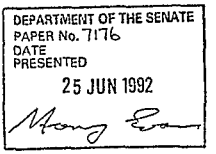
MAKING LEGISLATION MORE INTELLIGIBLE AND EFFECTIVE



Proceedings of a Conference held in Parliament House, Canberra 6 March 1992.

Joint Parliamentary Committee on Corporations and Securities

Victorian Law Reform Commission

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Please note that the opening remarks, the paper by the Hon Jim Kennan and the discussion have been transcribed from a recording of the proceedings. They have been edited where necessary to render the spoken word into a clear written form.

OPENING

Senator Michael Beahan: Good morning, my name is Michael Beahan I am the Chairman of the Joint Committee on Corporations and Securities, which is a joint sponsor with the Victorian Law Reform Commission of this seminar, *Making Legislation More Intelligible and Effective.*

There are so many distinguished guests here that if I were to comply with protocol it would take me a long time to complete this introduction so in line with recent precedents to relax protocol by much more senior people than myself I'll simply say welcome to all of our distinguished guests.

Firstly the lights are dimmed because our first speaker John Green is an audiovisual man and will be giving some presentations on the screen. Secondly I would personally like to apologise for the star chamber appearance of this meeting room. We West Australians are very sensitive about royal commissions and it looks awfully like a royal commission to me rather than a seminar, but I hope that won't interfere with the free flow and exchange of ideas.

I first became interested in the concept of plain english as a student when I was referred to that wonderful and timeless reference The Complete Plain Words by Sir Ernest Gowers. A much thumbed paperback is at home in my study. Considerable time has passed since then but my interest was again aroused firstly on entering Parliament when I had to confront for the first time that information overkill that all of us have to face with mailboxes full to this height every morning. It is not just in legislation that plain english is necessary; some lobbyists and people who are trying to influence parliamentarians certainly need to learn something about plain english presentation. But also of course as a new parliamentarian who hadn't spent a lifetime reading legislation I was befuddled by the complexity of that legislation.

It was given further focus when I was a member of the Scrutiny of Bills Committee for the first three years of my parliamentary career. I remember enjoying some very esoteric discussions with Barney Cooney the Chairman of that Committee and with Professors Jim Davis and Douglas Whalen who were advisers to the Committee. Finally of course, when I took on this job as the foundation chairman of the Joint Committee on Corporations and Securities. I admit to having been daunted at the prospect of getting on top of the Corporations Law, I haven't got on top of it and it will be a long time if ever before I do. But I was happy to know that this is a view shared by a number of my other colleagues including the lawyers on the Committee. That made me feel a lot better.

My interest was given further stimulus when I met John Green at a conference in Sydney and again when the Committee received a very valuable presentation by the Victorian Law Reform Commission which demonstrated what could be achieved in the area of plain english drafting.

I'm aware that the Committee has come in at the late stages of what is a very long

running debate. I'm also aware from the brief encounter that we have had with this topic that its an issue that is much more complex than initially meets the eye. Never-the-less I thinks its in line with this Committee's role, one of the roles that the Committee's carved out for itself, that we should run seminars like this that bring people together discussing issues which are of broad concern but obviously are also of specific concern in the Corporations area. I think its an appropriate time and appropriate thing for us to do to bring together members of the executive and their departmental officers who write drafting instructions, parliamentary counsel who draft legislation, parliamentarians who debate, amend and carry legislation and the parliamentary staff who assist them in doing this, the regulators responsible for administrating some of the most complex legislation, particularly in this case the ASC, members of the business community who must live by the legislation, and the lawyers who interpret it and advise those business people and others. Given the complexity of corporations law and the ongoing program of amendments, my committee will be maintaining an interest in this topic. We are not the only ones of course. There is a lot of interest around not only at the Commonwealth level but also among the States. The House of Representatives Committee on Legal and Constitutional Affairs is considering a reference in this specific area.

One of the nice things about introducing speakers today is that they are so well known that I don't really have to go into detail, so I'll just call on Michael Duffy the Commonwealth Attorney-General to open this conference.

OPENING ADDRESS BY THE HON MICHAEL DUFFY - 6 MARCH 1992

Seminar: Making legislation more intelligible and more effective

INTRODUCTION

I WOULD LIKE FIRSTLY TO THANK SENATOR BEAHAN FOR INVITING ME, ON BEHALF OF THE PARLIAMENTARY JOINT COMMITTEE ON CORPORATIONS AND SECURITIES AND THE VICTORIAN LAW REFORM COMMISSION, TO OPEN THIS SEMINAR ON SUCH A TOPICAL AND IMPORTANT ISSUE.

WHAT I'D LIKE TO DO IN THESE OPENING REMARKS IS TAKE A PRAGMATIC LOOK AT WHAT CAN BE ACHIEVED IN THE SIMPLIFICATION OF COMMONWEALTH LEGISLATION IN THE CORPORATE SPHERE.

ENVIRONMENT FACING CORPORATE LEGISLATION

CORPORATE LEGISLATION MUST BE PREPARED TO FACE AN ENVIRONMENT WHICH IS SOMEWHAT HOSTILE. THE CORPORATIONS LAW IS BASICALLY A LAW REGULATING BUSINESS. IT IMPOSES STRINGENT REGULATION AND IT MUST BE EXPECTED THAT IT NEEDS PRECISION AND CERTAINTY. IT IS TIMELY THAT WE SHOULD BE LOOKING AT THESE ISSUES TODAY BECAUSE OF THE RECENT CRITICISMS THAT HAVE SURFACED IN RELATION TO THE COMPLEXITY OF THE CORPORATIONS LAW. I THINK THAT IF WE ARE TO HAVE A SUCCESSFUL SEMINAR, IT IS NECESSARY FOR ALL PARTICIPANTS TO APPROACH THE SUBJECT IN A BALANCED WAY THAT FULLY RECOGNISES THE SOMETIMES QUITE IMPOSSIBLE DEMANDS THAT WE PUT ON OUR LEGISLATORS AND DRAFTERS.

HAVING SAID THAT, I WOULD NOT WISH TO BE SEEN AS WALKING AWAY FROM ACKNOWLEDGING THE REALITY THAT OUR COMPANIES AND SECURITIES LAWS HAVE BECOME INCREASINGLY COMPLEX OVER RECENT YEARS. I THINK THAT THERE ARE A NUMBER OF EXPLANATIONS FOR THAT. QUITE APART FROM THE COMPLEXITY INHERENT IN THE CONSTITUTIONAL LIMITATIONS ON THE COMMONWEALTH'S LEGISLATIVE POWER IN THIS AREA, THE ACTIVITY WE ARE SEEKING TO REGULATE IS EXTREMELY DIVERSE. AND, DARE I SAY IT, WE ARE ALSO DEALING WITH SOME BODIES WHICH CAN AFFORD VERY HIGH LEGAL COSTS IN ORDER TO TRY TO MANIPULATE THE LAWS TO THEIR OWN ENDS.

