions, with the likely result that there will be a greater awareness of what the legislation is seeking to achieve. An appropriate definition of inside information would include the adoption of a reasonable person test as the means for establishing materiality within the framework of the definition.

Recommendation 3

The Committee recommends that, consequent upon Recommendation 2, a statutory definiton of inside information be included in the insider trading provisions. That definition should provide that inside information is information which is not generally available, but, if it were, a reasonable person could expect it to have a material effect on the price or value of the securities issued by the company which is the subject of the information. (paragraph 4.4.17)

Availability of information

As the term 'generally available' in relation to inside information is critical in determining whether insider trading has occurred, uncertainty about its application indicates a need to clarify the concept. The concept of general availability should be defined by providing that the information should be available to a reasonable investor, and by requiring a reasonable time period for the dissemination of information. In addition, guidelines should be issued by the regulatory agencies on appropriate methods for disclosure of information.

Recommendation 4

The Committee recommends that, for the purposes of the insider trading provisions, information be defined as generally available where it is disclosed in a manner which would, or would be likely to bring it to the attention of a reasonable investor, and where a reasonable period of time for the dissemination of the information has elapsed. (paragraph 4.5.9)

Recommendation 5

The Committee recommends that the National Companies and Securities Commission/Australian Securities Commission issue guidelines to assist the commercial community in determining appropriate methods for disclosure of information. (paragraph 4.5.10)

Securities and options

Trading in prescribed interests, options and convertible securities should be subject to the insider trading provisions in an identical manner to trading in securities. The integrity of the securities markets could be severely damaged if a

loophole in the legislation allowed insiders to reap substantial profits simply by using an interpretation of the scope of the legislation to avoid the insider trading prohibition.

Recommendation 6

The Committee recommends that the insider trading provisions be amended to ensure that the prohibition on insider trading extends to unit trusts and other prescribed interests, exchange traded options and convertible securities. (paragraph 4.6.10)

Tippees

The existing tippee provision is deficient. The need to demonstrate an association or arrangement between a tippee and an insider is an unnecessary and complicating factor. It detracts from the objective of the provision, which is to prevent persons (including corporations) from using inside information received from insiders to trade in or subscribe for the securities of the company which is the subject of the information. The most appropriate solution to the deficiencies of the tippee provision is to include tippees within the definition of an insider.

Recommendation 7

The Committee recommends that the insider trading provisions be amended to provide that tippees are included in the definition of an insider outlined in Recommendation 2. (paragraph 4.7.10)

Tipping

While the tipping provision needs to be redrafted, consistent with the Committee's earlier recommendation for redrafting and simplifying the insider trading provisions, the Committee is not convinced that the tipping provision should be extended to cover dealings in all securities, rather than only listed securities. Persuasive arguments have not been put forward to indicate that a change is warranted in this regard.

Recommendation 8

The Committee recommends that, consistent with Recommendation 1, the existing provision on tipping be redrafted and simplified, but that the provision continue to cover only listed securities. (paragraph 4.8.8)

Chinese Walls

The competitive advantage which currently exists for incorporated dealers and investment advisers should be removed by providing that the Chinese Wall defence is available to both corporate and non-corporate dealers.

Recommendation 9

The Committee recommends that the insider trading provisions be amended to provide that the Chinese Wall defence is available to both corporate and non-corporate dealers. (paragraph 4.9.9)

Onus of proof

The Committee has made a number of recommendations aimed at clarifying and simplifying the existing provisions on insider trading. Many of these recommendations already remove the more difficult elements of proof for the prosecution. Accordingly, the Committee does not support the proposals for reversing the onus of proof in relation to insider trading.

Recommendation 10

The Committee recommends that the onus of proof in relation to insider trading should remain on the prosecution. (paragraph 4.10.10)

Penalties

In an environment in which the motives are profit, and in which the levels of profit, or losses avoided, can be substantial, maximum penalties of $20,000 for a natural person and $50,000 for a body corporate are grossly inadequate. Instead, a truly effective deterrent to insider trading must strike at the objective of that trading, i.e. the profit realised or the loss avoided. Those who would contemplate insider trading must be put on notice that they risk losing everything which could be gained from the transaction in question, as well as damaging their capacity to operate within the securities industry. They should also suffer an additional loss as a penalty for committing the offence. That additional penalty should have some correlation with the profit realised or the loss avoided.

Recommendation 11

The Committee recommends that the existing penalties for insider trading be amended so that the penalties are:

- **in the case of a natural person, the amount of profit realised or loss avoided, plus an additional penalty equivalent to that profit or loss, or $100,000, whichever is the greater, or five years imprisonment, or both; and**
- **in the case of a body corporate, the amount of profit realised or loss avoided, plus an additional penalty equivalent to that profit or loss, or $500,000, whichever is the greater. (paragraph 4.12.20)**

Adoption of a penalty which is expressed in terms of double the amount of profit made or loss avoided may have implications in relation to other equally serious offences within the framework of corporate law. This does not deter the Committee from recommending what it considers to be an appropriate penalty for

the crime in question. Rather, it suggests that a review of the penalties currently applicable to other corporate and securities offences is required, to determine whether those penalties are adequate.

Recommendation 12

The Committee recommends that, consequent upon amending the penalties for insider trading, the Attorney-General's Department undertake a review of the adequacy of all penalties applicable in relation to corporate and securities offences. (paragraph 4.12.21)

Civil remedies

The current approach to civil remedies, which allows compensation for victims of insider trading but does not include an additional civil penalty, should be retained. The Committee generally supports the existing policy that the appropriate method of providing additional punishment beyond confiscation of profits is by criminal sanction. However, as there was wide support for increasing the deterrence value of civil remedies, it would be appropriate to empower the courts to make a wider variety of orders in relation to insider trading matters.

Recommendation 13

The Committee recommends that the courts be empowered to make a wider variety of orders in relation to insider trading matters. The orders should be similar to those available where a person is found guilty of unacceptable conduct in the context of a takeover, and could include orders:

- **restraining the exercise of voting or other rights attached to shares;**
- **directing the disposal of shares;**
- **vesting shares in the National Companies and Securities Commission/Australian Securities Commission;**
- **cancelling a contract or arrangement for the acquisition or sale of shares; and**
- **removing a professional's licence. (paragraph 4.13.15)**

The Committee confirms that criminal actions and civil actions should remain completely separate. The legislation should clearly provide that the lack of a *criminal conviction must not be a barrier to a successful civil action.*

Recommendation 14

The Committee recommends that the remedy provisions for insider trading should clearly provide that the lack of a criminal conviction for insider trading is not a barrier to a successful action for damages. (paragraph 4.13.16)

Enforcement of the provisions

The increased focus on insider trading adopted recently by the National Companies and Securities Commission (NCSC) and its State delegates is an important and much needed step in efforts to improve public and investor confidence in the integrity of the securities markets. If Australia is to increase its current levels of investment, the importance of which cannot be overemphasised, then potential investors among the public must have confidence in the integrity of the securities markets. That confidence can only be guaranteed if investors are sure that they will not be placed at a disadvantage by those who are in possession of inside information.

Recommendation 15

The Committee recommends that the detection, investigation and prosecution of insider trading be retained as an enforcement priority of the National Companies and Securities Commission/Australian Securities Commission. (paragraph 5.3.13)

In relation to the anticipated changeover from the NCSC to the Australian Securities Commission (ASC), the Committee considers that any insider trading matters under investigation by the NCSC and its delegates at the time of the changeover must be given full and proper consideration by the ASC and its delegates.

Recommendation 16

The Committee recommends that, in the changeover from the National Companies and Securities Commission to the Australian Securities Commission, appropriate transitional arrangements be implemented to ensure that any outstanding insider trading matters under investigation by the National Companies and Securities Commission and its delegates are given full and proper consideration by the Australian Securities Commission and its delegates. (paragraph 5.3.14)

Adequacy of resources

If those with the potential to engage in insider trading are to be deterred from such activity, there must be a significant likelihood of detection. With the complexity of today's financial markets, this necessarily involves detailed computer systems and sufficient trained staff to operate those systems. Clearly, Australia's capabilities in this regard can be improved.

Recommendation 17

The Committee recommends that adequate resources be made available to the National Companies and Securities Commission/ Australian Securities Commission to allow the establishment of detailed computer systems for monitoring securities trading, along with adequate corporate databases and sufficient operations staff. (paragraph 5.4.12)

International co-operation

There is no doubt that an increase in transnational trading in securities, coupled with the accessibility of worldwide markets and the potential for round the clock trading, has made insider trading a problem which extends beyond national boundaries. As such, there is a definite need to promote co-operation between national regulatory agencies. It is only through international co-operation that the problem of insider trading being perpetrated offshore can be dealt with adequately.

Recommendation 18

The Committee recommends that the Australian Government pursue the development of Memorandums of Understanding with other countries which have active securities markets. The Memorandums of Understanding should provide the basis for co-operation in the detection and investigation of practices such as insider trading. (paragraph 5.5.6)

Recommendation 19

Consequent upon Recommendation 18, the Committee recommends that the National Companies and Securities Commission/Australian Securities Commission be provided with sufficient powers for the purpose of co-operating with overseas regulatory agencies in the detection and investigation of practices such as insider trading. (paragraph 5.5.7)

The role of the stock exchanges

The stock exchanges in Australia clearly have a vital role to play in protecting the integrity of the securities markets. This role extends not only to monitoring trading activity, to ensure that any irregularities are brought to the attention of the regulatory agencies for investigation, but also includes the oversight of its members' activities, to ensure that the listing requirements are followed. The stock exchanges can only assure themselves that their listing requirements on prompt disclosure of material information are being adhered to if they pursue a rigorous approach to market surveillance.

Recommendation 20

The Committee recommends that Australian stock exchanges pursue a rigorous approach to market surveillance. (paragraph 5.7.10)

Codes of conduct

There is considerable merit in the proposal that codes of conduct be adopted and rigorously enforced within the securities industry as a supplement to the laws on insider trading. Unless participants in the securities industry are guided by the

principle that insider trading is unacceptable, and unless this attitude is rigorously enforced by the industry itself, it is unlikely that the practice will be eradicated, regardless of the degree of effectiveness of the legislation or its administration.

Recommendation 21

The Committee recommends that representative groups within the securities industry, in consultation with the National Companies and Securities Commission/Australian Securities Commission, develop codes of conduct to be applied on an industry-wide basis. These codes of conduct should particularly address issues relevant to the integrity of the securities markets. (paragraph 5.9.7)

CHAPTER 1

INTRODUCTION

1.1 *Conduct of the inquiry*

1.1.1 On 8 February 1989, the Attorney-General, the Hon. Lionel Bowen, MP, requested that the House of Representatives Standing Committee on Legal and Constitutional Affairs (the Committee) conduct an inquiry into insider trading and other forms of market manipulation. The terms of reference for the inquiry are set out at page xi.

1.1.2 The terms of reference were advertised in Australia's national daily newspapers. The announcement of the inquiry attracted extensive media coverage, which was maintained during its conduct.

1.1.3 Submissions were received primarily from individuals and organisations with an active role and interest in the securities industry. A list of submissions received by the Committee is provided at Appendix A. A list of exhibits is provided at Appendix B.

1.1.4 Evidence was taken at public hearings held in Melbourne, Canberra and Sydney during April, May and August 1989. A list of witnesses who appeared at those hearings is provided at Appendix C.

1.1.5 The Committee also made available to interested parties the submissions authorised for publication, and requested comments on the proposals contained in those submissions. This provided the opportunity for those who had lodged submissions to test and challenge each other's views.

1.1.6 In addition, the Committee prepared, for the information of the wider community, a newsletter which included details on the progress of the inquiry and in which relevant issues were raised.

1.1.7 The submissions authorised for publication and the transcripts of evidence from the public hearings are available from the House of Representatives Committee Office, the Parliamentary Library and the National Library of Australia.

1.1.8 As the evidence received by the Committee was directed primarily to the issue of insider trading, the Committee has decided to deal specifically with insider trading in this report. Matters relevant to other forms of market manipulation, which constitute the remaining aspects of the terms of reference for the inquiry, are continuing to be considered.

1.1.9 In conducting the inquiry, the Committee was concerned at the delay in obtaining a submission from the Commonwealth Attorney-General's Department. At the same time, the Committee wishes to acknowledge the assistance provided by officers of the Department during the latter stages of the inquiry.

1.2 *Need for an inquiry*

1.2.1 The Committee's interest in undertaking an inquiry into insider trading and other forms of market manipulation arose as a result of evidence provided by the National Companies and Securities Commission (NCSC) in July 1988, in the context of the Committee's inquiry into mergers, takeovers and monopolies. At public hearings on the mergers inquiry, the NCSC indicated that proving insider trading cases under the existing legislation was a matter of extraordinary difficulty and improbability. The NCSC commented that Australia's insider trading law draws the definition of insider trading too narrowly and requires too many hurdles in order to be successful with a prosecution.[1]

1.2.2 Also of relevance to the establishment of the inquiry was the release of a study into insider trading by Dr R.A. Tomasic and Mr B.D. Pentony (Canberra College of Advanced Education). The study was based on an empirical survey of the attitudes and experiences of participants in the securities industry.

1.2.3 In their study, Tomasic and Pentony stated:

> ... while it is not amenable to precise measurement, it would be a reasonable estimate that the extent of insider trading ranges from 'not uncommon' to 'widespread'. It is certainly not an occasional aberration.[2]

1.2.4 Tomasic and Pentony concluded:

> Our initial suspicions, that the law against insider trading is practically non existent, were confirmed during the course of this study.[3]

1.2.5 In conducting the inquiry, the Committee was hopeful that it would be an important means of assuring public and investor confidence in the Australian securities markets.

1.3 *Framework of the report*

1.3.1 Chapter 2 provides an historical perspective on insider trading, both from an Australian and overseas experience.

1.3.2 Chapter 3 deals with the policy basis for the prohibition of insider trading. It includes an analysis of the extent of insider trading in Australia.

1.3.3 The legislative framework is dealt with in Chapter 4. The adequacy of the existing legislation is considered, along with proposals for reform.

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[1]House of Representatives Standing Committee on Legal and Constitutional Affairs, Inquiry into Mergers, Takeovers and Monopolies, Evidence pp.481, 484
[2]Exhibit 1(iv) p.15
[3]Exhibit 1(iv) p.30

1.3.4 The regulatory framework is examined in Chapter 5. Consideration is given to the role and effectiveness of the regulatory agencies, particularly the NCSC and its State delegates. Issues relevant to self-regulation are also discussed.

1.4 *Explanation of terminology*

1.4.1 In examining the adequacy of the existing laws relating to insider trading, the Committee was required to consider two pieces of legislation. First, it was required to examine the insider trading provisions contained in the *Securities Industry Act 1980*. The Securities Industry Act was in force as at October 1989.

1.4.2 Secondly, the Committee was also required to consider the insider trading provisions contained in the *Corporations Act 1989*. The Corporations Act constitutes a principal part of the new corporations legislation which was assented to on 14 July 1989. As at October 1989, the corporations legislation was yet to be proclaimed and was subject to a High Court challenge.

1.4.3 The insider trading provisions in the Securities Industries Act and the Corporations Act are identical in the main part. Accordingly, unless otherwise indicated, the insider trading provisions in both Acts will be considered in tandem and will be referred to as 'the insider trading provisions' or 'the provisions'. Where reference is made to specific provisions in each Act which may differ from the provisions of the other Act, the section of the relevant Act will be quoted.