WITHIN THESE CONSTRAINTS, I THINK THAT THE CORPORATIONS LAW IS A REMARKABLE ACHIEVEMENT. THERE IS NOW ONE BODY OF LAW APPLYING THROUGHOUT AUSTRALIA.

THAT IS NOT TO SAY THAT MORE CAN NOT BE DONE TO IMPROVE LEGISLATION SO THAT IT IS MORE EFFECTIVE AND INTELLIGIBLE.

REFORM OF CORPORATE REGULATION AND LAW

IT'S IMPORTANT AT THE OUTSET TO FOCUS ON WHAT HAS BEEN ACHIEVED BY THE LAW MAKERS AND DRAFTERS IN IMPLEMENTING THE GOVERNMENT'S DEMANDING AGENDA IN REFORMING CORPORATE REGULATION AND LAW OVER THE LAST 18 MONTHS. THE ACHIEVEMENT INVOLVED IN THE TRANSFORMATION OF THE CORPORATIONS ACT 1989 FROM ONE SOLELY BASED ON COMMONWEALTH LEGISLATION TO AN APPLIED LAWS REGIME, THREE REFORM BILLS LAST YEAR AND A FURTHER MAJOR REFORM BILL WHICH WAS RELEASED FOR PUBLIC COMMENT SOME WEEKS AGO, SPEAKS FOR ITSELF.

THE PREPARATION OF THIS LEGISLATION WAS A HERCULEAN EFFORT IN ITSELF, AND ONE THAT IN MY VIEW HAS NOT BEEN MATCHED IN ANY OTHER ERA OF CORPORATE LAW REFORM IN AUSTRALIA. WITHOUT THE CONSIDERABLE DEDICATION OF THE OFFICE OF PARLIAMENTARY COUNSEL SUCH A MASSIVE RESTRUCTURING AND REFORM OF COMPANIES AND SECURITIES LEGISLATION WOULD NOT HAVE BEEN POSSIBLE.

HOWEVER, WHILE THE LEGISLATION IS COMPLEX, IT HAS BEEN EXTREMELY EFFECTIVE IN DELIVERING A COHESIVE ADMINISTRATIVE, JURISDICTIONAL AND ENFORCEMENT APPARATUS WHICH HAS ALL THE CHARACTERISTICS OF A SINGLE NATIONAL LAW.

COMMONWEALTH INITIATIVES TO MAKE LEGISLATION MORE INTELLIGIBLE

WHILE THE DEMANDS OF THE PARLIAMENT FOR LEGISLATION HAVE INCREASED ENORMOUSLY, IN RECENT YEARS THERE HAS BEEN A CONCERTED EFFORT BY COMMONWEALTH DRAFTERS TO MAKE LEGISLATION MORE SIMPLE.

THIS APPROACH IS REFLECTED IN A NUMBER OF ASPECTS OF COMMONWEALTH LEGISLATIVE DRAFTING. FOR EXAMPLE:

- YOU WILL FIND THAT IN RECENT EXAMPLES OF COMMONWEALTH DRAFTING THERE IS LESS RECOURSE TO TRADITIONAL EXPRESSIONS - THE WRITING STYLE ITSELF IS SIMPLER;

- THERE HAS BEEN GREATER RECOURSE TO PURPOSE OR OBJECTS CLAUSES. IN THE NATIONAL SCHEME LEGISLATION EXAMPLES OF THIS CAN BE FOUND IN THE FEDERALISING PROVISIONS IN THE COVERING CLAUSES AND MORE RECENTLY IN THE LOANS TO DIRECTORS' PROVISIONS IN THE RECENTLY RELEASED CORPORATE LAW REFORM BILL 1992. THE FEDERALISING PROVISIONS IN PARTICULAR ARE A NOVEL CONCEPT AND I THINK THAT THE OBJECTS CLAUSE IS A VERY USEFUL TOOL FOR HELPING READERS TO UNDERSTAND THE CONTENT OF THE PROVISIONS;

- IN THE CORPORATIONS LAW, IN PARTICULAR, AS COMPARED WITH THE CO-OPERATIVE SCHEME LEGISLATION, THE USE OF CHAPTERS TO BRING TOGETHER RELATED PROVISIONS AND A MORE APPROPRIATE GROUPING OF PROVISIONS I THINK ASSISTS THE READER IN FINDING RELEVANT PROVISIONS. I WOULD NOTE ALSO THAT THIS APPROACH IS FOLLOWED THROUGH IN THE REGULATIONS, SO THAT THE REGULATIONS RELEVANT TO A PARTICULAR CHAPTER BEAR THE SAME IDENTIFYING NUMBER AS THE CHAPTER AND ARE MUCH EASIER TO FIND.

I AM CONFIDENT THAT COMMONWEALTH DRAFTERS' EFFORTS TO ACHIEVE GREATER INTELLIGIBILITY WILL NOT STOP THERE, BUT THAT THEY WILL CONTINUE TO EXAMINE OTHER WAYS OF IMPROVING LEGISLATION.

HOWEVER, THEIR DUTY IS TO GIVE PRECISE LEGAL EFFECT TO THE POLICY DETERMINED BY THE GOVERNMENT. THIS NEED FOR PRECISION, COUPLED WITH THE COMPLEXITY OF THE POLICY, PREVENTS THEM FROM MAKING THE LAW AS SIMPLE AS THEY WOULD LIKE.

A MORE RADICAL APPROACH

THERE HAVE BEEN SUGGESTIONS BY SOME THAT A MORE RADICAL APPROACH TO OUR LEGISLATION CAN BE ACHIEVED BY ADOPTING THE SO-CALLED EUROPEAN STYLE OF DRAFTING, WHICH IS CHARACTERISED BY AVOIDING DETAIL AND CONCENTRATING ON GENERAL PRINCIPLES. THIS IS THE STYLE DESCRIBED BY JOHN GREEN OF FREEHILLS BY THE CATCHPHRASE "FUZZY LAW".

WHILE THERE CAN BE NO DOUBT THAT A STYLE THAT CONCENTRATES ON GENERAL PRINCIPLES IS FAR EASIER TO READ THAN OUR USUAL STYLE OF

DRAFTING, WHEN SUCH LAW IS APPLIED TO PARTICULAR CIRCUMSTANCES, THE EFFECT IS OFTEN NOT CLEAR. THAT IS, THE GENERAL PRINCIPLES STYLE LEAVES THE DETAILS OF ANY PARTICULAR POLICY TO BE WORKED OUT EITHER IN SUBORDINATE LEGISLATION OR BY THE COURTS. EVEN IN EUROPE, SUBORDINATE LEGISLATION IS OFTEN VERY DETAILED.

THERE IS CLEARLY A TENSION BETWEEN SIMPLICITY AND CERTAINTY. OUR TRADITIONAL STYLE CONCENTRATES ON CERTAINTY AND PRECISION AT THE COST, IN SOME CASES, OF COMPLEXITY. CONVERSELY, THE GENERAL PRINCIPLES APPROACH FOCUSES ON EASE OF UNDERSTANDING AT THE COST OF CERTAINTY IN INDIVIDUAL CASES.

THE GENERAL PRINCIPLES APPROACH MAY BE SUITABLE IN SOME AREAS OF COMMONWEALTH LAW. HOWEVER, I HAVE RESERVATIONS AS TO WHETHER IT IS A VIABLE OPTION IN RELATION TO CORPORATE LAW FOR A NUMBER OF REASONS.

FIRSTLY, ALTHOUGH THERE HAVE BEEN SOME ENCOURAGING SIGNS OF THE ADOPTION OF WIDER RULES OF STATUTORY INTERPRETATION BY OUR COURTS, I DO NOT THINK THAT WE HAVE REACHED A POINT WHERE WE CAN COMPLETELY EMBRACE THE GENERAL PRINCIPLES APPROACH. I DON'T BELIEVE THAT THE COURTS WOULD BE COMPLETELY COMFORTABLE WITH THE EXPANSION OF THEIR ROLE THAT A GENERAL PRINCIPLES APPROACH TO LAW-MAKING REQUIRES. FOR EXAMPLE, THE FULL COURT OF THE VICTORIAN SUPREME COURT IN R. V. O'CONNOR (1987) V.R. 496 DREW ATTENTION TO THE FACT THAT LEGISLATION COUCHED IN GENERAL TERMS WHICH DOES NOT MAKE PARLIAMENT'S INTENTION CLEAR GREATLY INCREASES THE WORK OF THE COURTS, ADDING TO COSTS AND DELAYS. THE COURT COMMENTED:

> "NO DOUBT SUCH DRAFTING IS OFTEN PROMPTED BY A DESIRE TO SIMPLIFY LEGISLATION. UNFORTUNATELY ATTEMPTS TO DO SO USUALLY LEAVE A NUMBER OF QUESTIONS UNANSWERED. THEY ALSO VERY OFTEN LEAVE THE COURTS WITHOUT GUIDANCE AS TO HOW THE QUESTIONS SHOULD BE ANSWERED AND WHEN DEALING WITH LEGISLATION THE COURT'S ONLY TASK IS TO INTERPRET AND APPLY THE LAW LAID DOWN BY PARLIAMENT. THE COURTS CANNOT BE LEGISLATORS." (AT PAGE 500)

NOR DO I THINK THAT THE AUSTRALIAN COMMUNITY IS PREPARED TO HAVE LEGISLATION DRAFTED IN GENERAL PRINCIPLES. IT SEEMS TO ME THAT THE PRICE OF 'GENERAL PRINCIPLE' LAWS IS MUCH GREATER RECOURSE TO THE

COURTS TO FLESH OUT THE DETAILS OF THE LEGISLATION, AND THEREFORE GREATER COSTS. BEFORE MOVING TO ADOPT SUCH A DRAFTING STYLE, WE THEREFORE NEED TO ASK THE QUESTION WHETHER IT IS IN THE GENERAL PUBLIC INTEREST TO MAKE THE TASK OF READING THE LEGISLATION EASIER, FOR THOSE THAT HAVE A NEED TO READ IT, AT THE COST OF GREATER COURT COSTS.

THE LAW IS ALREADY TOO GENERAL FOR SOME PRACTITIONERS. THEY WANT THE LAW SPELT OUT, AND NOT LEFT TO BUREAUCRATS OR COURTS TO INTERPRET.

FOR EXAMPLE, WHEN I EXPOSED THE INSIDER TRADING PROVISIONS FOR PUBLIC COMMENT A LITTLE OVER 12 MONTHS AGO, ALTHOUGH A FEW SUBMISSIONS CALLED FOR SIMPLER DRAFTING, A MAJORITY SOUGHT GREATER DETAIL IN THE PROVISIONS IN ORDER TO CLARIFY WHETHER PARTICULAR FACTUAL SITUATIONS DID OR DID NOT COME WITHIN THE PROVISIONS.

THE COMMUNITY'S CONCERN ON THIS POINT MAY FIND EXPRESSION THROUGH PARLIAMENTARY COMMITTEES, SUCH AS THE SCRUTINY OF BILLS COMMITTEE. THAT COMMITTEE MAY THINK THAT THE EFFECT OF GENERALLY EXPRESSED LEGISLATION ON PEOPLE'S RIGHTS, DUTIES AND INTERESTS IS IN SOME CASES TOO UNCLEAR FOR CITIZENS TO DISCOVER WHETHER OR NOT THEY ARE COMPLYING WITH THE LAW.

FINALLY, THERE IS A QUESTION OF DEGREE - HOW GENERAL IS GENERAL? EVEN IF THERE IS A WIDELY-HELD WISH TO MOVE TOWARDS GENERAL PRINCIPLES DRAFTING, IT WILL BE VERY DIFFICULT TO ASSESS HOW GENERAL THE EXPRESSIONS OF PRINCIPLE SHOULD BE, AND HOW MUCH DETAIL SHOULD BE RETAINED.

PROSPECTUS PROVISIONS

THAT IS NOT TO SAY, HOWEVER, THAT IN PARTICULAR CASES THERE IS NOT A ROLE FOR GENERAL PRINCIPLES DRAFTING. THE NEW PROSPECTUS PROVISIONS ARE A GOOD EXAMPLE OF THIS. WE HAVE MOVED FROM A DETAILED LIST OF WHAT SHOULD BE INCLUDED IN A PROSPECTUS TO A REQUIREMENT THAT THE PROSPECTUS INCLUDE ALL INFORMATION THAT INVESTORS AND THEIR ADVISERS WOULD REASONABLY REQUIRE AND EXPECT.