CHAPTER 2

THE PROHIBITION OF INSIDER TRADING

2.1 *Australian experience*

2.1.1 Laws specifically prohibiting insider trading have been enacted in Australia only in the last two decades. Their introduction has been an integral part of efforts to establish uniform national companies and securities legislation.

Uniform Companies Act

2.1.2 Prior to 1970, there was no legislation specifically prohibiting insider trading in Australia. Only section 124 of the Uniform Companies Act prohibited company officers from using information acquired by virtue of their position to gain an advantage for themselves, or to cause detriment to the company.

2.1.3 The Uniform Companies Act was enacted by each State and by the Commonwealth in 1961/62. It was largely based on the *Victorian Companies Act 1958*. By providing legislation which had the same provisions and covered the same topics in each State and under Commonwealth law, the Uniform Companies Act was intended as a means of establishing uniformity in companies and securities law throughout Australia. However, the States and the Commonwealth continued to amend their legislation independently of each other.

2.1.4 Following a report by the Company Law Advisory Committee in February 1970, section 124 of the Uniform Companies Act was supplemented by section 124A, which was more specific as to the prohibition of insider trading.

The Rae Committee

2.1.5 In March 1970, the Senate established a Select Committee on Securities and Exchange (the Rae Committee) to inquire into and report on the desirability and feasibility of establishing a Commonwealth securities and exchange commission. The terms of reference for that inquiry included an investigation of the powers and functions necessary for such a commission to enable it to act speedily against manipulation of prices, insider trading and other improper or injurious practices. The inquiry was prompted by an unprecedented investment boom which occurred in Australia in the late 1960s and the inability of the securities industry to cope with the excesses of that boom.

2.1.6 Shortly after the establishment of the Rae Committee, the first law in Australia specifically prohibiting insider trading was enacted in New South Wales. Section 75A of the *New South Wales Securities Industry Act 1970* prohibited direct or indirect insider trading by persons who obtained information through their association with a corporation.

2.1.7 In 1974, the Rae Committee reported:

> There has been considerable experience of insider trading, manipulation and other abuse in the stockmarkets. We have seen much evidence of behaviour among sharebrokers, intermediaries and advisers in the securities industry and among some financial journalists which has fallen short of minimum standards of propriety, competence and financial responsibility.[1]

2.1.8 In relation to insider trading, the Rae Committee stated:

> The notorious plunder of markets by insiders and professional sharetraders with highly efficient systems for garnering inside information has caused a severe loss of investor confidence ... Relatively minor regulatory alterations will not restore that confidence.[2]

2.1.9 Accordingly, the Rae Committee recommended the establishment of an Australian Securities Commission to carry out fundamental reform of the securities industry. It considered that there should not only be a single, national, governmental, regulatory body to administer a proposed national system of securities regulation, but that it should be a commission in the nature of a statutory corporation rather than a body set up within a department.[3]

2.1.10 Following the tabling of the Rae Committee report, the Corporations and Securities Bill (Cth) 1974 was introduced into the Parliament (later to be reintroduced as the Corporations and Securities Bill 1975). The purpose of the Bill was:

> ... to provide for the securities industry in Australia to operate on a sound basis with an effective system of controls to be administered nationally by a commmission to be called the Corporations and Exchange Commission.[4]

2.1.11 The Bill did not survive the change in government in 1975.

Interstate Corporate Affairs Agreement

2.1.12 Meanwhile, in July 1974, the Governments of Queensland, New South Wales and Victoria signed the Interstate Corporate Affairs Agreement (ICAA), which sought to achieve greater uniformity in companies and securities law, establish reciprocal arrangements and common practices in the law's

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[1]Report from the Senate Select Committee on Securities and Exchange, *Australian Securities Markets and their Regulation, Part 1, Volume 1*, The Government Printer of Australia, Canberra, 1974, p.471

[2]ibid. pp.392-3

[3]ibid. p.495

[4]Commonwealth of Australia, Parliamentary Debates (Hansard) 1974, Senate, Vol.62, 5 December 1974, p.3239

administration, avoid unnecessary duplication, and increase the protection under the law of the investing public. The three original ICAA States were joined by Western Australia in 1975.

2.1.13 As a result of that agreement, a uniform Securities Industry Act was introduced in the ICAA States in 1975. Section 112 of the 1975 Act prohibited insider trading. It generally followed the similar provision in the Commonwealth Corporations and Securities Bill.

2.1.14 ICAA was the forerunner of the more substantial co-operative scheme which was to follow.

Co-operative companies and securities scheme

2.1.15 A Formal Agreement between the Commonwealth and the States to establish a co-operative companies and securities scheme was signed on 22 December 1978. The Formal Agreement led to the enactment of uniform companies and securities legislation by the Commonwealth and the States. It also resulted in the establishment of the NCSC in 1980, with responsibility for the general administration of the co-operative scheme. The NCSC has delegated many of its powers to the State Corporate Affairs Commissions.

2.1.16 The *Securities Industry Act 1980* forms a principal part of the co-operative scheme. Insider trading is prohibited by virtue of section 128 of that Act.

Inquiry into co-operative scheme

2.1.17 Concerns about the operation of the co-operative scheme led to the establishment in 1986 of an inquiry by the Senate Standing Committee on Constitutional and Legal Affairs into the role of Parliament in relation to the national companies scheme.

2.1.18 In its report of April 1987, the Senate Committee concluded that the co-operative scheme had outlived its usefulness. It recommended that the Commonwealth Parliament should enact comprehensive legislation covering the field regulated by the co-operative scheme. The recommendation was founded on an opinion from Sir Maurice Byers, QC, which asserted that the Commonwealth possesses the constitutional power to enact comprehensive legislation covering company law, takeovers, and the securities and futures industry.[5]

Corporations legislation

2.1.19 On 25 May 1988, the Attorney-General, the Hon. Lionel Bowen, MP, introduced into the Parliament a package of 16 bills aimed at replacing the separate State and Territory legislation under the co-operative scheme with a single regime of Commonwealth law applicable throughout Australia.

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[5]Senate Standing Committee on Consitutional and Legal Affairs, *The Role of Parliament in Relation to the National Companies Scheme*, AGPS, Canberra, 1987, p.74

2.1.20 The ensuing debate led to the establishment in October 1988 of the Joint Select Committee on Corporations Legislation (the Corporations Committee) to inquire into and report on the 16 bills of the corporations legislation. Following the tabling of the Corporations Committee report in April 1989, and action arising therefrom, the corporations legislation was passed by the Parliament in May 1989. The legislation was assented to on 14 July 1989.

2.1.21 The Commonwealth corporations scheme consists of the following Acts:

- the *Australian Securities Commission Act 1989*, which provides for the administrative arrangements of the new scheme;
- the *Corporations Act 1989*, which sets out the law governing companies, takeovers, the securities industry and the futures industry;
- the *Close Corporations Act 1989*, which provides a new form of incorporation for small business; and
- ancillary Acts covering the imposition of fees and levies.

2.1.22 Section 1002 of the Corporations Act prohibits insider trading. The prohibition is identical in the main to that contained in section 128 of the Securities Industry Act.

2.1.23 As at October 1989, the corporations legislation was yet to be proclaimed and was subject to a High Court challenge. Accordingly, the legislation under the 1978 co-operative scheme remained in force, pending the outcome of that challenge.

Existing provisions

2.1.24 In general terms, the existing Australian provisions on insider trading prohibit a person who is connected with a corporation, or has been connected with it during the last six months (an insider), from dealing in the securities of that corporation or an associated corporation if, because of that connection, the person is in possession of information which is not generally available, but if it were, would be likely to materially affect the price of those securities (inside information).

2.1.25 A person is considered to be connected to a corporation if the person is an officer of the corporation, a substantial shareholder, or occupies a position which may reasonably be expected to give access to inside information.

2.1.26 In addition, the provisions prohibit a person who is associated with an insider (a tippee) from trading with the use of inside information obtained from the insider. It also prohibits an insider from passing on inside information (tipping) if the insider ought reasonably to expect that the person will then trade in the securities.

2.1.27 Criminal penalties apply to insider trading offences and compensation is available for innocent parties to an insider trading transaction who suffer loss. A person who engages in insider trading is also liable to account to the company whose securities are the subject of the insider trading transaction.

2.1.28 The insider trading provisions are supported by provisions which prohibit a corporate officer or employee from making improper use of information acquired by virtue of his or her position to gain an advantage for himself or herself or to cause detriment to the corporation.

Judicial interpretation

2.1.29 While the insider trading provisions have been in force in almost the same form since 1980, there have been few concluded cases interpreting those provisions.

2.1.30 As at October 1989, there have still not been any successful prosecutions for insider trading in Australia. The Attorney-General's Department noted that it is only aware of two decided prosecutions, both of which were dismissed by a magistrate and are unreported.[6]

2.1.31 However, there have been some civil cases involving the application of the provisions.

2.1.32 In *Kinwat Holdings Pty Ltd v Platform Pty Ltd* (1982) 1 ACLC 194, the operation of the insider trading provisions in relation to a takeover offer was briefly considered. In that case, the plaintiff sought to restrain the defendant offeror from making offers to acquire shares in the target pursuant to a takeover scheme by alleging that the offeror was in possession of material, non-public information relevant to the price of the target's shares. After the writ of summons was issued, but before the matter was heard, the offeror wrote to the Sydney Stock Exchange disclosing the relevant information, and a newspaper published a story containing the information. Connolly J. of the Queensland Supreme Court held that the letter and the newspaper article had the effect of making the information generally available, so the offeror was free to continue with its takeover.

2.1.33 In *Hooker Investments Pty Ltd v Baring Bros Halkerston and Partners Securities Ltd & Ors* (1986) 10 ACLR 524 (the *Hooker Investments* case), it was alleged that the defendant, who was in possession of material, non-public information about a corporation's securities, was in breach of the insider trading provisions by agreeing to enter into an underwriting agreement in relation to those securities. The New South Wales Court of Appeal held that the provisions are directed to persons who are trading in the marketplace, and are not directed to an underwriting agreement to subscribe for shares proposed to be issued. The Court also held that the word 'person' in the first three subsections of the provisions did not cover a body corporate. In any case, the Court found that the information concerned would not have materially affected the price of the issue.

2.1.34 A third case, *ICAL Limited v County Natwest Securities Australia Limited & Anor* (1988) 13 ACLR 129 (the *ICAL* case), is discussed at paragraph 4.11.4.

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[6]Evidence p.S519

2.1.35 It should be noted that, as at October, a number of cases were pending in various jurisdictions.

2.2 *Overseas experience*

An international perspective

2.2.1 The continuing erosion of national boundaries in relation to the world's securities markets has made it imperative that, in examining insider trading in Australia, due consideration is given to the experience of overseas jurisdictions in this regard. The growing interdependence and global reach of the world's securities markets has created the situation whereby insider trading is increasingly becoming a matter of international concern. It is, therefore, important to understand international attitudes and regulatory approaches to insider trading, as a basis for considering the adequacy of Australia's own attitudes and approach to regulation.

2.2.2 From an historical perspective, the specific prohibition of insider trading in overseas jurisdictions is only a relatively recent occurrence, even though it pre-dates Australian experience by almost four decades. While references to betrayal of fiduciary duty can be found in the nineteenth century, legislation against insider trading generally has its origins in the 1929 stock market crash and its aftermath.

International comparisons

2.2.3 In comparable overseas jurisdictions, it is generally accepted that insider trading is undesirable and should be prohibited by law. In establishing what constitutes insider trading, though, a number of countries have avoided an overly precise or restrictive definition, and have instead expressed the prohibition in broad terms.

2.2.4 This is particularly evident in the United States, where there is no legislative definition of insider trading. Rather, the prohibition of insider trading has developed from judicial and administrative interpretations of a general anti-fraud provision. Such an approach necessarily means that the legislation cannot be expected to provide a useful guide in situations where there is some doubt as to whether particular conduct should be considered insider trading. It places great reliance on the role of the courts in interpreting the scope of the legislation.

2.2.5 In its submission, the Attorney-General's Department noted that while the approach adopted in the United States has caused few problems in relation to straightforward cases of insider trading, there has been considerable dispute when it comes to peripheral areas. While this has resulted in several calls for the inclusion of a legislative definition of insider trading, no definition has yet been provided.[7]

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[7]Evidence p.S558

2.2.6 The above concerns about the scope of the legislation, which have also been reflected in recent reforms in New Zealand, can be equated with similar concerns which have arisen in Australia.

2.2.7 In relation to what is meant by insider trading, it should be noted that many of the key elements of the existing Australian provisions are replicated in comparable overseas jurisdictions. For example, in both the United Kingdom and New Zealand, as in Australia, an insider is determined by reference to the concept of a person connected with a company. As for inside information, the United States classifies it as material, non-public information, New Zealand uses a test of non-public information which would affect price, and the United Kingdom refers to unpublished, price-sensitive information.

2.2.8 However, while many of the concepts are similar, there are notable differences in approach. For example, in the United States, materiality of information is determined on the basis of whether a reasonable investor would consider the information important in making investment decisions. No such test is currently applicable in Australia.

2.2.9 Other important differences can be found in relation to the remedies available against insider trading. Australia's criminal penalties lag well behind those of the United States, which has penalties in the range of 10 years jail and $US1m for individuals and $US2.5m for non-natural persons, as well as those applied in Ontario, Canada, which include disgorgement of profits and a fine not more than the greater of $1m or triple the profit.

2.2.10 It is also important to note that, as a result of growing international concern about the extent and effects of insider trading, there has been a greater focus on enforcement. Once again this is reflected in the experience of the United States, where the Securities Exchange Commission (SEC) has made insider trading one of its top enforcement priorities.

2.2.11 In evidence to the Committee, the NCSC stated:

> Australia simply cannot afford to be left out of the trends that are going on in the Northern Hemisphere.[8]

2.2.12 Clearly, the greater emphasis directed to insider trading by the NCSC in recent years, and the increased awareness of the problem within the community, demonstrates an affinity with international concerns in this regard.

[8]Evidence p.78

CHAPTER 3

THE POLICY FRAMEWORK

3.1 *Objectives of regulating insider trading*

The theoretical base

3.1.1 In determining the adequacy of the legislative and administrative controls over insider trading, it is first necessary to consider the rationale for having such controls.

3.1.2 Various theories have been offered as a basis for prohibiting insider trading. These include the concepts of:

- fairness, i.e. market participants should have equal access to the relevant information from the company which issues the securities;
- fiduciary duty, i.e. a person who holds a position of trust should not make a personal profit from that position without the informed consent of the beneficiaries;
- economic efficiency, i.e. insider trading is damaging to the integrity of the financial market; and
- corporate injury, i.e. insider trading injures the company which issued the securities, the shareholders in the company and investors who deal with insiders.

3.1.3 Alternative theories, however, have been expressed in defence of insider trading. The arguments of Professor Henry Manne have attracted particular attention. Manne has suggested that insider trading is beneficial on the grounds of enhancing market efficiency, as trading by insiders moves the price of the security involved in the right direction, and in this manner informs the market of the confidential information on which the insiders have acted. A further argument is that insider trading enables entrepreneurs to receive rewards for their efforts.[1]

Current attitudes

3.1.4 During the inquiry, the overwhelming body of opinion was that insider trading is wrong and should be prohibited. In the words of the Australian Stock Exchange Limited (ASX):

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[1]H. Manne, *Insider Trading and the Stock Market* (1966), in P. Anisman, *Insider Trading Legislation for Australia: An Outline of the Issues and Alternatives,* AGPS, Canberra, 1986, p.7

> ... the use of inside information for the purposes of gaining material profit or avoiding or reducing a material loss through trading in or subscribing for securities (insider trading) is both legally and morally unacceptable.[2]

3.1.5 However, because of the myriad of circumstances which can occur in any securities transaction, and the variety of people and companies which may be involved, there can often be different interpretations as to whether a particular transaction falls within the ambit of what is considered unacceptable. To assist in overcoming such difficulties of interpretation, it was argued that it is essential to have a clear policy basis for the regulation of insider trading, which can be communicated to all concerned. In this regard, a number of options were raised in submissions.

3.1.6 Mr A.B. Greenwood (Blake Dawson Waldron, Solicitors) suggested that the regulation of insider trading should be based on the principle that trading with inside information is theft. He argued that the theft involved is not that of the information itself, but rather the theft of value from the person who would not have otherwise parted with that value.[3]

3.1.7 Clayton Utz (Solicitors and Attorneys), on the other hand, noted that, in the United States, the courts have recently adopted, as a basis for interpreting and justifying the laws in this area, a 'misappropriation' theory, i.e. the use of inside information is misappropriation of the information from the company to which it belongs. Clayton Utz suggested, though, that such a philosophy does not provide a totally adequate explanation of the scope and character of insider trading laws in Australia. It indicated that a logical extension of the theory would be that it is legitimate to deal in possession of inside information if the use of the information has been approved by the corporate entity to which it belongs.[4]

3.1.8 Linked to the misappropriation theory is the view that insider trading laws stem principally from the insider's fiduciary duty to the corporation to which the information belongs. In its submission, the Institute of Directors in Australia warned that any attempt to limit the scope of the prohibition on insider trading by reference to fiduciary duties or some other level of analysis would be misleading and undesirable.[5]

3.1.9 In other submissions, the concepts of fairness and equality of access were highlighted. The Business and Consumer Affairs Agency, New South Wales, for example, expressed the view that the insider trading provisions are an important element in maintaining a fair marketplace.[6] In a similar submission, the following principles were suggested as a guiding policy:

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[2]Evidence p.S68
[3]Evidence pp.S2-3
[4]Evidence p.S421
[5]Evidence p.S265
[6]Evidence p.S105

(1) In the anonymous stock market, all dealings are done on the basis of such information as anyone can discover by diligence or with the aid of professional advisers.

(2) In face to face deals, each party should disclose to the other any known information from an otherwise inaccessible source.[7]

3.1.10 The NCSC, in supporting the above principles, suggested that confidence in the market rather than damage to the market was the most important argument in favour of a prohibition on insider trading.[8] It indicated that a fair basis for the regulation of insider trading can be derived from the following statement made in October 1988 by the SEC:

> The capital formation process depends upon investors confidence in the fairness of securities markets. When committing capital to securities markets, investors expect that the individuals with whom they deal are not making investment decisions on information available only to corporate insiders or on information wrongly obtained.[9]

3.1.11 At the same time, the NCSC rejected the proposition that insider trading can provide benefits, outside of the profits to be realised by the insider. It indicated that arguments which suggest that insider trading facilitates the market or is a legitimate reward for enterprise are essentially theoretical economic arguments which have little practical application.[10]

3.2 *Extent of insider trading*

3.2.1 To assist in determining an appropriate policy basis for the regulation of insider trading, it is important to understand the extent of the problem.

3.2.2 Evidence on the degree to which insider trading occurs in Australia was difficult to obtain. Statistical data on the subject is not available. As a result, the Committee had to rely primarily on anecdotal evidence to provide an indication of how widely insider trading is practised.

3.2.3 While there was general acceptance that insider trading does occur in Australia (one witness commented: 'I think you would have to have your head in the sand if you did not think there was a problem...')[11] , there were differing views on how widespread the problem is, and in which areas it is most likely to occur.

3.2.4 On the basis of their study into insider trading, Tomasic and Pentony noted that the extent of insider trading was measured as ranging from rare to rife, depending on the person to whom you spoke. Pentony commented:

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[7]Evidence p.S3
[8]Evidence p.77
[9]Evidence p.72
[10]Evidence p.75
[11]Evidence p.43

> Those closest to the industry were likely to say it was towards rare; those further out on the periphery of the industry were inclined to say it occurred very commonly.[12]

3.2.5 As for the perpetrators of insider trading, Tomasic and Pentony suggested that there is an impression that persons who are likely to engage in insider trading are those with the opportunity, and that means persons who are closely associated with the company. They indicated that insider trading is more likely to be done by those close to management, and more likely in respect of companies which are relatively closely held.[13]

3.2.6 The Business Council of Australia (BCA), though, indicated that while some believe that the problem lies with company directors and executives, others believe that the problem stems from market participants, such as brokers, bankers and investment advisers.[14] In light of the uncertainty which exists on the subject, BCA suggested that claims that insider trading is rampant need to be treated with some caution.[15]

3.2.7 In some submissions, the extent of the problem was not considered such an important issue. It was argued that its occurrence should simply be accepted, and appropriate steps should be taken to prevent it.[16] ASX, for example, stated:

> ... we are operating on the principle that it does exist and that we ought to reduce the scope for it to exist.[17]

3.3 *Policy on insider trading*

3.3.1 The evidence on the extent of insider trading in Australia is inconclusive. While there is sufficient anecdotal evidence to judge that insider trading does occur, there are doubts as to the extent to which the anecdotal evidence can be relied upon to provide an accurate assessment of how often insider trading is practised and where it is most prevalent.

3.3.2 It is the view of the Committee that the extent of the problem should not become a major pre-occupation. As the overwhelming evidence indicates that insider trading does occur, attention should be focussed on how best to deal with the problem. In this regard, the Committee recommends several legislative and administrative solutions in the ensuing chapters of the report.

3.3.3 It is, nevertheless, evident that many of the doubts about the extent of insider trading stem from difficulties in determining the types of activity covered by the existing provisions. Establishment of an appropriate policy basis for the legislation is an important first step in promoting understanding about what the legislation is attempting to achieve.

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[12]Evidence p.273
[13]Evidence p.273
[14]Evidence p.43
[15]Evidence p.S24
[16]Evidence pp.S84, S265, S479
[17]Evidence p.115

3.3.4 In this regard, the Committee rejects the notion that insider trading promotes market efficiency, or that it is a legitimate reward for enterprise. While such notions can be supported by economic arguments, they ignore the practical reality that insider trading damages an essential component in the proper functioning of the securities markets, that is investor confidence.

3.3.5 At the same time, insider trading legislation should not be based on any theory which may limit the scope of the prohibition, either by some concept of fiduciary duty or a theory of misappropriation.

3.3.6 Rather, it must be emphasised that the basis for regulating insider trading is the need to guarantee investor confidence in the integrity of the securities markets. Accordingly, the Committee confirms the principles adopted in 1981 by the Committee of Inquiry into the Australian Financial System (the Campbell Committee) as a basis for the prohibition of insider trading:

> The object of restrictions on insider trading is to ensure that the securities market operates freely and fairly, with all participants having equal access to relevant information. Investor confidence, and thus the ability of the market to mobilise savings, depends importantly on the prevention of the improper use of confidential information.[18]

[18] *Australian Final System*, Final Report of the Committee of Inquiry, AGPS, Canberra, 1981, p.382

CHAPTER 4

THE LEGISLATIVE FRAMEWORK

4.1 *Developments in the 1980s*

4.1.1 Insider trading legislation in Australia has been the subject of increasing interest and concern since the enactment of the Securities Industry Act in 1980.

4.1.2 In 1981, the Campbell Committee reported :

> It has ... been suggested that the existing provisions of the Securities Industry Act have proved largely ineffective in dealing with the problem of insider trading.[1]

4.1.3 The Campbell Committee suggested that the NCSC should, as a matter of priority, review the insider trading provisions of the Securities Industry Act, with a view to strengthening them.[2]

4.1.4 In response, the NCSC commissioned a report on insider trading (the Anisman report),[3] with up-to-date proposals for Australian law. The Anisman report was published in 1986 as a discussion paper, but met with significant opposition, particularly from the business community. The approach adopted by Anisman was considered to be excessively legalistic and far too complex. As a result, the NCSC withdrew the Anisman report and, instead, decided to place greater emphasis on testing the existing law.[4]

4.1.5 However, concerns about the adequacy of the existing legislation have remained. In February 1987, the Victorian Attorney-General, the Hon. Jim Kennan, MLC, stated:

> The provisions of the Securities Industry Code are so ambiguous and their ambit so unclear that it is easy for the market to believe that prosecutions are unlikely to succeed. Uncertain and ambiguous legislation and difficult concepts like information 'not generally available' and 'likely to materially affect the price' make policing the provisions difficult.[5]

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[1]Campbell Committee report, op.cit., p.383
[2]ibid. p.383
[3]P. Anisman, *Insider Trading Legislation for Australia: An Outline of the Issues and Alternatives,* AGPS, Canberra, 1986
[4]Evidence p.74
[5]Speech by the Attorney-General for Victoria, the Hon. Jim Kennan, MLC, to a seminar on insider trading, Centre for Commercial Law and Applied Legal Research, Monash University, Melbourne, 24 February 1987, p.3

4.1.6 As noted in the introduction to the report, such concerns were echoed by the NCSC in July 1988, while providing evidence in the context of the Committee's inquiry into mergers, takeovers and monopolies. Similar concerns are also raised in the Tomasic and Pentony study on insider trading in Australia.

4.1.7 In addition, the Corporations Committee, in its report of April 1989, referred to a number of matters raised during its inquiry into the corporations legislation which it considered should be raised in the context of the inquiry into insider trading and other forms of market manipulation. These matters are:

- definitions of insider trading;
- investigation and enforcement resources; and
- adequacy of compensation and penalties.[6]

4.2 ***Scope of the legislation***

4.2.1 A common criticism of the insider trading provisions was that they are both complex and broad in their application. The Institute of Directors in Australia, for example, indicated that there is considerable concern in the community about the ambit and meaning of critical concepts in the provisions.[7]

4.2.2 It was frequently suggested that difficulties in the detection and prosecution of insider trading stem from the complexity of the provisions. This view was reflected by the Australian Mutual Provident Society (AMP), which stated:

> ... an impediment to the effective functioning of the legislation is the difficulty of proving all the elements of a breach of the legislation.[8]

4.2.3 The Australian Merchant Bankers Association (AMBA) added:

> ... the difficulties ... are compounded by ... a definition of insider trading which is so broad as to cover activities and situations which are not considered by the market to be real 'insider trading'.[9]

4.2.4 Criticism was also directed at the 'convoluted cross-references to previous sub-sections', which, it was claimed, make it difficult to appreciate how many elements are required to constitute a breach of the provisions.[10] It was argued that obscurities in interpretation give rise to a degree of uncertainty which is unacceptable in provisions imposing serious criminal penalties.[11]

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[6]*Report of the Joint Select Committee on Corporations Legislation,* AGPS, Canberra, 1989, pp.135-6
[7]Evidence p.S265
[8]Evidence p.S262
[9]Evidence p.S63
[10]Evidence p.S275
[11]Evidence p.S249

4.2.5 Despite such criticisms, though, a cautious approach to reform of the law was suggested in some submissions. It was noted that there are many more insider trading cases before the courts than ever before. Given the lack of case law to date, it was argued that the Committee should await the outcome of those cases before recommending any major amendments to the law, in order to see if any useful interpretations of the law emanate from those decisions.[12]

Conclusions

4.2.6 The Committee does not accept the proposition that there is a need to await judicial interpretation of the insider trading provisions before considering any changes to the legislation. It is of the view that, where a significant deficiency or uncertainty in the law is apparent, as is evident in relation to the insider trading legislation, Parliament is under an obligation to implement workable legislative solutions to ensure that there is precision and clarity in the law. Parliament must not abrogate that responsibility in the hope that judicial interpretation may contribute to that clarity. In this regard, the Committee endorses the comments of the NCSC, which stated:

> ... if the deficiencies can be identified in the law itself and rectified, then the public will be put on notice that the legislature views this behaviour seriously so as to strengthen the regulator's hand and assist the judiciary in dealing with insider trading.[13]

4.2.7 Having come to that conclusion, the next question was whether minor amendments to overcome specific deficiencies in the existing legislation would suffice, or whether a major overhaul of the provisions was required.

4.2.8 The evidence on this point varied. While some argued that minor amendments would clarify the confusion which surrounds the current provisions, others suggested that one of the principal objectives of any reform should be to clarify and simplify the legislation. To this end, the Securities Institute of Australia provided a proposal on how simplified legislation could be achieved.[14]

4.2.9 On balance, the broad thrust of the evidence indicated a need to redraft the insider trading provisions, and, in so doing, to simplify the legislation. Much of the uncertainty which currently exists can be contributed to the confusing language and format of the provisions. This includes continual references to previous subsections. In addition, many key elements, such as materiality, are not defined at all.

4.2.10 The extent of the problem is indicated by the number of deficiencies identified in submissions. Minor amendments to the legislation would be insufficient to overcome the range of matters raised.

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[12]Evidence pp.S27, S439, S484 and p.98
[13]Evidence p.S110
[14]Evidence p.S103

4.2.11 In redrafting and simplifying the legislation, it is important that clear and practical definitions are included. Recommendations in this regard are detailed in the sections of the report which follow.

Recommendation 1

4.2.12 The Committee recommends that the existing insider trading provisions be redrafted and simplified, with clear and practical definitions of the offence of insider trading.

4.3 *Definition of an insider*

4.3.1 It was argued in a significant number of submissions that the existing definition of an insider, which requires a person to be connected to a corporation, is too restrictive. In support of this view, the *Hooker Investments* case was cited.[15] As previously noted, in that case it was held that only a natural person can be a connected person.

4.3.2 To overcome this interpretation, it was suggested that the definition should be specifically extended to encompass corporations as well as natural persons.[16]

4.3.3 A widely held view, though, was that it is not the connection with a corporation which matters. Rather, it was argued that it is the use of the information which causes the damage and which should be addressed in the law.[17] In the words of ASX:

> A person (including a corporation) who is in possession of inside information which the person knew or should have known was inside information and trades in or subscribes for the securities in the company, the subject of the information, then that person has engaged in insider trading no matter whether the person is in any way connected with the company or not.[18]

4.3.4 ASX pointed out that there would need to be an exception to this rule to permit an underwriter to subscribe for and sell any securities which it is required to take up as a consequence of an underwriting agreement.[19] This was supported by Mallesons Stephen Jaques (Solicitors and Notaries), the NCSC and the Law Council of Australia (LCA).[20]

Conclusions

4.3.5 The offence of insider trading must have its genesis in the use of information derived from within a company. The existing prohibition requiring a person to be connected to the corporation which is the subject of the information

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[15]Evidence pp.S4, S52, S70, S111, S249, S531-2
[16]Evidence pp.S4, S63, S70, S278, S532
[17]Evidence pp.S69, S262, S501
[18]Evidence p.S69
[19]Evidence p.S69
[20]Evidence pp.S57, S502 and pp.167-8

unnecessarily complicates the issue. It is the use of information, rather than the connection between a person and a corporation, which should be the basis for determining whether insider trading has occurred.

4.3.6 The provisions should be redrafted to reflect the above position. Concurrently, it should be put beyond doubt that the provisions extend to corporations as well as to natural persons. Wording along the lines suggested by ASX is considered appropriate in this regard. However, there should be an exception to this rule in relation to the entering into of underwriting agreements.

Recommendation 2

4.3.7 The Committee recommends that the insider trading provisions be amended to provide that a person (including a corporation) who is in possession of inside information, and who knows or ought reasonably to know that it is inside information, shall not use that information to trade in or subscribe for the securities of the company or an associated company which is the subject of the information. There should be an exception to this rule to permit an underwriter to subscribe for and sell any securities which it is required to take up as a consequence of an underwriting agreement.