WHILE DRAFTING THE PROVISIONS IN THIS WAY HAS ACHIEVED A GREATER MEASURE OF SIMPLICITY, THIS WAS NOT THE PRIMARY REASON FOR THE CHANGE. THE LAW WAS NOT ACHIEVING ITS POLICY GOAL. THE PREVIOUS

APPROACH HAD LED IN MANY CASES TO PROSPECTUSES THAT TECHNICALLY COMPLIED WITH THE PROVISIONS, BUT WERE USELESS TO INVESTORS IN TERMS OF THE INFORMATION THAT THEY CONTAINED. IT WAS RECOGNISED THAT ISSUERS AND NOT POLICY MAKERS WERE IN THE BEST POSITION TO DETERMINE WHAT INFORMATION WOULD BE RELEVANT TO INVESTORS, THUS THE ONUS WAS PLACED ON THOSE ISSUERS TO ENSURE THAT THE PROSPECTUS WAS AN INFORMATIVE DOCUMENT.

I THINK THE MARKETS ARE COMING TO ACCEPT THE NEW PROSPECTUS PROVISIONS, AND I AM CONVINCED THAT WE HAVE MOVED IN THE RIGHT DIRECTION. BUT I HAVE TO TELL YOU, THERE IS NO SINGLE AREA OF THE CORPORATIONS LAW FOR WHICH I HAVE COPPED GREATER CRITICISM, THAN THIS AREA. I HAVE BEEN PILLORIED BY PRACTITIONERS FOR CREATING UNCERTAINTY AND ADDING TO BUSINESS COSTS BY NOT SPELLING OUT A PRESCRIPTIVE CHECKLIST OF REQUIREMENTS.

THE WAY FORWARD

AS YOU WILL HAVE GATHERED, I HAVE RESERVATIONS ABOUT WHETHER GENERAL PRINCIPLE DRAFTING IS THE ANSWER TO MAKING LEGISLATION LESS COMPLEX.

COMMONWEALTH DRAFTERS ARE ABLE AND WILLING TO USE GENERAL PRINCIPLE DRAFTING. BUT THE DECISION TO MOVE TOWARDS GENERAL PRINCIPLES DRAFTING IS ONE FOR THE GOVERNMENT AND PARLIAMENT, NOT THE DRAFTERS, TO MAKE. IT WAS A DECISION WE TOOK IN RELATION TO THE PROSPECTUS PROVISIONS, BUT THAT DID NOT PREVENT ILL-INFORMED CRITICISM BEING DIRECTED AT THE DRAFTERS FOR CARRYING OUT MY INSTRUCTIONS.

CONCLUSION

THERE ARE NO EASY ANSWERS. HOWEVER, WE MUST BE OPEN TO NEW IDEAS AND APPROACHES. THIS SEMINAR IS IMPORTANT IN THAT REGARD, AS THE DIFFERENT VIEWS EXPRESSED HERE TODAY WILL STIMULATE OUR THINKING ON THESE IMPORTANT ISSUES. I WILL BE VERY INTERESTED TO HEAR THE OUTCOMES OF THE SEMINAR, AND IN PARTICULAR THE PANEL DISCUSSION TO TAKE PLACE LATER THIS MORNING.

A FAIR GO FOR FUZZY LAW

JOHN M GREEN

Partner
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DE-KREMLINISING AUSTRALIA

Somehow I feel a little like Daniel in the lion's den. Here I am in Australia's premier law-making institution, about to tell an assembly of distinguished drafters, parliamentarians and others that they should rethink their tools, their workpractices, their products. That you should rethink what it is you do, and how it is you do it. That you should be exposed to the same rethinking going on right now in much of the rest of Australia. And, like Daniel, I don't know which of you are angels and which lions.

But like Daniel, I have faith that ultimately I will be spared from the lions' jaws — although not from the roars, because we will certainly hear those.

Daniel probably had it a bit easier than I suspect I will. But for me, the good news is that he and what he stood for survived, even though it was unpopular with the lawmakers of the day and even though the tide of public opinion was then against him.

Some of you will say making the law simpler, more understandable and more effective can't be done. It's a pipedream. Some will say the cure is worse than the disease. Some will simply say what you're doing now is fine, so why change anything. Some will claim we're wasting our time. While Daniel was saved by an angel, many of you will see me and my thoughts as your Gabriel.

Jumping ahead of Daniel somewhat, maybe I could impolitely categorise the hardened cynics amongst you as the modern day Marie Antoinettes of the law. You're saying:

> *"It's all OK. Just let us get on with it. We've been doing it like this for years, and we know what's best. Leave it to us."*

That is just another way of saying "let them eat cake".

The trouble is Australia can no longer afford to leave it to them. It no longer has enough cake to eat.

We have to find new solutions. We have to challenge the trusted orthodoxies and come up with better ones. I am not suggesting I have the perfect answer. I don't. But I am suggesting it may be a better one and we should start moving down that track with a vengeance before the law and its makers lose all credibility in the eyes of those it and you serve.

To some extent I compare those amongst you who oppose, passionately it seems, much of what I will put to you with the former Kremlin leaders, very much in charge, or so you think, but unwilling to see today, let alone tomorrow.

Unwilling to accept many old ideas and methods are losing their value. Unwilling to accept the challenge of change.

Unlike Boris Yeltsin, I don't yet have to scream my message from the top of a tank outside this place.

For the moment, perhaps the last one, I can do it from the inside because some of you at least are interested in moving forward. Some of you, at least, have open minds about a new tomorrow, you are not locked to the past. You are the ones I will be mainly talking to. But the others of you, please listen, please be tolerant and open your minds to alternative solutions.

We all want Australia to be the clever country. We need it to be so.

To be clever, we must innovate. Innovation starts with ideas, but ideas are just the start. For us to become truly clever, our ideas must become products or services. Those products or services must get to markets. They must become profits, or at least have a good chance at becoming profits.

Profit-seeking does for ideas what a partner does for sex. Without one, it's a wank. Enjoyable, perhaps, but not terribly productive. Without the prospect of profit, good ideas produce little that is material.

The call is for Australia to become internationally competitive in what we sell, not just to the rest of the world, but also to ourselves. Bring down the cost and time of production. Reduce distribution costs and delays. And so on.

But watch out! The law plays a part in this too. Law's curse is to increase the time-cycle of turning an idea into a profit, and to increase the cost of doing so.

So, as lawmakers, lawdrafters and lawtakers you should be revolting against laws and legal thinking that cost Australia years of unnecessary delay and millions of dollars of unnecessary expense — laws that help keep Australia so internationally uncompetitive. Laws that, because of their complexity, delay and stifle the prospects of good ideas and new businesses getting off the ground; that shackle our businesses to cost structures which crush them and the community they are trying to serve.

What am I really talking about?

I'm talking about declaring war on law. On black-letter law. And on black-letter thinking.

Part of a lawyer's baggage these days is that law is increasingly seen as a "negative" profession. Lawyers are not seen as producers. We are not seen as valued assets on Australia's balance sheet. Rather, we are seen as necessary costs on the profit and loss account — as leeches on the country's carcass.