4.4 *Inside information*

4.4.1 The concept of inside information is central to the operation of the existing provisions. However, there is uncertainty in relation to precisely what information falls within the definition.

4.4.2 The current provision requires a judgement to be made not only on whether the information in question would, if it were generally available, be likely to affect the price of the securities, but also on whether it would affect the price in a material way. While the concept of materiality is crucial in the determination, the concept itself is not defined in the legislation.

4.4.3 In its submission, the NCSC indicated that proving materiality under the existing provisions almost certainly requires the calling of expert witnesses. However, conflicting evidence of experts can make it difficult to sustain a successful prosecution. The NCSC stated:

> The more rigorous the standard of materiality, i.e. the more certainty and specificity required of the information before it is treated as material, the more scope for insider trading to take place based on rumours of possible trading outcomes.[21]

[21]Evidence p.S112

4.4.4 In the submissions, there was overwhelming support for retention of the requirement that the information in question must be likely to affect the price of the securities in a material way.[22] As a solution to the problem of establishing materiality, it was suggested that, rather than leaving the matter to the vagaries of the courts, a statutory definition of materiality should be adopted.[23]

4.4.5 In this regard, various options were canvassed. First, the adoption of a reasonable person test was favoured in a number of submissions.[24] Such a test would allow the courts to establish materiality by determining whether a reasonable investor would consider the information important in deciding whether to trade in a security.

4.4.6 In support of such a test, it was argued that the courts are familiar with the concept of reasonable person, as it is already applied in a number of other contexts.[25] Another attraction is that the the test is objective, rather than hypothetical, and thus removes the necessity for expert opinion.[26] Consistency with overseas legislation was also considered relevant, as a reasonable person test already applies in the United States.[27]

4.4.7 Some doubts were raised, however, about whether a reasonable person test would provide any additional clarity. ASX, for example, argued that such a test would pose the same difficulty of proof as already exists.[28]

4.4.8 An alternative option was that the materiality test could be based on a percentage price formula, so that any information which would be likely to increase the price of the securities of a company by a certain percentage, say five percent or more, would be considered material.[29] Such a formula operates on the premise that there needs to be an initial threshold so as to allow normal market operations to continue.

4.4.9 Tomasic and Pentony, though, argued that their research indicated that the securites industry regards a percentage price formula as entirely inappropriate.[30] Evidence to the Committee suggested that there could be risks in relation to such a formula as a result of its arbitrary nature. Mallesons Stephen Jaques stated:

> ... what could be material depends on the securities and depends on the circumstances.[31]

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[22]Evidence pp.S24, S51, S63, S72, S100, S112, S425
[23]Evidence p.S425
[24]Evidence pp.S4, S24, S51, S107, S112, S288, S425-6
[25]Evidence pp.10, 59, 94
[26]Evidence p.10
[27]Evidence p.58
[28]Evidence p.S72
[29]Evidence p.S72
[30]Exhibit 1(iv) p.43
[31]Evidence p.58

4.4.10 A further suggestion was to enact, within the framework of simplified legislation, a concept of 'confidential information', i.e. information which is both non-public and price-sensitive. Confidential information would be deemed price-sensitive if the price of the securities in question could be reasonably expected to increase or decrease materially at the time of dealing if the confidential information was generally known. It was noted that there is already considerable case law precedent on what comprises confidential information.[32]

Conclusions

4.4.11 To be relevant to the offence of insider trading, the information used as the basis for such trading must be likely to affect the price of the securities in a material way. Otherwise, matters of only minor consequence may unnecessarily preoccupy the regulators and affect the proper administration of the legislation.

4.4.12 Having come to that conclusion, the Committee is of the view that any concept which is central to the operation of the legislation must be expressed in clear and practical terms, to ensure that there is no uncertainty as to the situations which are intended to be covered. The failing of the current provisions in this regard is that they offer no guidance in relation to how the question of materiality should be resolved. This has clearly increased the evidentiary burden for the regulators. The Committee, therefore, supports the enactment of a statutory definition of materiality.

4.4.13 As part of its earlier recommendation on simplifying the legislation, the Committee favours the adoption of terminology within the insider trading provisions which would accurately convey the nature of the offence. For this reason, the Committee sees merit in establishing the concept of 'inside information' in the legislation, as provided for in Recommendation 2. The adoption of the term 'inside information', if appropriately defined, would assist in simplifying the language of the provisions, with the likely result that there will be a greater awareness of what the legislation is seeking to achieve.

4.4.14 Turning to an appropriate definition for inside information, the Committee supports the adoption of a reasonable person test as the means for establishing materiality within the framework of the definition. While some doubts have been expressed about whether a reasonable person test would provide any additional clarity, the degree of support for such a test indicates that the concepts involved should not create any major difficulties in their interpretation. The experience in the United States with such a test tends to affirm this conclusion.

4.4.15 The fact that courts in the United States already apply a reasonable person test is an additional attraction for the adoption of a similar test within the framework of Australian legislation. With the growing international reach of the world's securities markets, consistency with international standards and trends is desirable.

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[32]Evidence p.S99

4.4.16 The Committee does not support the adoption of a percentage price formula for determining materiality. It is concerned that a strict percentage formula may be too arbitrary in situations where lesser percentage movements may still have a substantial effect on the price of the securities in question.

Recommendation 3

4.4.17 The Committee recommends that, consequent upon Recommendation 2, a statutory definition of inside information be included in the insider trading provisions. That definition should provide that inside information is information which is not generally available, but, if it were, a reasonable person could expect it to have a material effect on the price or value of the securities issued by the company which is the subject of the information.

4.5 *Availability of information*

4.5.1 Relevant to determining the type of information covered under the insider trading provisions, it was argued in some submissions that the concept of general availability lacks precision and should be replaced by a provision which indicates the manner of disclosure and ensures that the information is likely to be available to the ordinary investor.[33] It was also suggested that such a provision could specify a reasonable waiting period for the information to be absorbed.[34]

4.5.2 LCA noted that, in the United States, the American Law Institute's proposed Federal Securities Code has moved towards the specification of precise times from the release of information to the time when it can be regarded as sufficiently absorbed by the market that insiders are free to trade. For example, LCA indicated that it is considered unsatisfactory that an insider should be able to leave a press conference and go straight to the telephone and start buying stock before the market has had sufficient time to absorb the information.[35]

4.5.3 However, on the grounds of market efficiency, there was opposition to the proposal that there be specification of precise times between release and absorption of information. AMP argued:

> ... if we were to wait until every investor had an opportunity to assess information we would be forced to suspend stocks every time there was a news release.[36]

4.5.4 AMP suggested that the interests of the private investor are best served by allowing market professionals to have instant access to information, so as to produce a properly priced security, thereby reducing the opportunity for insider trading.[37]

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[33]Evidence pp.S106, S113, S252, S425
[34]Evidence p.S425
[35]Evidence p.S252
[36]Evidence p.S503
[37]Evidence p.S504

4.5.5 While acknowledging that the absence of a time rule may disadvantage small investors vis a vis market professionals, the NCSC indicated that any arbitrary period is likely to be unrealistically long in some cases and penalise the diligent.[38]

Conclusions

4.5.6 The Committee reiterates its view that any concept which is fundamental to the operation of the legislation must be expressed in clear and practical terms. As the term 'generally available' is critical in determining whether insider trading has occurred, uncertainty about its application indicates a need to clarify the concept.

4.5.7 It is clearly incompatible with the intent of the legislation if an insider gains an advantage from the dissemination of inside information before the market has had a reasonable time to absorb that information. Accordingly, the concept of general availability should be defined by providing that the information should be available to a reasonable investor, and by requiring a reasonable time period for the dissemination of the information. In addition, guidelines should be issued by the regulatory agencies on appropriate methods for disclosure of information.

4.5.8 However, the Committee is opposed to incorporating a fixed time period within the legislation, as this may well impact on the efficient operation of the securities markets and may penalise individual initiative and diligence. Instead, the given circumstances of a case should be taken into account when deciding whether the time frame involved was reasonable.

Recommendation 4

4.5.9 The Committee recommends that, for the purposes of the insider trading provisions, information be defined as generally available where it is disclosed in a manner which would, or would be likely to bring it to the attention of a reasonable investor, and where a reasonable period of time for the dissemination of the information has elapsed.

Recommendation 5

4.5.10 The Committee recommends that the National Companies and Securities Commission/Australian Securities Commission issue guidelines to assist the commercial community in determining appropriate methods for disclosure of information.

4.6 *Securities and options*

4.6.1 Concerns were also expressed about the definition of the term 'securities' and the reach of the insider trading provisions in that regard. In the existing legislation, 'securities' is defined to include options and any other right in respect of a share, debenture, bond or note. It was submitted that, in relation to

[38]Evidence p.S113

the insider trading provisions, the use of the terms 'deal in any securities of a body corporate' and 'deal in any securities of any body corporate' would seem to indicate that those provisions only apply to dealing in the securities of the issuing body corporate. As a result, the insider trading prohibition would not extend to exchange traded options or unit trusts and other prescribed interests because they are not securities of the company.[39]

4.6.2 In a number of submissions, it was argued that these ommissions should be rectified.

4.6.3 Macquarie Bank Limited (Macquarie Bank) could see no reason why the legislation ought to prohibit only the actions of insiders who deal in corporate securities and not those who deal in unit trust securities. It noted that, as at February 1989, ASX estimates indicated that the combined market capitalisation of listed trusts was in the order of $6.3 billion. In addition, as at December 1988, estimates by the Unit Trust Association of Australia indicated that the combined amount of unitholders' funds in unlisted trusts was in the order of $21.4 billion.[40]

4.6.4 In other submissions, the issues relevant to options were highlighted. The Attorney-General's Department, for example, noted that the trade in options offers various advantages for market players. First, options can be traded at a far lower price than the cost of the underlying securities, and, therefore, trade in options is significantly more highly geared than trade in the actual securities. Secondly, the purchase of an option to buy securities does not oblige the purchaser to buy the securities, and so, if the market falls, the purchaser can simply decide not to exercise the option.[41]

4.6.5 Accordingly, both the Attorney-General's Department and AMBA stressed that the omission of options from the offence of insider trading is a serious matter, as options enable an insider using inside information to make large profits with virtually no risk, and with greater advantage than trading in the underlying securities. It was argued that appropriate amendments should be made to ensure that options not issued by an issuing body corporate, as well as other rights to acquire such options, are fully subject to the insider trading provisions.[42]

4.6.6 The NCSC also indicated its support for the application of the insider trading prohibition to unit trusts and other prescribed interests, as well as to exchange traded options and convertible securities. However, it pointed to existing provisions in section 4 of the Securities Industry Act, sections 168, 171 and 229 of the *Companies Act 1981* and Codes, and sections 51 and 92 of the Corporations Act, to warn against the restrictive view that the existing legislation allows insider trading in prescribed interests, exchange traded options and

[39]Evidence p.S533
[40]Evidence p.S35
[41]Evidence p.S533
[42]Evidence pp.S279, S533

convertible securities.[43] Similarly, Clayton Utz indicated that dealings in exchange traded options may be caught by provisions relating to the futures industry, which prohibit dealings in futures contracts 'concerning a body corporate'.[44]

4.6.7 Nevertheless, both the NCSC and Clayton Utz conceded that if there is any doubt as to the application of the insider trading prohibition to prescribed interests, options or convertible securities, or if the prohibition is considered inadequate, an amendment to remove such doubt would be supported.[45]

Conclusions

4.6.8 Trading in prescribed interests, options and convertible securities should be subject to the insider trading provisions in an identical manner to trading in securities. The integrity of the securities markets could be severely damaged if a loophole in the legislation allowed insiders to reap substantial profits simply by using an interpretation of the scope of the legislation to avoid the insider trading prohibition.

4.6.9 While the NCSC is of the view that the existing legislation already extends the insider trading prohibition to prescribed interests, exchange traded options and convertible securities, advice from Attorney-General's raises doubts in this regard. Given the serious implications of being able to avoid the insider trading prohibition in this respect, it should be put beyond doubt that the prohibition does apply to unit trusts and other prescribed interests, exchange traded options and convertible securities.

Recommendation 6

4.6.10 The Committee recommends that the insider trading provisions be amended to ensure that the prohibition on insider trading extends to unit trusts and other prescribed interests, exchange traded options and convertible securities.

4.7 *Tippees*

4.7.1 The existing provision relating to tippees has the effect of prohibiting a tippee from dealing only when, at the time the inside information was received, the tippee had an association with the person who was connected to the company and who provided the information, or there was an arrangement between the tippee and the insider for the communication of inside information with a view to dealing. The requirement that there be an association or arrangement between the insider and the tippee has drawn the most criticism.

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[43]Evidence p.S501
[44]Evidence p.S426
[45]Evidence pp.S426, S501

4.7.2 It was suggested that the law in this regard is unsatisfactory because a tippee is only prohibited from dealing if he/she goes to the trouble of formalising the arrangement.[46] Clayton Utz indicated that this almost requires 'proof of some element of conspiracy'.[47]

4.7.3 It was also argued that the law on tippees can be avoided merely by passing the information through a series of links between the person connected with the company and the person who does the deal.[48] The overwhelming view was that the requirements of the provision place a heavy burden of proof on the prosecution.[49]

4.7.4 Alongside such concerns, the language of the provision itself was criticised. As noted at paragraph 4.2.4, it was claimed that:

> The convoluted cross-references to previous subsections make it very difficult to appreciate how many elements must be established in order to characterise someone as a tippee.[50]

4.7.5 One solution is to remove the requirement for an association or arrangement between the tippee and the person who is connected with a corporation and who provides the inside information. This, it was suggested, could be achieved by deleting paragraph 3(b) of the provisions.[51]

4.7.6 AMBA took this suggestion a step further and submitted that paragraph 3(a) should be redrafted to make it clear that to be a tippee the receiver of the information must be aware that the provider is an insider. AMBA indicated that amendments along the lines suggested above would result in tippee liability provisions which are more in line with the thrust of overseas provisions, without introducing some of their less precise concepts (e.g. the New Zealand requirement of information having been given in confidence, or the United Kingdom provisions which leave some vagueness with their over-reliance on reasonable person tests).[52]

4.7.7 An alternative solution, as suggested by the NCSC, is to enlarge the categories of persons coming under the definition of insiders to include tippees.[53] BCA saw merit in this proposition, but considered that there could be difficulties as to where the line is drawn.[54]

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[46]Evidence pp.S70, S111
[47]Evidence p.S427
[48]Evidence p.S70
[49]Evidence pp.S25, S54, S253, S427
[50]Evidence p.S275
[51]Evidence p.S5, S275
[52]Evidence pp.S275-6
[53]Evidence p.S111
[54]Evidence p.S25

Conclusions

4.7.8 The existing tippee provision is inadequate. The need to demonstrate an association or arrangement is an unnecessary and complicating factor. It detracts from the objective of the provision, which is to prohibit persons from using inside information received from insiders to trade in or subscribe for the securities of the company which is the subject of the information.

4.7.9 In accordance with the earlier recommendation for redrafting and simplifying the legislation, the most appropriate solution to the deficiencies of the tippee provision is to include tippees within the definition of an insider. Adoption of Recommendation 2 would achieve such a position, as tippees would be included in the category of persons (including corporations) who are in possession of inside information. As a result, there would be no need for a separate tippee provision. This would not make the provision too broad, as it still would be necessary to show that the person or corporation knew or ought reasonably to have known that the information was inside information when trading in the securities.