People don't use lawyers because they want to. They come because they feel they have to.

That's all changing, of course. Many lawyers, in corporations, at firms like mine, even in government, try hard, but within the necessary bounds of ethics and integrity, to add value and to be proactive for their clients.

And it is hard. That effort to add value is heavily and unnecessarily constrained. And here I do not refer to ethics and integrity as a constraint, for they are not. I refer to the constraints imposed by much of the law itself. Particularly black-letter law.

And generations of lawyers, teachers and parliaments have not just allowed it to happen, we have fostered it. How?

By training lawyers:

- to accept and cherish the complex, but to eschew and revile simplicity
- to maintain law as arcane intellectual artistry, unintelligible and incomprehensible except to an increasingly remote and expensive elite
- to equate precedent with justice
- to focus on content, but ignore context
- to idolise the letter not the spirit, the form not the substance, and
- to revere a tired and discredited dogma that equates precision with certainty

With no disrespect to our hosts, or this place, it's as if many of our laws have been modelled on Canberra. Crafted perfection, fantastic engineering, expense unspared.

It's just that the rest of Australia is paying for it, and we can't afford it any more.

A long time ago, the law was simple. It was the Church's law — the Ten Commandments. But if we had designed them as we design many of our modern laws, there would've been 10,000 commandments, and they would've been hardly more effective.

Now, let's talk briefly about more recent history, recent corporate history. Why, because even though we've had lots of corporate law, we've still had lots of corporate crime.

Something went wrong in the 80's. What was it?

Close your eyes!

In reality, that's what went wrong. Everyone closed their eyes to what was going on. Everyone had their eyes closed. They did, you did, we all did. And Australia lost out. We are still losing out.

THE BUCCANEERS

What we had was grand larceny committed by a few notorious perpetrators.

The trouble is they thought "grand" was a word meaning "excellent", and did they pursue excellence! But in their pursuit, no-one stopped them. The barriers were there, but they had fallen. Regulators didn't put them up. Boards didn't put them up. Banks didn't put them up.

The crooks were lucky. After all, timing is everything. And they got their timing right. What do I mean? Well, here you had a bunch of brigands marching hand-in-hand with an army of incompetents, fools, or blind people.

Some of these crooks were falsely branded "entrepreneurs" — a word which has sadly become a buzz word for "shonk". Risk-taking has become wrong. But risk-taking is an essential part of a democratic capitalist system. Risk-taking and entrepreneurs must once again become respectable. That is vital for Australia. But, of course, not in the 80's mould.

When we embraced deregulation, we thought Adam Smith's invisible hand was guiding us, but we were mistaken — it was Alex Portnoy's.

So what happended? Some directors ***fraudulently*** abused their trust. This was a tiny minority, but is seems they did it on a massive scale.

What they really were was a band of midnight burglars and corporate rapists clothed as widget makers — the *well dressed Arthur Daleys and Mike Tysons of our business world.*

Some other directors *negligently* or even *innocently* abused their trust. This was a little more common.

Too many directors thought their job was to pat managers on the back. With hindsight, perhaps they should have done less patting and more frisking!

More frisking might in some cases have revealed the loud bunch of *jangling keys to the yacht, the bar fridge, the dining room, the jet, the* Roller etc.

Even if they didn't frisk, maybe they could have contemplated more. One of a director's important jobs is to contemplate.

To sit back and think forward.

Unfortunately, the only effective contemplation for some honest directors was of the wine with lunch. When they sat back, they didn't close their eyes and contemplate. They closed their eyes and slept.

It's an Australian tragedy — not a Greek one — we can all understand it. One by one, most of our economies received sudden seismic shocks:

- *Victoria, a basket case. Once the Garden State, now a weed patch.*
- Western Australia, the State of Excrement.
- Queensland, a real Banana republic.
- Tasmania — where you could almost get the best government money can buy!
- South Australia, not only is the Festival over — it's become a wake, *and for lawyers, a picnic.*
- New South Wales, where I come from — still the Premier State - but there's not much to compare it to!
- And, last, here, Australia's capital. What is it? $2!

THE CRIMES

A *common* stream in many of the cases looked at by the ASC is the sucking out of corporate resources.

So one could say our laws just didn't work and we must have new ones. That is too glib a response.

We have laws against rape. They are fairly simple. You mustn't rape. If you do, you go to gaol.

But do people still rape? Regrettably, yes. Does that mean we need more laws? No.

We have laws against corporate rape. But some still do it. Does that mean we need more laws? No, it doesn't.

We seem to think that because it happens, ***rape with a pen*** needs much more complex law than ***rape with a penis***. Clearly it is more complex, but how much more so?

CROOK SCALE

What's happened in corporate behaviour is really very simple. Let me give you ***Green's Crook Scale***. In this scale there are 3 layers of crooks.

The Hardened Crooks

These people will always break the rules, no matter what the penalty.

The Calculating Crooks

These are the cold analysts of the risk/reward ratio. They say:

- What are my chances of being caught?
- *Even if I do get caught, what penalty will I get?*

The Soft Crooks

They are honest people. But they look around, they see everyone else breaking the rules and getting away with it, so they say to themselves "it must be OK, everyone's doing it, so I will, too."

In the corporate world, we had an explosion of high profile calculating crooks and as a direct result, the soft crooks. And then, one might speculate, some of the calculating crooks moved up my scale to become hardened crooks.

One problem with Australians is we set our cruise control on 10% above the speed limit. What we must do is either adjust the laws to reflect that practice by raising the limit, or rigidly enforce those laws to encourage people to stick to the limit.

Chairman of the Australian Institute of Company Directors, Sir Eric Neal, said:

"You can't legislate for honesty. You can legislate to punish dishonesty and that's all."

He's right. And to go way back, Tacitus said something like "as long as there are men, there will be wickedness".

THE COPS

If, while everyone else had their eyes closed, the cops had kept theirs open and had tried to enforce the existing laws so the risk/reward ratio worked in favour of staying honest, we'd have had fewer crooks.

We'd all have opened our eyes and have been horrified by what we saw.

We all know this happened with tax. It took radical change, including visible enforcement to change the ethic.

Now, the 2 main corporate cops (the ASC and the ASX) have indeed changed their spots.

But during the period when most of the excesses happened, where were they? On TV. They weren't active policemen — they were media stars.

Our corporate cops had most of the guns and bullets they needed. They just should've taken their guns out of their holsters and waved them around more often.

WEAPONS

They had all sorts of powerful weapons. The power to investigate. To access documents. To ask questions. To hold hearings. To conduct examinations. To declare conduct unacceptable. To seek injunctions. To sue in civil courts. To prosecute. And lots more.