Recommendation 7

4.7.10 The Committee recommends that the insider trading provisions be amended to provide that tippees are included in the definition of an insider outlined in Recommendation 2.

4.8 ***Tipping***

4.8.1 The existing insider trading provisions also preclude the communication of inside information (tipping) to persons known, or who ought reasonably to be known, by the provider to be likely to engage in trading of securities to which the information relates. The prohibition is limited to tipping with respect to securities listed on stock exchanges. It is the only provision in respect of insider trading which operates solely in relation to listed securities. In all other respects, the insider trading provisions are applicable to trading in the securities of all companies, including unlisted companies and proprietary companies.

4.8.2 It was pointed out that the restriction of the tipping provision to listed securities reflects the policy that shareholders in proprietary companies do not require the same protection as shareholders in public companies. The reasons given were that such shareholders are generally better informed of and have easier access to material information affecting the company's operation, and that restrictions are placed on the transfer of shares in many proprietary companies.[55]

4.8.3 The Attorney-General's Department submitted that no evidence has been produced to suggest that shareholders in non-public companies are being adversely affected by such a policy. As a result, it saw no need to amend the existing approach in this regard.[56]

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[55]Evidence p.S542
[56]Evidence p.S543

4.8.4 Clayton Utz went one step further by suggesting that the extension of the insider trading provisions to the securities of non-listed companies carries significant and possibly even undesirable consequences. It noted that, in the case of non-listed companies, almost all information in the possession of a major shareholder concerning the issuing company will be non-public and price-sensitive. Clayton Utz, therefore, argued that, if the insider trading provisions were extended into this area, the vendor could be placed at a considerable legal disadvantage in the event of a civil claim, as the purchaser would only need to show that the vendor failed to disclose some of the information, irrespective of any contractual warranties obtained.[57]

4.8.5 LCA adopted a similar position by suggesting that it does not seem appropriate that failure to disclose information to a potential purchaser in a private dealing should be visited with such serious criminal consequences as are applicable under the insider trading provisions.[58]

4.8.6 AMBA, on the other hand, took the opposite view by indicating that it favours extension of the tipping provision to cover dealings in all securities, rather than only listed securities. It also favours extending the tipping provision to ensure that it is applicable to body corporates as well as individuals. The main reason for advocating this position was to ensure consistency with AMBA's earlier support for broadening the reach of the definition of an insider.[59]

Conclusions

4.8.7 While the tipping provision needs to be redrafted, consistent with the Committee's earlier recommendation for redrafting and simplifying the insider trading provisions, the Committee is not convinced that the tipping provision should be extended to cover dealings in all securities, rather than only listed securities. Persuasive arguments have not been put forward to indicate that a change is warranted in this regard. In particular, the Committee is mindful of the concerns which have been expressed about the potential implications for vendors if the tipping provision was so extended.

Recommendation 8

4.8.8 The Committee recommends that, consistent with Recommendation 1, the existing provision on tipping be redrafted and simplified, but that the provision continue to cover only listed securities.

4.9 *Chinese Walls*

4.9.1 Under the existing provisions, a body corporate whose directors or officers are in possession of inside information about securities is able to deal in those securities if:

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[57]Evidence p.S422
[58]Evidence p.S254
[59]Evidence p.S63

- the decision to enter into the transaction was taken on the body corporate's behalf by a person other than the officer who possesses the information; and
- the body corporate had in operation at the time arrangements to ensure that the information was not communicated to the person who made the decision, and to ensure that no advice with respect to the transaction was given to the person in possession of the information.

4.9.2 The arrangements noted above are commonly referred to as 'Chinese Walls'. They are intended to ensure that investment decision makers do not have access to inside information obtained by other employees in the course of other types of business. Chinese Walls are implemented through the adoption of policies and procedures governing dissemination of information, and even through physical separation of departments within an organisation.

4.9.3 The justification for such a provision is that it will lessen the potential for insider trading. Its effectiveness, though, depends to a large extent on the compliance mechanisms in operation within a corporation.

4.9.4 Commenting on the provision, both AMBA and AMP felt that Chinese Walls can and do work.[60] AMBA stated:

> If you set up deliberate systems which are properly explained to people, if you enforce those systems and insist on compliance, you can overcome a large number of problems.[61]

4.9.5 Tomasic and Pentony, however, questioned the appropriateness of the Chinese Wall defence. They suggested that there is a common view that Chinese Walls are derisory. Pentony commented:

> There has never been a Chinese Wall that does not have a grapevine.[62]

4.9.6 Others, though, suggested that the Chinese Wall defence could be extended by making it available to unincorporated financial institutions. AMBA, ASX and the NCSC indicated that this would remove an anomalous competitive advantage which currently exists in relation to incorporated dealers and investment advisers.[63] While supporting the proposal in principle, the Attorney-General's Department argued that, as the defence was intentionally framed to specifically provide a defence for bodies corporate subject to the insider trading restrictions, extension of that defence to unincorporated bodies which continue to be exempt from the primary insider trading prohibition would not be appropriate.[64]

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[60]Evidence pp.155, 216-7
[61]Evidence p.155
[62]Evidence p.276
[63]Evidence pp.S64, S70, S113
[64]Evidence pp.S545-6

Conclusions

4.9.7 At this stage, the Committee supports the maintenance of the Chinese Wall defence for insider trading. While some doubts have been expressed about the integrity of Chinese Walls, the Committee is swayed by the confidence of participants in the securities industry that Chinese Walls can and do work. Insufficient evidence has been provided to suggest otherwise. It is evident, though, that if Chinese Walls are to be effective, rigorous compliance programs need to be in place and should be subject to the scrutiny of the regulatory agencies.

4.9.8 Following on from this conclusion, the Committee is of the view that the competitive advantage which currently exists for incorporated dealers and investment advisers should be removed by providing that the Chinese Wall defence is available to both corporate and non-corporate dealers. In light of the Committee's earlier recommendation for removing the requirement that an insider be defined by reference to a connection with a body corporate, there is no apparent justification for not extending the Chinese Wall defence as suggested.

Recommendation 9

4.9.9 The Committee recommends that the insider trading provisions be amended to provide that the Chinese Wall defence is available to both corporate and non-corporate dealers.

4.10 ***Onus of proof***

4.10.1 The existing insider trading provisions place the onus of proof on the prosecution to prove beyond reasonable doubt that an insider has, within the relevant period, dealt in securities while in possession of inside information.

4.10.2 In their study on insider trading, Tomasic and Pentony suggested that there is a very strong case for the reversal of the onus of proof once a prima facie case of insider trading has been established. They commented:

> Whilst this might be seen as politically undesirable, it may be the only realistic solution to adopt short of a re-write and relaxation of the current legislative provision.[65]

4.10.3 Under current Commonwealth criminal law policy on reversal of the onus of proof, the persuasive burden of proof may only be shifted to the defendant in those cases where:

- the matters to be raised by way of defence are peculiarly within the knowledge of the accused; and
- it would be extremely costly for the prosecution to be required to negative the defence.

4.10.4 The Attorney-General's Department indicated that some aspects of the offence of insider trading appear to fall within the scope of that policy.

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[65]Exhibit 1(i) p.53

4.10.5 First, it suggested that there is scope for altering the persuasive burden of proof in paragraph 5(b) of the provisions. That paragraph prohibits a person who is in possession of inside information from passing the information on to another person if the first person knows, or ought reasonably to know, that the other person will use that information for the purpose of trading. The Attorney-General's Department submitted that it is very difficult for the prosecution to elicit independent evidence that the defendant knew the tippee would use the information for trading, but comparatively easy for the defendant to give evidence to deny that proposition. It argued that even if the onus were cast on the defendant, the prosecution would still have to prove that the defendant was in possession of the information and passed it on to a third person.[66]

4.10.6 Secondly, the Attorney-General's Department submitted that the persuasive burden of proof might also be placed on the defendant in relation to subsection 3 of the provisions. That subsection prohibits a person who is in possession of inside information from dealing in the relevant securities if:

- he/she has obtained the information from another person and is aware or ought reasonably to be aware that that person is precluded from dealing in those securities; and
- he/she has an association or arrangement with the other person in relation to communicating such information and dealing in securities.

4.10.7 The Department argued that these elements are very difficult for the prosecution to prove, but comparatively easy for the defendant to disprove, because they relate to matters within the defendant's sphere of knowledge.[67]

4.10.8 There was, however, considerable opposition to any proposal to reverse the onus of proof in relation to insider trading.[68] While it was acknowledged that insider trading is difficult to prove, it was submitted that that was no reason to abandon basic principles of Australia's legal system in an attempt to achieve more convictions. Those principles were cited as being:

- a person is innocent until proven guilty;
- the standard of proof for a criminal conviction is 'beyond reasonable doubt'; and
- the standard of proof for success in a civil action is 'on the balance of probability'.[69]

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[66]Evidence p.S539
[67]Evidence p.S539
[68]Evidence pp.S26, S75, S256 and pp.56, 175-6, 241
[69]Evidence p.S75

Conclusions

4.10.9 The Committee has made a number of recommendations aimed at clarifying and simplifying the existing provisions on insider trading. Many of these recommendations already remove the more difficult elements of proof for the prosecution. Accordingly, the Committee does not support the proposals for reversing the onus of proof in relation to insider trading.

Recommendation 10

4.10.10 The Committee recommends that the onus of proof in relation to insider trading should remain on the prosecution.

4.11 ***Takeovers***

4.11.1 In some submissions, it was suggested that there is an inherent conflict between the insider trading provisions and the duties of directors.[70]

4.11.2 It was pointed out that, in the context of a takeover, directors of target companies have a duty to maximise the price at which control of their company passes. However, it was claimed that the insider trading provisions can inhibit directors properly fulfilling their obligations to shareholders in this regard.[71]

4.11.3 The insider trading provisions can, it was argued, inhibit directors from soliciting alternate takeover bids, even if inside information is not passed on to the potential bidder.[72] It was also suggested that the provisions can prevent actual dissemination of inside information to potential bidders, as the provisions would be breached even if assurances were given by the prospective bidder that no acquisition of securities would be made until proper disclosure had occurred (e.g. by way of a Part A statement).[73]

4.11.4 As an example of this conflict, the *ICAL* case was cited. In that case, a merchant bank, retained by the target of a takeover, communicated inside information to a potential rival bidder for the purpose of soliciting interest in the target's shares.

4.11.5 Bryson J. accepted that the insider trading provisions need to be reconciled with the scope of the directors' fiduciary duties to seek a better price or another bid. Accordingly, His Honour declined to grant an injunction to restrain the plaintiff and its directors from causing or procuring any person or corporation to acquire or dispose of stock units in the target while the inside information was not generally available. Bryson J. held that it would not be wise to make use of the remedy of an injunction against a company, or directors of a company, when the supposed insider trading was in fact an exercise undertaken with a view to widening the area of interest in the shares of the company in

[70]Evidence pp.S36-40, S55-6, S276-7
[71]Evidence pp.S38, S56, S276-7
[72]Evidence pp.S38, S56, S276
[73]Evidence p.S38

response to a takeover offer. Such a measure was considered to be obviously in the interest of shareholders. His Honour placed high value on generally promoting interest in shares.

4.11.6 It was suggested to the Committee that the existing legislation should be amended to accord with the practical result arrived at in the *ICAL* case. AMBA submitted that the simplest way to achieve this would be to include an additional subsection to the effect that the insider trading provisions are subject to other duties owed by directors.[74]

4.11.7 Alternatively, Macquarie Bank suggested that the insider trading provisions should be amended to enable a company, which may or may not be subject to a takeover, to solicit a bid from a prospective offeror, and, in doing so, to provide price-sensitive information. To ensure that third parties are not disadvantaged, it submitted that the offeror should not be allowed to acquire shares in the target either under its takeover bid or otherwise (e.g. via on-market purchases) without prior disclosure of any price-sensitive information. Such disclosure may occur through the Part A statement or, alternatively, directly to the market (i.e. by notification to ASX). In making this suggestion, Macquarie Bank emphasised that the persons to whom the target company discloses information, and the particular information disclosed, should be left to the discretion of the target's directors.[75]

4.11.8 When questioned on the potential for abuse, that is on whether the above suggestion could act as a legislative shield for deliberate insider trading, Macquarie Bank responded:

> The answer to that logically lies with how good a watchdog the board of directors is going to be in that option process.[76]

4.11.9 In response to the above suggestions, the NCSC indicated that the thrust of the existing legislation is consistent with the view that it is the use of inside information in the trading of or subscribing for securities which should be prohibited, rather than the mere possession of that information. For this reason, it is yet to be satisfied that there is a problem with the existing insider trading provisions in relation to takeovers.[77]

4.11.10 The NCSC commented that if disclosure of information is necessary in order to induce a bid, it is likely that the information will be material to the decision of an offeree on whether or not to accept the offer. It considers that such information should be disclosed, say by the directors in their Part B statement in response to a bid for which they may be soliciting a counter bid. The NCSC stated:

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[74]Evidence p.S277
[75]Evidence p.S39
[76]Evidence p.35
[77]Evidence p.S501

> We would not support amendments to the insider trading provisions which might serve (albeit incidentally) to encourage less than full disclosure pursuant to obligations under the takeovers legislation.[78]

Conclusions

4.11.11 On the basis of the evidence received in relation to the application of the insider trading provisions in a takeover context, the Committee is not convinced that legislative action to overcome any potential conflict with the duties of directors is warranted at this stage. In its recommendations, the Committee has endorsed the principle that it is the use of inside information to trade in or subscribe for securities which should be prohibited, and not the mere possession of that information. It is unlikely that the practical application of that principle would inhibit directors in fulfilling their obligations to shareholders.

4.11.12 However, should further evidence confirm that company directors are inhibited in fulfilling their obligations to shareholders in a takeover context because of an interpretation of the scope of the insider trading provisions, an appropriate amendment to the legislation should be made.