Given those weapons, the regulators still favoured the power of publicity in favour of the law. History has proved that a sad mistake.

Adlai Stevenson once said that an editor's job is to separate the wheat from the chaff - and publish the chaff. The problem is that once the chaff is published, it's gone. No-one remembers.

If the media gives instant impact, it doesn't usually give lasting influence. But the law can do that. Indeed that is one of its jobs.

THE POLITICIANS

Why did the old corporate cops act like this? Were they incompetents? Were they fools? Were they blind?

No. They were broke. And, as you know, you get what you pay for!

The NCSC was scandalously underfunded and underresourced. It's budget was only $7 million at its best. Clearly inadequate. But if you were to combine the NCSC and the State CAC's however, that excuse of poverty was a big lie. The States actually sucked millions in profits straight out of corporate enforcement into consolidated revenue.

And it got worse. The old hoary bogie of Centralism got in the way. The politicians directed the NCSC to delegate prosecutions to the State CAC's. And once there, the NCSC was powerless.

The WA Regional Commissioner for the ASC, Mr Murray Allen confirmed this in 'The Australian' newspaper earlier this week (2/3/92) when he said:

> *"The problem with the old system was there was a lack of co-ordination between the various organisations and a lot of buck passing."*

No-one took charge of corporate Australia. We carved up Australia with separate sheriffs for each town all answerable to different Mayors and an FBI that couldn't override the locals because not only couldn't it afford the horse to get it into town, it couldn't make anyone ride it there.

All this was a prescription for disaster. And we got it. But we didn't deserve it.

But that's why they used the media. It was there. It was national. It was instant. It was free.

But it didn't last. And it didn't work.

The ASC now has a budget of over $100 million. If the NCSC had access to that sort of money, who knows?

THE LAW

If there *had* been better enforcement by the cops, would our existing laws have worked better? In my opinion, generally yes. But we can't be sure. Too often in the past, the regulators have taken the easy way out because they believed the law to be inadequate. They and others press for changes to the law without pressing for the law to be tested.

It is gratifying to see this is now changing a little, although to judge by recent amendments to the law, not by much. WA Regional Commissioner Allen colourfully commented (in the same article):

> *"Unless you get off your bum and investigate and try to push the law, test the law, find out what its weaknesses are by testing ... I don't think it is legitimate to say the law is weak, therefore we will do nothing. If the law is weak, then you've got to show it to be weak."*

We have rarely tried this approach before. What we do instead is let the crooks escape, butcontinue to enshroud our businesses, and hence our consumers, in tons of new and complex regulation. The real problem we now have is finding the law. That is a problem for both the regulated as well as the regulators. We are literally lumbered by laws. And we must get rid of many of them. We have too much of the approach "to catch the rats, you must catch the mice". It is time we left the mice alone, because if you haven't noticed it, it's mostly the mice you are catching.

When I started learning law over 20 years ago, if you piled up the two statutes most used in business law, the Income Tax Assessment Act and the Companies Act, your pile would consist of only 2 volumes and it would've been 6 cm high. But if you take today's versions of those same laws, even with their smaller type-face and much thinner paper, you have a pile which is more than 4 times taller, and comprises 7 volumes.

Just ask yourselves honestly, if someone did a cost/benefit analysis of the extra 5 volumes and 20cms of thickness, would the conclusion be it was all worth it?

This is not a novel phenomenon. Jonathan Swift questioned it almost 300 years ago:

> *"If books and laws continue to increase as they have for 50 years past, I am in some concern for future ages; how any man will be learned, or any man a lawyer."*

Even so, there's no doubt in recent times we've had a veritable avalanche of law. A vomit of verisimilitude. And it continues.

As a result the *costs* of law and justice have exploded. But have the *chances* of justice increased? Hardly!

WHAT DO WE DO?

And don't just nod approvingly. Many of you are responsible. So accept your responsibility and do something positive.

The best thing you can do is stop doing what you are doing. Stop adding to the corporate quagmire. The next best thing you can do is start throwing away the stuff you've created that doesn't work, or even if it does is outweighed by the costs.

What we should do is reduce our laws and make them simpler. That might help make them more effective.

I don't mean just re-writing our current laws into plain English although that could certainly help. I mean reduce the quantity and change the quality.

For a start, more of us might start to understand it.

Our laws are so complex, in many cases unnecessarily, that even intelligent people can't understand them. Speaking of intelligent people, *Marx (Groucho) once said that something was so simple, even a 5 year* old could understand it - so he said "get me a 5 year old". Our laws are a bit like that.

GRADING OUR LAWS

There's a computer software program which grades text by the number of years of formal education you need to understand it. Its range of "acceptable" text ends at 16 years. 16 years! That's what you usually take to finish an undergraduate degree. Most of our modern laws fail even that test dismally.

If only more lawyers studied science instead of law, they'd be able to define the shortest distance between 2 points as a straight line. But ask most lawyers to do it and you'll get something that'll look like Canberra's road system!

You will remember a 43 page piece of draft law first released in 1990 with the helpful title of the Corporations Amendment Bill 1991. It was designed to catch much of what occurred in the *80*'s - loans to directors, management fees, etc. I call this the "Snouts in the Trough Bill".

Courtesy of the Victorian Law Reform Commission, I arranged for the original "Snouts in the Trough Bill" to be put through this computer program. And do you know what - it wasn't 16 years you needed. You needed 27 years of formal education to understand it. 27 years! Most of us here aren't even old enough for that, let alone satisfy it.

After public exposure, the Companies & Securities Advisory Committee released another version of the draft, late in 1991. This time the draft was over 50 pages long. The latest version, in the Corporate Law Reform Bill 1992, released only weeks ago, is now up to 60 pages. Despite that length, and it is still too long, I have to say it is a very substantial improvement on the previous versions, although its effectiveness will still, in my view, be dampened by its over-regulatory nature and hard focus on detail. And business people will continue to reel in horror when they are confronted by it.

I'm not very good with computers, so I've developed my own patented test I try to apply in my own practice. It is ***Green's Eye-Glazing Test.*** If I find my eyes glazing over when I read something, sure as hell my clients aren't going to sit up in wonderment and say "Gee, this is terrific". So what do you do? You do what I tell my children — you try, try again. You try until it's as clear as you can make it.

Perhaps the problem is that when some of you, the Parliamentarians, the first recipients of laws, get them, your eyes are already glazed-over - by hard work and late hours, of course — so you don't notice the problem.

The Parliamentarians should demand all legislation be rated by some readability test, and if when rated, it fails the test, you shouldn't even look at it. You should throw it back. If *that* test applied, most of our laws would be gone with no real change other than to business costs and our peace of mind.

URGENT OR NOT?

Is this need to reduce the law, to make it more simple, urgent?

After all, most of the cowboys are dead, or dying, or just have a bad back. The fringe of corporate crooks has been cut off. The damage has been done. The excesses of the immediate past are unlikely to be passionately repeated in the near future, regardless of changes to the law.

Why? 4 reasons:

- The credit providers have forgotten how to lend — or if they haven't forgotten, they've locked away the cashbox key. That *may change, of course, now we're One Nation.*
- The auditors have remembered what "true and fair" means, although the law is doing its unfortunate best to make them forget again by ignoring that test and going instead for specific standards without an overriding sense of purpose encapsulated by "true and fair".
- The regulators (ASX and ASC) are wielding their sticks, and are expected to continue.
- And perhaps most importantly, our eyes have opened and, at least for a while, we will remember. In his book on "The Crash of 1929", Galbraith sensibly commented that "memory is much *more important than law in keeping people honest*".

Over the years we've had several spurts of egregious corporate behaviour, closely followed by new laws designed to prevent them recurring. But despite that, they still seem to. Why? Mostly because of Galbraith's dictum — eventually, people forget what happened last time. Either they weren't around, and only read of it as history. Or they were there, but think it can't happen again because they believe the new laws designed to stop it are accepted and understood and, importantly, are enforced.

WORDS, WORDS, WORDS

I believe our existing laws would catch most of the excesses complained of. I don't readily accept that we need rafts of new law to solve old problems. In most cases, theft is still theft and rape is still rape, corporate or otherwise.

So let's not fall for the now discredited folly of adding even more words. Lots of extra words aren't the solution. For many people, extra words are simply the gateway to fraud.

Lord Halsbury wrote in his preface to the first edition of the 'Laws of England':

> *"The more words there are, the more words there are about which doubts may be entertained."*

I would put it this way. The more words, the more opportunity to loophole; give me one word, I'll give you no loopholes; give me 50 words, I'll give you 100 loopholes.

So, where do we start? We start with art. Hans Hoffman, a US painter said in his 1930 book 'Search for the Real':

> *"The ability to simplify means to eliminate the unnecessary so that the necessary may speak."*

And in the very recent words of the Chief Justice of the High Court, Sir Anthony Mason:

> *"Assiduous concentration on detail can obscure the identification of policy goals and guidelines, reducing the role of the courts to an application of the statutory language which, on its own, does not always make much economic, social or practical sense." (Address to 1992 National Corporate Law Teachers' Workshop, 3/2/92)*

What our laws often do is to so mask the sun, the essential message, with such detail, it's rays are invisible and cold. Where possible, we should strip away the clouds so the sun can better do its job. Many of our laws are so complex, their fundamental messages are hidden.

PUBLIC EXPOSURE

One of the very good things the Government has done is to very often expose its Bills to public comment — to get the input of all those interested. That process should continue.

That said, I make a plea. As one who has a real interest in corporate law reform, I have to tell you that the process isn't working as well as it might. Why? Because there is too much to digest in too short a timespan. If the volume was less, even if it covered the same areas, it would be easier for business to helpfully respond.

Because of the volume, and the inconveniences of having to earn a living, few people are able to spend the time in contemplating the Government's reform programme it deserves. My plea for less and simpler law would help those people who wish to contribute to do so.

WHAT'S IT COSTING US

If one of the purposes of law is to reduce chaos to order, we are not succeeding.

It is costing Australia too much money and too much time.

In 1987-88, the last year that statistics are available, the legal profession earned over $3billion (Australian Bureau of Statistics 'Legal Services Industry", Catalogue No. 8667.0). I would hesitate to think what it might be now. Then add to that the amount earnt by other professionals who also give legal advice or are involved in compliance work (whether or not they are lawyers). Let's just take the accountants. The same year, they earned $2.3billion (ABS Catalogue No. 8668.0 'Acounting Services Industry'). Then assume that only 5% of the total of that $5.3billion arises because of overly complex legislation.

That means Australia wasted $265million that year alone. Indeed, something similar, presumably greater, every year. You are talking very serious money.

And we haven't even embarked on how much time has been wasted. Let's take that $265million per year, and apportion it at an average hourly rate of $100, that's 2.6million n hours, or over 1,500 years. That means every year in Australia over 1,500 professionals are totally wasting their time and that of their clients. We're talking of over 1,500 years of total, absolute unproductive waste in Australia every year. And I suspect my figures are overly cautious. For example, they take no account of the cost of government in administering these rules.

Can we really afford that?

THE SOLUTION — FUZZY LAW

So, my solution is that where possible we move right away from black-letter, detailed, heavily proscriptive, law.

What we would replace it with is law that meets these 4 criteria as far as possible:

- short and simple
- clear and intelligible
- based on broad principles or concepts, not detailed rules
- promoting certainty

I am not saying all laws must fit this formula. But I am saying they should be judged against these crieria, benchmarked against them, and any detours justified, as often they will.

A couple of years ago, I coined the term "Fuzzy Law" for this, a term which many choose to misunderstand. They choose it to mean vague, unfocussed, uncertain. How I mean it is quite different. Let me explain.

Some of you have heard of 'fuzzy logic' and its growing use in developing the exciting new computer technologies. It does involve *probabilities and concepts, not detailed rules. But the concepts need to* be clearly expressed, focussed and appropriate.

My concept of Fuzzy Law is somewhat similar. Our laws would be much more conceptual, not too detailed. I'm not saying no detail; only just enough. And that will vary with the subject-matter of the law. It is what some of you know as 'principled' or 'purposive' drafting. It is what others of you know as 'anti-formalism'. What you call it doesn't really matter, but Fuzzy Law has been useful, because it has captured people's attention. It has drawn the public focus, just a little, on one part of what *you people do here.*

Most Australian lawyers, particularly drafters, and, surprisingly, many business people find all this a horrible thought. But it is actually the norm in much of Europe, in the US, and even in New Zealand, although I am not suggesting we blindly follow others with different traditions. What I am suggesting is we at least try an approach that seems to have more often than not worked elsewhere and mould it to our culture and circumstances. To the extent it is good, let's take it and improve it. To the extent it is bad, let's not.

In his interesting 1977 treatise, "Legislative Drafting: a new approach" (Butterworths), Sir William Dale observed that in contrast to the U.K., and I would say Australia:

> *"lucid and often succinct drafting is to be found in the countries on the European continent....The continental lawmakers, influenced by their heritage of codes, think out their laws in terms of principle, or at least of broad intention, and express the principle or intention in the legislation." (at page 332)*

This view has not escaped the eye of Australian drafters. A little has been written about it, from the strongly critical to the strongly supportive.