4.12 ***Penalties***

4.12.1 The existing penalties for a breach of the insider trading provisions are:

- in the case of a natural person, a $20,000 fine, or five years imprisonment, or both; and
- in the case of a corporation, a $50,000 fine.[79]

4.12.2 It was widely acknowledged that the existing pecuniary penalties are inadequate. There was general agreement that, because of the potentially substantial profits which can be realised through insider trading, or alternatively the losses which can be avoided, the existing levels of penalty are of little, if any, consequence.[80] It was even suggested that fines per se are really quite irrelevant in this area of the law. In the words of AMBA:

> The present system provides no active disincentive for an insider trader.[81]

4.12.3 On the other hand, the threat of imprisonment was seen as a powerful disincentive to insider trading. At a recent AMBA conference on insider trading, Dr W.J. Beerworth (Managing Director, Wardley James Capel) remarked:

> ... five years in denim to anybody in this audience would seem like the death penalty.[82]

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[78]Evidence p.S502

[79]In the Corporations Act, the fine for a body corporate has been increased to five times that for a natural person, i.e. $100,000

[80]Evidence pp.S58, S114, S433, S534 and pp.94, 120, 274

[81]Evidence p.150

[82]Evidence p.S534

4.12.4 The deterrence value of imprisonment was higlighted in a number of submissions. There was considerable opposition to the suggestion that insider trading could be decriminalised to lower the burden of proof. It was argued that removal of the criminal sanction could be regarded as a legitimisation of insider trading. The NCSC indicated that such a move would adversely affect Australia's international credibility.[83] Greenwood pointed out:

> ... if we are going to convince people that insider trading is wrong, it needs to be dealt with in accordance with the kind of wrong that it is.[84]

4.12.5 In this regard, retention of the prison sentence at the existing level was supported, as long as the threat of imprisonment is perceived as something more than mere legislative rhetoric.[85]

4.12.6 However, a number of alternative solutions was suggested in relation to the existing pecuniary penalties. In some submissions, an increase in the maximum pecuniary penalties was considered essential. The Attorney-General's Department, for example, indicated that an appropriate level of penalty might be a fine of $60,000 and/or 10 years imprisonment for a natural person, and a fine of $300,000 for a body corporate. It argued that this would retain consistency with the level of penalties prescribed under the *Crimes Act 1914*.[86]

4.12.7 The Attorney-General's Department also noted that, as insider trading is an indictable offence, the *Proceeds of Crime Act 1987* already applies. Under that Act, if a person is convicted of an indictable offence, a court may order confiscation of property derived from the offence. This means that it is already possible to force a person convicted of insider trading to forfeit his or her total profits from the insider trading transaction.[87]

4.12.8 In a number of other submissions, though, it was suggested that a more appropriate approach would be to impose a fine which is equivalent to the profit obtained or loss avoided, and to include an additional fine measured as a multiple of the profit made or loss avoided. It was argued that it is important to make it clear to those people who would contemplate insider trading that they will be stripped of their profits and possibly even more.[88]

4.12.9 While supporting the proposal for a fine equivalent to a multiple of the profit made or loss avoided, the Institute of Directors in Australia and Clayton Utz submitted that the offender's maximum criminal and civil liability should not exceed that ceiling. Accordingly, it was suggested that it may be appropriate to provide a mechanism which allowed civil claimants, such as a company from which the information was misappropriated, to claim directly against any moneys paid into court.[89]

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[83]Evidence p.S114
[84]Evidence p.8
[85]Evidence p.S434 and p.151, and Exhibit 1(iv) p.44
[86]Evidence p.S535
[87]Evidence p.S535
[88]Evidence pp.S114, S267, S279, S433 and pp.120, 150
[89]Evidence pp.S267, S436

4.12.10 LCA, on the other hand, indicated a need for caution. It argued that, while it is easy to advocate multiple damages in relation to insider trading, such a penalty may not be consistent with penalties applicable to other equally serious offences. LCA considers that the question of punitive damages should not be looked at in isolation from the range of penalties applicable in the securities code as a whole.[90]

Conclusions

4.12.11 If insider trading is to be treated seriously both within the securities industry and in the wider community, then the penalties applicable to the offence must be of sufficient magnitude to deter those who may consider that the profits which can be realised from insider trading are worth the risk.

4.12.12 In this regard, imprisonment remains one of the most effective deterrents for an industry which places great weight on professional reputation. It is, therefore, essential that insider trading remains a criminal offence.

4.12.13 In relation to the term of imprisonment, it has not been adequately demonstrated that extension of the existing maximum beyond five years would necessarily increase the deterrence value. The deterrent is in the threat of imprisonment. The damage which would be caused to a person's reputation within the existing time frame would be sufficient to ensure exclusion from the securities industry.

4.12.14 However, the same conclusion cannot be drawn in relation to the existing pecuniary penalties. In an environment in which the motives are profit, and in which the levels of profit, or losses avoided, can be substantial, maximum penalties of $20,000 for a natural person and $50,000 for a body corporate are grossly inadequate. Indeed, even the concept of a fine based on an arbitrary sum can be seen as inappropriate.

4.12.15 Instead, a truly effective deterrent to insider trading must strike at the objective of that trading, i.e. the profit realised or the loss avoided. Those who would contemplate insider trading must be put on notice that they risk losing everything which could be gained from the transaction in question, as well as damaging their capacity to operate within the securities industry. They should also suffer an additional loss as a penalty for committing the offence. That additional penalty should have some correlation with the profit realised or the loss avoided.

4.12.16 Accordingly, the Committee favours the adoption of a pecuniary penalty which is a multiple of the profit realised or the loss avoided. A fine which is equivalent to double the amount of profit made or loss avoided is considered most appropriate in this regard, as it would mean that the gain is removed with an additional penalty equivalent to the gain. While the Committee acknowledges that removal of profits is already available under the Proceeds of Crime Act, it considers that a fine for insider trading which is expressed in terms of double the profit made or loss avoided is necessary to provide a stonger deterrent.

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[90]Evidence p.163

4.12.17 To ensure that a substantial penalty is available in all insider trading cases, even those where the profit realised or loss avoided is small, it is still necessary to retain an option for the courts to impose a penalty which is greater than double the profit, up to a suitable maximum.

4.12.18 *However, the Committee opposes the suggestion that some mechanism* should be established which would allow civil claimants to claim against moneys paid to the court. This would unnecessarily involve the Commonwealth in the civil processes, thereby detracting from its primary role of prosecutor. Rather, it is important that the courts should retain their discretion in setting the criminal penalty, so that any civil claims can be taken into consideration in determining the amount of pecuniary penalty.

4.12.19 Adoption of a penalty which is expressed in terms of double the profit made or loss avoided may have implications in relation to other equally serious offences within the framework of corporate law. This does not, however, deter the Committee from recommending what it considers to be an appropriate penalty for the crime in question. Rather, it suggests that a review of the penalties currently applicable to other corporate and securities offences is required, to determine whether those penalties are adequate.

Recommendation 11

4.12.20 The Committee recommends that the existing penalties for insider trading be amended so that the penalties are:

- **in the case of a natural person, the amount of profit realised or loss avoided, plus an additional penalty equivalent to that profit or loss, or $100,000, whichever is the greater, or five years imprisonment, or both; and**

- **in the case of a body corporate, the amount of profit realised or loss avoided, plus an additional penalty equivalent to that profit or loss, or $500,000, whichever is the greater.**

Recommendation 12

4.12.21 The Committee recommends that, consequent upon amending the penalties for insider trading, the Attorney-General's Department undertake a review of the adequacy of all penalties applicable in relation to corporate and securities offences.

4.13 *Civil remedies*

4.13.1 A person or corporation which contravenes the insider trading provisions (except the tipping provision) is liable, whether convicted or not, to compensate any other party to the transaction for any loss suffered by that party, and to account for any profit to the body corporate whose shares are traded. The amount of compensation is the difference between the price at which the securities were dealt in and the price at which they would be likely to have been dealt in if the inside information had been generally available.

4.13.2 In their study on insider trading in Australia, Tomasic and Pentony indicated that there is strong support within the securities industry for the introduction of new and improved civil remedies to supplement the criminal law. Suggestions raised in that study include multiple damages and using disgorged profits to support insider trading regulation.[91]

4.13.3 A significant degree of support for increasing and improving the range of civil remedies was also evident from submissions and evidence provided to the Committee. A number of suggestions were canvassed in this regard.

4.13.4 The NCSC, BCA and Mallesons Stephen Jaques indicated that it may be appropriate to empower the courts to make a wider variety of orders in relation to insider trading matters, similar to those contained in subsection 45(1) or subsection 60(4) of the *Companies (Acquisition of Shares) Act 1980* or subsection 146(1) of the Companies Act. There could be orders:

- restraining the exercise of voting or other rights attached to shares;
- directing the disposal of shares; or
- vesting shares in the NCSC.[92]

4.13.5 Removal of a professional's licence, it was argued, is also a powerful sanction.[93]

4.13.6 Alternatively, it was suggested that the provisions on civil liabilities need to be restructured to better reflect stock market transactions. Proposals in this regard include provision for:

- adequate civil actions which can be brought on behalf of shareholders in the public market;[94]
- civil actions to ensure, regardless of whether any shareholders can be said to have suffered a loss, that insiders should not retain the advantage which they may gain through insider trading;[95]
- a civil deterrent to insider trading, in the nature of double or treble damages;[96] and
- the right of a company from which the inside information was misappropriated to claim for damages.[97]

4.13.7 The Attorney-General's Department, however, expressed serious reservations about the introduction of civil penalties in Australia, particularly multiple damages. While recognising the potential deterrence value of multiple damages, the Department indicated that there would be considerable difficulty in applying such a proposal in practice. The difficulty in establishing how and to

[91]Exhibit 1(iv) p.44
[92]Evidence pp.S26, S58-9, S115
[93]Evidence pp.S26, S59
[94]Evidence p.S256
[95]Evidence p.S256
[96]Evidence pp.S115, S256
[97]Evidence pp.S71, S436

whom damages would be distributed, along with the costs which would be involved, was considered relevant by the Department, particularly as class actions are unavailable in Australia at present.[98]

4.13.8 The Attorney-General's Department also argued that extending civil liability beyond other parties to a transaction could be considered punitive and inconsistent with the common law principles underpinning the assessment of damages. Relevant in this regard is the fact that multiple damages do not fall within the Commonwealth's current criminal law policy, under which it is generally considered that the appropriate method of providing additional punishment beyond confiscation of profits is by the usual criminal sanctions of fine and imprisonment.[99]

4.13.9 As a further issue in relation to civil remedies, some doubt was expressed about whether a civil action can be brought before a criminal action has been successfully prosecuted. It was suggested that it may be necessary to amend the legislation to make it clear that there is no practical barrier to a successful action for damages because there has been no criminal conviction for insider trading.[100]

Conclusions

4.13.10 The current approach to civil remedies, which allows compensation for victims of insider trading but does not include an additional civil penalty, should be retained. The Committee generally supports the policy that the appropriate method of providing additional punishment beyond confiscation of profits is by criminal sanction. This is consistent with its earlier recommendation for adoption of a pecuniary penalty for insider trading based on double the profit realised or loss avoided.

4.13.11 The Committee agrees with the position of the Attorney-General's Department that the practical difficulties in implementing a scheme of multiple damages would outweigh the potential deterrence value. A suitable solution to the problem of distribution of damages could not be ascertained from the available evidence.

4.13.12 In addition, the Committee notes the finding of the Corporations Committee, which stated:

> ... the Committee is satisfied that the provisions in the [Corporations] 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.[101]

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[98]Evidence pp.S547-50
[99]Evidence pp.S547-50
[100]Evidence p.S71
[101]Corporations Committee Report, op.cit. p.136

4.13.13 However, as there was wide support for increasing the deterrence value of civil remedies, it would be appropriate to empower the courts to make a wider variety of orders in relation to insider trading matters. The orders should be similar to those which are available where a person is found guilty of unacceptable conduct in relation to a takeover.

4.13.14 At the same time, the Committee confirms that criminal actions and civil actions should remain completely separate. The legislation should clearly provide that the lack of a criminal conviction must not be a barrier to a successful civil action.

Recommendation 13

4.13.15 The Committee recommends that the courts be empowered to make a wider variety of orders in relation to insider trading matters. The orders should be similar to those available where a person is found guilty of unacceptable conduct in the context of a takeover, and could include orders:

- **restraining the exercise of voting or other rights attached to shares;**
- **directing the disposal of shares;**
- **vesting shares in the National Companies and Securities Commission/Australian Securities Commission;**
- **cancelling a contract or arrangement for the acquisition or sale of shares; and**
- **removing a professional's licence.**

Recommendation 14

4.13.16 The Committee recommends that the remedy provisions for insider trading should clearly provide that the lack of a criminal conviction for insider trading is not a barrier to a successful action for damages.

4.14 *Bounties*

4.14.1 In the United States, a bounty award of ten percent of government recovery is available for those who assist the government in the detection of insider trading. The bounty award was introduced by the United States Congress in an attempt to augment the detection and prosecution of insider trading by the SEC. Congress was reacting to the experience of a much publicised insider trading case, in which an anonymous tip was a crucial factor.

4.14.2 Commenting on the feasibility of introducing a similar bounty award in Australia, the Attorney-General's Department objected to any such proposal, primarily on the grounds that it would adversely affect the credibility of sworn evidence by an informer in court. The Department argued that Australian courts and juries would take a dim view of the practice of financially rewarding informers, and would assess the evidence by such an informer to be of low weight. This would make prosecutions difficult to achieve.[102]

4.14.3 The Attorney-General's Department also pointed out that the investigating authorities could not confidently base a case on evidence provided by an informer seeking a reward, not only because of the doubts which the court or jury would have about the evidence, but also because of the investigator's own doubts about the informer's motivation and the credibility of the evidence.[103]

Conclusions

4.14.4 The Committee rejects any suggestion that a system of rewards for informers or bounties be introduced in Australia. Such a system is incompatible with current attitudes in relation to the credibility of evidence. It is also incompatible with accepted principles and practice within Australian society.

[102]Evidence p.S551
[103]Evidence p.S551

CHAPTER 5

THE ADMINISTRATIVE FRAMEWORK

5.1 *The role of the regulatory agencies*

Co-operative scheme

5.1.1 Under the co-operative companies and securities scheme, the Ministerial Council for Companies and Securities (Ministerial Council) has overall responsibility for the operation of that scheme. Each party to the Formal Agreement establishing the co-operative scheme, i.e. the Commonwealth, the States and the Northern Territory, is represented on the Ministerial Council by the Minister who is responsible for that party's companies and securities laws (usually each party's Attorney-General).

5.1.2 The NCSC, which was established in 1980, is responsible for administering the companies and securities legislation enacted under the co-operative scheme. It has delegated most of the powers and functions conferred on it by that legislation to the Corporate Affairs administrations of each State, the Australian Capital Territory and the Northern Territory.

5.1.3 In the exercise of its powers and functions under the Securities Industry Act, including those relevant to the insider trading provisions, the objective of the NCSC and its delegates is:

> ... to ensure that the market for securities functions efficiently, in a manner that facilitates the capital formation process and is regarded as a market in which large and small investors, both domestic and international, can participate with confidence.[1]

5.1.4 The NCSC has sought to achieve this objective by:

- liasing with providers of, and participants in, markets concerning market developments and initiatives;
- undertaking surveillance to detect market manipulation and other malpractice, and to encourage corporate controllers, intermediaries and other market participants to act with proper regard for existing and prospective investors;
- applying the licensing provisions to ensure that dealers and investment advisers are, and are seen to be, financially sound, that they maintain high professional standards, and that they and their representatives perform their duties efficiently, honestly and fairly; and

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[1] *National Companies and Securities Commission, Ninth Annual Report and Financial Statements, 1 July 1987 to 30 June 1988*, AGPS, Canberra, 1988, p.37

- vetting all exchange rules and promoting conditions in which the securities markets operate efficiently, fairly and in the interests of the public.[2]

Corporations legislation

5.1.5 The new corporations legislation, which establishes the Commonwealth companies and securities scheme to replace the co-operative scheme, also provides a new administrative framework to replace the arrangements applicable under the co-operative scheme.

5.1.6 A principal feature of the corporations legislation is the establishment of the Australian Securities Commission (ASC) to replace the NCSC as the responsible regulatory agency in relation to companies and securities law. The State Corporate Affairs administrations are to administer the Commonwealth laws as delegates of the ASC.

5.1.7 In performing its duties and exercising its powers, the aims of the ASC, as set out in the Australian Securities Commission Act, are:

- 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;
- to maintain the confidence of investors in the securities markets and futures markets by ensuring adequate protection for such investors;
- to achieve uniformity throughout Australia in how the ASC and its delegates perform those functions and exercise those powers;
- to administer national scheme laws effectively but with a minimum of procedural requirements;
- to receive, process and store, efficiently and quickly, the documents lodged with, and the information given to, the ASC under national scheme laws;
- to ensure that those documents, and that information, are available as soon as possible for access by the public; and
- to take whatever action it can take, and is necessary, in order to enforce and give effect to national scheme laws.

5.2 ***Effectiveness of the regulatory agencies***

5.2.1 The third part of the inquiry's terms of reference required the Committee to consider the role and effectiveness of the NCSC and its State delegates. However, given that the inquiry has been conducted in a period of transition between the co-operative scheme and the new Commonwealth scheme, with the validity of the corporations legislation still subject to a High Court

[2]ibid. p.37

challenge as at October 1989, the Committee has decided to refer only to those matters relating to the administration of the insider trading provisions which are of relevance to either of the securities commissions and their delegates.

5.3 *Enforcement of the provisions*

5.3.1 In a majority of submissions, it was argued that it is the detection and enforcement of the insider trading provisions, rather than the provisions themselves, which require the most attention.[3] It was suggested that without a greater investigation and enforcement effort, reform of the law might only produce more minor successes in prosecution, without combatting the more significant breaches.[4]

5.3.2 In response, the NCSC indicated that, since 1987, in the aftermath of the Anisman report, it has given a high priority to the detection and prosecution of insider trading, with a view to determining whether in practice the law could cope with actual abuses.[5] This approach has been followed by the State Corporate Affairs administrations, and has resulted in a number of additional investigations and a number of additional cases before the courts.

5.3.3 The Business and Consumer Affairs Agency, New South Wales, indicated that the recent increase in law enforcement activity against insider trading appears to be paying some dividends. It stated:

> More people are coming forward to report suspect dealings and increased monitoring by the Stock Exchange and the National Companies and Securities Commission has led to more matters being referred for possible investigation.[6]

5.3.4 At the same time, it is widely accepted that insider trading is not the malefaction which causes the most harm. In the words of the NCSC:

> ... misleading accounts, secret deals, the reversible put and call options that have recently become quite popular, the misuse of controlling shareholders' positions, the general abuse of directors' fiduciary positions, market manipulation and warehousing all cause more damage to shareholders, and more identifiable damage, than insider trading.[7]

5.3.5 Nevertheless, it was argued that, as insider trading is a matter which has the potential to undermine confidence in the securities industry, there needs to be a continuing effort by the law enforcement agencies and industry bodies to deter such conduct.[8]

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[3]Evidence pp.S23, S60, S76, S95-6, S246, S266, S282-3
[4]Evidence p.S96
[5]Evidence p.S110
[6]Evidence p.S407
[7]Evidence p.77
[8]Evidence p.S411

5.3.6 The importance which the new regulatory agency, i.e. the ASC, may attach to the enforcement of the insider trading provisions is unclear. Comments attributed in press reports to newly appointed representatives of the ASC indicate that insider trading may not be given a high priority by that organisation.[9]

5.3.7 In this regard, concerns have been expressed by the NCSC about whether appropriate transitional arrangements are in place to ensure that any continuing insider trading investigations will be considered and followed up by the ASC.[10]

Conclusions

5.3.8 The enforcement of the insider trading provisions is a matter of concern to the Committee. In this regard, the Committee is encouraged by recent initiatives from the NCSC and its State delegates which has seen greater effort and resources directed to the prevention of insider trading.

5.3.9 The increased focus on insider trading is an important and much needed step in efforts to improve public and investor confidence in the integrity of the securities markets. Recent figures, which indicate that the percentage of the population holding shares in Australia is well below that of countries such as the United States and the United Kingdom,[11] clearly demonstrate the need for maintaining existing levels of enforcement in relation to insider trading. If Australia is to increase its current levels of investment, the importance of which cannot be overemphasised, then potential investors among the public must have confidence in the integrity of the securities markets. That confidence can only be guaranteed if investors are sure that they will not be placed at a disadvantage by those who are in possession of inside information.

5.3.10 The recent emphasis on insider trading is also important in light of the increased international focus in this area. To maintain international credibility, Australia must demonstrate a continuing commitment to the effective prohibition of insider trading. Any digression from current levels of enforcement activity in this regard would be an inappropriate signal to the international community about Australia's commitment to what is increasingly being regarded as an international problem.

5.3.11 For these reasons, the detection, investigation and prosecution of insider trading must remain a priority of the regulatory agencies charged with administering Australia's companies and securities law. While there are a range of corporate practices, such as market manipulation, warehousing and ramping, which require appropriate attention by the regulatory agencies, this should not mean that insider trading is given less attention than is currently the case. Rather, it indicates that sufficient resources need to be made available, and need to be appropriately directed, to ensure that insider trading remains an enforcement priority. The adequacy of existing resources is discussed at section 5.4.

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[9]*The Sydney Morning Herald*, p.29 and *The Age*, p.20, 21 July 1989
[10]*The Age*, p.21 and *The Sydney Morning Herald*, p.41. 19 April 1989
[11]Evidence p.77

5.3.12 As for concerns about the effect of the changeover from the NCSC to the ASC, any insider trading matters under investigation by the NCSC and its delegates which are outstanding at the time of the changeover must be given full and proper consideration by the ASC and its delegates. Appropriate transitional arrangements in relation to insider trading matters need to be in place.

Recommendation 15

5.3.13 The Committee recommends that the detection, investigation and prosecution of insider trading be retained as an enforcement priority of the National Companies and Securities Commission/ Australian Securities Commission.

Recommendation 16

5.3.14 The Committee recommends that, in the changeover from the National Companies and Securities Commission to the Australian Securities Commission, appropriate transitional arrangements be implemented to ensure that any outstanding insider trading matters under investigation by the National Companies and Securities Commission and its delegates are given full and proper consideration by the Australian Securities Commission and its delegates.

5.4 *Adequacy of resources*

5.4.1 It was frequently suggested that a major reason for the lack of successful insider trading prosecutions in Australia has been the inability of the NCSC to devote adequate resources to enforcement. ASX, for example, commented that, while the NCSC has grown in stature over recent years through the manner in which it has discharged the duties required of it by both the Securities Industry Act and the Companies Act, it has been critically short of adequate resources ever since it commenced operations in 1980.[12] In a similar vein, the Institute of Directors in Australia argued that it would prefer to see resources go into the enforcement of the existing law, with any amendment that is clearly justified, rather than major reform of the present law.[13]

5.4.2 The Attorney-General's Department, however, indicated that, over the past 18 months, sufficient resources have been found within the co-operative scheme to investigate and commence prosecutions in a substantial number of insider trading matters. It argued that a considerable investment is already made by the Commonwealth and State Governments in corporate regulation, with 100 staff at the NCSC, over 1500 staff in the State and Territory Corporate Affairs Commissions, and an appropriation of around $80m per year for the operation of the Corporate Affairs offices. It also noted that there have been some recent initiatives in this regard, including a resolution of the Ministerial Council to increase the resources available to the NCSC, and legislative provisions enabling the imposition of further fees to fund those additional resources.[14]

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[12]Evidence p.S93
[13]Evidence p.S95
[14]Evidence pp.S525-6

5.4.3 The Attorney-General's Department suggested that if adequate resources are not available for the regulation of insider trading, the problem may not only lie in the overall level of resources committed to the scheme, but the current purposes for which those resources are used. For example, it was noted that, under the co-operative scheme, a significant amount of resources is devoted to registration and administrative functions, such as document filing and licensing. The Department indicated that deregulatory initiatives within the corporations legislation would free up significant resources from detailed, time-consuming and often unnecessary administrative functions, so as to improve the focus on the level of compliance in the area of market behaviour.[15]

5.4.4 Another factor relevant to resources cited by the Attorney-General's Department is that while the NCSC was created as a national body with a national task to perform, in practice it has been unable to set the priorities or work standards of more than 90 percent of the staff resources theoretically available to it under the co-operative scheme. The Department indicated that, by contrast, under the national management of the corporations legislation, the ASC will be able to administer all resources available to it. It anticipates that this will lead to a more co-ordinated and strategic approach to enforcement functions.[16]

5.4.5 Alongside the general issues noted above, the need for adequate resources for surveillance or monitoring of market activity was highlighted. ASX suggested that, next to adequate staffing, the most immediate need is for the establishment of an adequate national data bank on corporate and financial intermediaries and security holders, so that the information relevant to investigations can be extracted quickly.[17]

5.4.6 Greenwood cited the American example, where there are elaborate computer programs for detecting unusual trading patterns and an extensive database of networks and associations between a trader and the corporation whose securities are traded. Support for the development of more extensive monitoring in Australia was expressed in the following terms:

> In today's market it requires capital investment in that kind of computer monitoring and establishment of databases and it requires the people to monitor the computers. There are just no short cuts; it requires a heavy capital investment and people investment if you are going to be serious about uncovering and bringing insider trading cases to light.[18]

Conclusions

5.4.7 In a stringent economic climate, the adequacy of resources will always be a sensitive issue. Regulatory agencies are continually faced with the dilemma of determining priorities according to the finite resources which are available. In

[15]Evidence p.S526
[16]Evidence p.S527
[17]Evidence p.S94
[18]Evidence p.19

relation to the regulation of insider trading, where there are difficulties in detection and where the processes of investigation are of a lengthy and complex nature, the problems appear to be particularly significant.

5.4.8 The evidence, though, indicated that there are differing opinions as to whether, until recently, lack of enforcement of the insider trading provisions should be attributed simply to the adequacy of resources. It is evident that resources can only be regarded as one of the factors contributing to the level of enforcement activity in relation to insider trading. The decision of the NCSC in 1987 to adopt a more active role in relation to insider trading matters was not driven primarily by resource issues.

5.4.9 At the same time, it should be noted that a resolution by the Ministerial Council to increase the resources available to the NCSC, coupled with initiatives in the corporations legislation to free up resources used on registration and other administrative functions, indicates a recognition of the need to ensure that the agencies responsible for regulation of the securities industry must have sufficient resources to allow an active enforcement role to be pursued.

5.4.10 The one area which is of concern to the Committee, though, is in relation to the monitoring capabilities of the regulatory agencies. If those with the potential to engage in insider trading are to be deterred from such activity, there must be a significant likelihood of detection. With the complexity of today's financial markets, this necessarily involves detailed computer systems and sufficient trained staff to operate those systems. Clearly, Australia's capabilities in this regard can be improved.

5.4.11 The Committee, of course, recognises that introduction of such systems involves significant capital outlays. However, if Australia is to increase its levels of investment, it must be able to promote confidence in the integrity of its securities markets. In this regard, Australia must be prepared to make the investment in the systems and personnel which will guarantee that integrity. For this reason, the establishment of detailed computer systems for monitoring securities trading, along with adequate corporate databases and sufficient operations staff, should be a resource priority in the area of corporate regulation.

Recommendation 17

5.4.12 The Committee recommends that adequate resources be made available to the National Companies and Securities Commission/Australian Securities Commission to allow the establishment of detailed computer systems for monitoring securities trading, along with adequate corporate databases and sufficient operations staff.

5.5 *International co-operation*

5.5.1 With the growing reach of the world's securities markets, it was acknowledged in some submissions that the prevention of insider trading requires greater international co-operation.

5.5.2 AMBA submitted that there is a public perception that it is relatively simple to evade detection of insider trading and other securities laws by ensuring that transactions are effected overseas. To overcome this problem, it was suggested that the NCSC/ASC should be conferred with the power to assist overseas agencies in their investigations, with the aim of receiving reciprocal co-operation from those agencies.[19] This was supported by the NCSC.[20]

5.5.3 In this regard, it was argued that there is a need to establish Memorandums of Understanding between Australia, the United States, the United Kingdom, the European Economic Community and Pacific Rim countries.[21] In the words of Mallesons Stephen Jaques:

> Extensive co-operation between international regulatory agencies is required to deal adequately with international white collar crimes, including insider trading. It seems likely that the only long term solution lies in the establishment of a network of multilateral treaties on securities fraud, insider trading and corporate disclosure.[22]

Conclusions

5.5.4 There is no doubt that an increase in transnational trading in securities, coupled with the accessibility of worldwide markets and the potential for round the clock trading, has made insider trading a problem which extends beyond national boundaries. As such, there is a definite need to promote co-operation between national regulatory agencies. It is only through international co-operation that the problem of insider trading being perpetrated offshore can be dealt with adequately.

5.5.5 An important and necessary step in this direction is the development of Memorandums of Understanding between Australia and other countries which have active securities markets, including the United States, the United Kingdom, the European Economic Community and the various Pacific Rim countries. These memorandums should establish the basis upon which national regulatory agencies can provide each other with assistance in the detection and investigation of practices such as insider trading. On the basis of these memorandums, it will be necessary to ensure that the NCSC/ASC has sufficient powers for the purpose of providing assistance to overseas agencies in relation to securities matters.

Recommendation 18

5.5.6 The Committee recommends that the Australian Government pursue the development of Memorandums of Understanding with other countries which have active securities markets. The Memorandums of Understanding should provide the basis for co-operation in the detection and investigation of practices such as insider trading.

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[19]Evidence p.S283
[20]Evidence p.S502
[21]Evidence p.S76
[22]Evidence p.S59

Recommendation 19

5.5.7 Consequent upon Recommendation 18, the Committee recommends that the National Companies and Securities Commission/Australian Securities Commission be provided with sufficient powers for the purpose of co-operating with overseas regulatory agencies in the detection and investigation of practices such as insider trading.

5.6 *Self-regulation*

5.6.1 The potential for self-regulation in the securities industry was canvassed by Tomasic and Pentony in their study on insider trading. In that study, Tomasic and Pentony stated:

> If regulation by the existing regulatory agencies is regarded as being wanting, it might be asked if self-regulation is likely to be a more effective response to insider trading in the Australian context.[23]

5.6.2 Relevant to this issue, and as an appropriate commencement point for its consideration, is the role of the stock exchanges in Australia.

5.7 *Role of the stock exchanges*

5.7.1 The stock markets in Australia are maintained by ASX. In its submission, ASX noted:

> ... in its role as a regulator of both the market and its members, ASX has *a major part to play in the suppression of insider trading and market* manipulation.[24]

5.7.2 One of the primary components of that role is market surveillance. In general terms, ASX operates a surveillance system whereby market transactions are compared against certain programmed parameters. Any transaction outside the parameters is subject to investigation and may be referred, if necessary, to the NCSC or the State Corporate Affairs Commissions for further investigation.[25]

5.7.3 Also relevant to the role of ASX in deterring insider trading are ASX listing rules. Under those rules, there is an obligation on listed companies to disclose any material events affecting the company.

5.7.4 Tomasic and Pentony argued that the stock exchanges appear to have paid insufficient attention to enforcing their own listing rules. Tomasic and Pentony suggested:

> ... to this extent, they [the stock exchanges] have also failed to support the principle of informed markets and, thereby, if only indirectly, they have created the conditions where insider trading can flourish.[26]

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[23]Exhibit 1(iv) p.32
[24]Evidence p.S81
[25]Evidence p.S88
[26]Exhibit 1(iv) p.31

5.7.5 The Institute of Directors in Australia, while not adopting such a critical stance, argued that ASX should adopt a more active role in detecting insider trading. It believes that a less expensive version of the computer surveillance system used by the stock exchanges in the United States, which monitors share movements and performs audits where abnormalities arise, might provide a useful model for stock exchanges in Australia.[27]

5.7.6 In response, ASX advised that it is in the process of allocating additional resources to market surveillance activities through the introduction of more advanced computer analysis techniques. This includes the introduction of a Stock Exchange Automated Trading System, which provides a detailed and timed audit trail. ASX indicated, however, that the introduction of these techniques necessarily takes time, because if it is not done on a step-by-step basis, a great deal of money could be spent to achieve very little.[28]

5.7.7 ASX also advised that, since it has only been constituted as a national organisation since April 1987, it has needed time to introduce appropriate organisational structures and processes. This has taken place at the same time as it has had to deal with the consequences of the October 1987 share market crash. As regulation and compliance of members' functions is now to be managed from a national perspective, ASX is confident that its activities will yield improved results. In particular, ASX noted:

> The territorial confusions which used to occur between independent exchanges and which were a great impediment to effective oversight will be no longer relevant at the managerial and investigatory levels of ASX.[29]

Conclusions

5.7.8 The stock exchanges in Australia clearly have a vital role to play in protecting the integrity of the securities markets. This role extends not only to monitoring of trading activity, to ensure that any irregularities are brought to the attention of the regulatory agencies for investigation, but also includes the oversight of its members' activities, to ensure that the listing requirements are followed. The importance of this role cannot be overemphasised in the context of insider trading, as the threat of detection is a significant deterrent to such activity.

5.7.9 The nature of this role demands an adequate investment by the securities industry in the regulation of its own activities. While some concerns have been expressed about the extent of the industry's commitment in this regard, particularly the commitment of the stock exchanges, the Committee is encouraged by the advice of ASX that additional and improved resources are being devoted to surveillance, along with more effective management structures. The stock exchanges can only assure themselves that their listing requirements regarding prompt disclosure of material information are being adhered to if they pursue a rigorous approach to market surveillance.

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[27]Evidence pp.S266-7
[28]Evidence p.S88
[29]Evidence p.114

Recommendation 20

5.7.10 The Committee recommends that Australian stock exchanges pursue a rigorous approach to market surveillance.

5.8 *Disclosure requirements*

5.8.1 In 1986, the Anisman report stated:

> Insider trading is essentially a problem of non-disclosure ...[30]

5.8.2 This view was supported in a number of submissions, in which greater disclosure of information by companies was encouraged.[31] In the words of ASX:

> Clearly, if listed companies were to make immediate, full and regular disclosure of price-sensitive information to the Stock Exchange, such a practice would lessen opportunities to insider trade and manipulate the market.[32]

5.8.3 Differing opinions were expressed, though, as to whether more formal avenues of disclosure are required.

5.8.4 Those opposing increased formality argued that more formal means of disclosure could result in substantial levels of paper work, with miniscule real benefit. It was also suggested that more formal regulation of information disclosure (e.g. by discouraging company visits) would adversely affect the present flow of information to the market, to the detriment of the efficient operation of the Australian capital markets generally. It was even argued that excessively regulating information flow would have the inadvertent effect of encouraging insider trading.[33]

5.8.5 Rather than introduce more formal processes of disclosure, the Securities Institute of Australia submitted that the following should be encouraged:

- quarterly reporting by all listed companies;
- prompt release by companies of price-sensitive information;
- enforcement of existing disclosure requirements (e.g. ASX listing requirements and statutory disclosure requirements), with auditing and monitoring by regulatory authorities;
- greater policing and enforcement of existing legislation; and
- continuing disclosure through existing channels (e.g. company visits).[34]

5.8.6 In contrast, there was some support for providing additional statutory backing for existing disclosure requirements.

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[30]Anisman report, op.cit. p.2
[31]Evidence pp.S91, S99, S263, S280, S493, S502
[32]Evidence p.S91
[33]Evidence p.S100
[34]Evidence p.S99

5.8.7 ASX noted that, under the existing legislation on companies, it is an offence if an officer of a corporation makes available to a securities exchange information about that corporation if, to the knowledge of that officer, that information is false or misleading, or if an omission from that information renders it false or misleading. It was argued that the problem with that provision is that there is no statutory obligation on the officer of a corporation to furnish information to the securities exchange on which it is listed. The provision only applies if the information is provided voluntarily. ASX submitted that insider trading could be reduced if the provision was amended to place an obligation on the corporation to furnish price-sensitive information to the market.[35]

5.8.8 AMBA suggested an alternative legislative amendment, which would require directors and senior executive officers to notify the NCSC/ASC and ASX (in the case of listed companies) of any changes in their holdings of securities of the company (or made available by the company) within three days of the transaction.[36] Under the existing legislation, such notification is only required to be made to the company.

5.8.9 AMBA noted that an amendment along the lines suggested would bring Australia into line with the American approach. The following benefits were cited:

- it would discourage use of information which clearly falls within the prohibition of insider trading; and
- it may enable company officers to vary the size of their holdings at times when they were not privy to inside information with greater confidence that their dealings would be objectively perceived as being acceptable.[37]

5.8.10 While the NCSC was in favour of this proposal[38] , BCA indicated that, as a matter of principle, it does not support the singling out of one class of insiders for special treatment. BCA pointed out that, in its view, the existing law in practice already imposes substantial inhibitions on directors dealing in their own company shares.[39]

5.8.11 A further suggestion was to adopt a rule similar to section 16 of the United States *Securities Exchange Act 1934*. Part A of that section requires that directors, officers and substantial shareholders file a notice with the SEC and the local stock exchange within 10 days of any sale or purchase of securities in the company. Part B of the section permits the company to recover any profit made by such persons where securities in the company have been traded on a short-term basis.

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[35]Evidence p.S92
[36]Evidence p.S280
[37]Evidence p.S280
[38]Evidence p.S502
[39]Evidence p.42

Conclusions

5.8.12 It is evident that the potential for insider trading would be considerably diminished if all companies fostered the attitude that there should be prompt disclosure of any material information relating to the company's activities. In principle, therefore, the Committee is attracted to suggestions that there should be more regular reporting by companies and more rigorous enforcement of existing disclosure requirements.

5.8.13 However, as proposals for extending existing disclosure requirements have implications beyond the sphere of insider trading, further evidence and discussion of such proposals is clearly warranted. The Committee intends to give further consideration to the issues involved as part of its wider investigations into other forms of market manipulation.

5.9 *Codes of conduct*

5.9.1 It was suggested to the Committee that, while effective laws and credible administration can have a significant impact on the incidence of insider trading, the practice will remain as long as there is benign tolerance of such behaviour within sections of the corporate and financial communities. It was considered doubtful whether legislation alone can ever be a complete answer in determining and preventing unacceptable conduct.

5.9.2 As a solution, the adoption of voluntary codes of conduct was recommended in a number of submissions. It was envisaged that such codes of conduct would supplement the legislation, by forming the basis of acceptable standards of behaviour within the industry.[40] The codes could include:

- rules for dealings by employees in the shares of their employer company, the employer's clients and other companies;
- disclosure requirements;
- acceptable criteria for Chinese Walls;
- duties of compliance officers; and
- sanctions for breaching the codes.[41]

5.9.3 Both AMBA and ASX indicated that they already have or are in the process of developing such codes.[42] ASX submitted:

> What is required is for mature and experienced business and professional leaders to come together to agree on various codes of conduct to form the basis of acceptable standards in each industry group.[43]

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[40]Evidence pp.S89-90, S266, S281-2, S502
[41]Evidence pp.S90, S282
[42]Evidence pp.S90, S281-2
[43]Evidence p.S89

5.9.4 Suggestions that codes of conduct are cosmetic were dismissed. The Institute of Directors in Australia argued that such codes can make people sensitive to what constitutes insider trading, and can also allow companies to apply pressures the law cannot, for example through the threat of dismissal.[44]

Conclusions

5.9.5 There is considerable merit in the proposal that codes of conduct be adopted and rigorously enforced within the securities industry as a supplement to the laws on insider trading. Just as ethical standards have proved effective in the regulation of the legal and medical professions, they should also be considered relevant in the field of corporate activity. Unless participants in the securities industry are guided by the principle that insider trading is unacceptable, and unless this attitude is rigorously enforced by the industry itself, it is unlikely that the practice will be eradicated, regardless of the degree of effectiveness of the legislation and its administration.

5.9.6 It is commendable that a number of companies and industry groups have already established or initiated the development of appropriate codes of conduct. However, to be truly effective, such codes should be applied on an industry-wide basis. Accordingly, the Committee urges industry representatives, particularly organisations such as ASX, AMBA, the Institute of Directors in Australia, the Securities Institute of Australia and BCA, to work towards common standards in relation to dealing in securities. The regulatory agencies, either the NCSC or the ASC, should be involved in this process, in order to provide guidance on acceptable and unacceptable conduct.

Recommendation 21

5.9.7 The Committee recommends that representative groups within the securities industry, in consultation with the National Companies and Securities Commission/Australian Securities Commission, develop codes of conduct to be applied on an industry-wide basis. These codes of conduct should particularly address issues relevant to the integrity of the securities markets.

Alan Griffiths, MP
Chairman
October 1989

[44]Evidence p.259

APPENDIX A

SUBMISSIONS

No.		Date
1	Mr A.B. Greenwood Blake Dawson Waldron, Solicitors Melbourne, Vic	24.2.89
2	Professor J.D. Cox Duke University Durham, North Carolina, U.S.A.	13.3.89
3	Mr E.M. Fowler Port Macquarie, NSW	10.3.89
4	Business Council of Australia Melbourne, Vic	20.3.89
5	Macquarie Bank Limited Melbourne, Vic	17.3.89
6	Department of the Treasury Canberra, ACT	16.3.89
7	Mallesons Stephen Jaques, Solicitors and Notaries Melbourne, Vic	21.3.89
8	Australian Merchant Bankers' Association Sydney, NSW	22.3.89
9	Australian Stock Exchange Limited Sydney, NSW	23.3.89
10	The Institute of Directors in Australia Sydney, NSW	20.3.89
11	The Securities Institute of Australia Sydney, NSW	28.3.89
12	Business and Consumer Affairs Agency (NSW) Sydney, NSW	31.3.89
13	National Companies and Securities Commission Melbourne, Vic	23.3.89
14	Commercial Law Section Law Institute of Victoria Melbourne, Vic	Received 3.4.89
15	Law Council of Australia Canberra, ACT	22.3.89
16	Australian Consumers' Association Marrickville, NSW	23.3.89

17	Australian Mutual Provident Society Sydney, NSW	18.4.89
18	The Institute of Directors in Australia - supplementary submission	4.5.89
19	Australian Merchant Bankers' Association - supplementary submission	5.5.89
20	Mr J. Hambrook University of Adelaide Adelaide, SA	3.5.89
21	Life Insurance Federation of Australia Incorporated Melbourne, Vic	9.5.89
22	National Companies and Securities Commission - supplementary submission	May 1989
23	Business and Consumer Affairs Agency (NSW) - supplementary submission	17.5.89
24	Clayton Utz, Solicitors and Attorneys Sydney, NSW	17.5.89
25	Commercial Law Section Law Institute of Victoria - supplementary submission	10.5.89
26	Corporate Affairs Department Perth, WA	12.5.89
27	Australian Merchant Bankers' Association - supplementary submission	6.6.89
28	Australian Stock Exchange Limited - supplementary submission	8.6.89
29	The Victorian Government Melbourne, Vic	27.6.89
30	National Companies and Securities Commission - supplementary submission	13.7.89
31	Australian Mutual Provident Society - supplementary submission	21.7.89
32	Attorney-General's Department Canberra, ACT	29.8.89

APPENDIX B

EXHIBITS

No.

1 Dr Roman Tomasic and Brendan Pentony, *Insider Trading in Australia,* Centre for Legal and Social Inquiry, Canberra College of Advanced Education, Canberra, 1988
(i) *Part 1, Regulation and Law Enforcement*
(ii) *Part 2, Extent and Effects*
(iii) *Part 3, The Ethical Dimension*
(iv) *Part 4, Summary and Recommendations*

2 Dr Roman Tomasic and Brendan Pentony, 'Insider Trading and Business Ethics in Australia', School of Management, Canberra College of Advanced Education, Canberra, 1988

3 Shaun Ansell, 'An Assessment of the Regulation of Insider Trading - Implications for Australia'

4 Alex Malik, 'Insider Trading' - assignment by final year student at the Univesity of New South Wales

5 Donald Magarey (Blake Dawson Waldron, Solicitors), 'Insider Trading - the story so far'

6 'Securities Industry', article in *Insights,* April 1989, Volume 3, Number 4, provided by the National Companies and Securities Commission

7 *Insider Trading,* Report to the Minister of Justice by the Securities Commission, Wellington, 1987
(i) *Volume 1, Text and Recommendations for Legislation*
(ii) *Volume 2, Footnotes and Appendices*

8 Submissions to the National Companies and Securities Commission on the Issues Paper *Insider Trading Legislation For Australia: An Outline of the Issues and Alternatives* (the Anisman report)

9 Don Harding, 'Insider Trading - Some Common Issues in Australian and American Regulation', 25 August 1989

10 Dr Roman Tomasic, 'Insider Trading and Principal Trading', School of Management, Canberra College of Advanced Education, Canberra, 1989

11 Roman Tomasic and Brendan Pentony, 'Crime and Opportunity in the Securities Markets: The Case of Insider Trading in Australia', Canberra College of Advanced Education, Canberra,. 1989

APPENDIX C

WITNESSES

MELBOURNE: 7 APRIL 1989

- Mr Antony Baron Greenwood, c/- Blake Dawson Waldron, Solicitors
- *Macquarie Bank Limited*
  - Mr Simon Vincent McKeon, Director, Corporate Services Division
- *Business Council of Australia*
  - Mr Rodney Turner Halstead, Committee Member
  - Mr Clive Randolph Speed, Assistant Director
- *Mallesons Stephen Jaques*
  - Mr Thomas Edward Bostock, Partner
  - Ms Amanda Jane Cornwall, Solicitor
  - Mr Rodney Turner Halstead, Partner

CANBERRA: 9 MAY 1989

- *National Companies and Securities Commission*
  - Mr Henry Bosch, Chairman
  - Mr Raymond John Schoer, Executive Director

SYDNEY: 17 MAY 1989

- *Australian Merchant Bankers' Association*
  - Dr William John Beerworth, Director of Board
  - Mr Malcolm Douglas Starr, Director, Companies & Securities
- *Australian Stock Exchange Limited*
  - Professor Robert Peter Austin, Solicitor
  - Mr James Hunter Berry, Manager, Regulations & Compliance
  - Mr John Gavin Campbell, Group Managing Director
- *Business and Consumer Affairs Agency (NSW)*
  - Mr Barry James French, Director of Compliance, Corporate Affairs Commissioner
  - Mr Brian Alexander Given, Acting Manager, Legal
  - Mr John Michael O'Dea, Special Investigator

- *Law Council of Australia*
  - Miss Mahla Liane Pearlman, Vice-President
  - Mr Stephen John Walker, Representative, Law Council of Australia and member of the Companies Committee, Business Law Section

SYDNEY: 18 MAY 1989

- *Australian Mutual Provident Society*
  - Mr Leigh Loddington Hall, Chief Manager, Investment Operations
  - Mr Lee Scott Holbutt, Manager, Australian Shares Research
- *Institute of Directors in Australia*
  - Dr William John Beerworth, Member
  - Professor Jeremy Guy Ashcroft Davis, Member, New South Wales Branch Council
  - Mr Neville Roy Head, Chairman, New South Wales Branch Council
  - Mr Charles Frederick Moore, Member
- *Securities Institute of Australia*
  - Mr Brian Cameron France, Member
  - Mr Rowan Alexander Ross, Federal Councillor

MELBOURNE: 8 AUGUST 1989

- *Life Insurance Federation of Australia*
  - Mr Darren Aubrey Davis, Research Officer
  - Mr James Patrick Grealish, Member, Finance and Investment Committee
  - Mr Brenton Charles Mitchell
- Mr Brendan Denis Pentony, Senior Lecturer in Law, Canberra College of Advanced Education
- Professor Roman Alexander Tomasic, Professor of Law, School of Management, Canberra College of Advanced Education
- *Victorian State Government*
  - Mr Ronald Claude Trevethan, Commissioner, Corporate Affairs Office
  - Mr Patrick John Whitehouse, Deputy Commissioner, Investigations Branch, Corporate Affairs