It is a subject I have unwittingly discovered touches off very raw, emotional and often passionate nerves. All that tells me is it's clearly an important, and live issue. And one which must continue to be discussed, but constructively, in Australia's interests and not just the self-interests of those whose day-to-day jobs it is we're potentially affecting.

And it is not just lawyers, but also business people who are cautious of this approach. Why that is so is probably because of 4 main reasons:

- they are cautiously and understandably concerned about a loss of certainty
- they rightly fear that what may work in some countries with a particular tradition may not work in ours
- they fear an explosion of expensive litigation to fill perceived gaps
- they listen to their lawyers.

Why many lawyers tell them it's bad is obvious:

- It will inevitably result in fewer of us. If the drafters do it well, with the talent and skill they show they have by being able to draft black-letter law, business people will be more able to act commercially and safely without involving lawyers to the extent they do now.

  Let me share a secret with you. There are already too many lawyers for a country this size. Again using the 1987-88 government figures, the legal profession then employed over 55,000 people in Australia, not all of whom are lawyers, of course, and excluding academics, judges, and lawyers in corporations or government departments. I heard the other day there are more law students in Australian law schools than there are practising lawyers. So, what I am proposing is a small bit of Darwinian micro-economic reform.

- Many lawyers don't like Fuzzy Law because they feel it lacks the intellectual rigour of black-letter law. Quite clearly, black-letter law requires great intellectual prowess. I enviously know from experience that the drafters of our laws can be people of enormous talent and ability. Not only can they draft elegant solutions to complex problems, they can do so with the speed of humming birds. But some think we are unable to apply that same intellectual strength to finding the right, and quite focussed, concepts.

Don't misunderstand me. I am not suggesting there is no place for black-letter law. Indeed, to toss out completely the way we have been doing things for so long itself may create the turmoil and costs which I am so keen to avoid and reduce.

For myself, I am confident you could do so, but given the often-hysterical and emotional response to what I have been putting for the last 2 years, I suggest we move forward slowly.

But we must move forward.

Perhaps my current thinking is closer to that recently expressed by the Chief Justice of the High Court, when he said:

> *"Maybe we could strike a happy medium... with some emphasis upon plain English and more emphasis upon simpler concepts and more straightforward and practical guidelines involving closer consideration of how rules will actually work in practice." (same address)*

Ideally, it would be *a lot* of emphasis on plain English and *a lot* of emphasis on simpler concepts, or Fuzzy Law.

What more emphasis on Fuzzy Law would do is give our courts more room to move and attack artifice, if artifice is still practised. Something black-letter law makes very difficult if not impossible, or, as the Chief Justice said "reducing the role of the courts to an application of the statutory language which, on its own, does not always make much economic, social or practical sense."

Fuzzy Law would encourage our business community and our courts to keep moving away from technicalities and towards substance. It would discourage loopholing, because without black-letter law, it would be harder.

Many people think that because we have a culture of black-letter law, it is the only way. It isn't. As I've mentioned, it is quite common in civil law countries, increasingly in New Zealand and interestingly, it also occurs from time to time in Australia, even from Canberra, so don't tell me it can't be done. It is being done, just not often enough.

Some examples?

Section 232 of the Corporations Law (the old section 229), the provision dealing with directors' duties, is a good example of existing and, I would suggest, powerful Fuzzy Law. It talks of directors acting ***honestly*** and ***reasonably***. Or not using their position ***improperly***. The

convictions last year of former *Rothwells* directors were just on that basis! And what about the *Guinness* convictions in the UK. Similar. Directors are understandably concerned about the refocussing by the authorities on this provision, and about the courts overreacting to the excesses of the '80s by being too ready to convict or impose harsh penalties. Some recent acquittals or findings of 'no case to answer' in a number of cases is evidence that courts are capable of finding a balance. It is the provision that I say really captures most of what's in the Government's Snouts in the Trough Bill. And it's done in one section. A section that increasingly is firing fear into the hearts of business people. It's just a shame it was ignored by most people in the '80s — its teeth were there, they were just in a glass on the bedside table.

Section 52 of the Trade Practices Act is another scary one. Scary because it is very effective. It's the one that simply says you can't mislead or deceive. The new, and I say, exciting corporate equivalent in section 995 Corporations Act is similarly effective.

The new prospectus contents law, section 1022, is also very fuzzy and simple. I love it for its elegant and clever simplicity. It just says you have to put into a prospectus everything that an investor would reasonably expect to find or reasonably require to know. It's proving to be very effective. People have been screaming blue murder about how all of a sudden they have to apply their cosy minds to a task that the naive investing public always thought was being performed but wasn't. Over time as cynics get used to the new system, the cries will die down. I just beg the Government to have the guts to stick with this important reform.

Whoever of you produced it deserves a medal for the simplicity, elegance and clarity for which this section will one day become known. It is the provision designed by the Government to bring credibility back to our shattered markets. It will succeed in doing so.

The self-interested bleating and criticism continues, as it will for some time. I say to the Givernment, other than being willing to continue fixing up the technical glitches that still remain as they are found, leave this piece of Fuzzy Law alone. It is working. It has cost the business community a fortune to understand, but it is now largely understood. Complaining of these costs is like saying that when your house is destroyed by a cyclone, it should rebuild itself and cost you nothing to do so. What we now have built is something which can help restore credibility to Australia's markets and international reputation.

PLATES & DOILY

Let me explain my notion of Fuzzy Law graphically.

First, take a plate. You should be able to draft Fuzzy Law to cover all this with a high degree of certainty. You'd simply say "a plate with a radius of x centimetres". It would be at the edge only that you could have some query. Is it in or is it out?

By using such a simple definition, you'd be more likely to see there was some uncertainty at the edge of the plate. And you could then deal with that by deciding to catch it or not — so you'd say " a plate with a radius of x centimetres, including (or excluding) what's on the circumference."

But try to cover the same area by defining each point on the plate's surface and of course you'd be more likely to end up with something resembling a paper doily full of holes rather than a solid plate. That's black-letter law. And by doing so, you create a bloodsport of loophole-spotting.

THE NEW UMBRELLA

Let's look at the country's reform agenda with an umbrella perspective. It isn't just straight law reform that is going on here, there are 5 main threads:

- the first is the focus on making our laws more effective, although we may differ about the method, that is why we are here
- the second is the renewed vigour of the Australian Stock Exchange and the recognition by many, including the Lavarch Committee that its listing rules may be a more effective way of regulating much of what goes on
- the third is the new focus on the accounting standards. It's unfortunate in my view we are apparently giving up on 'true and fair', but you'd expect that from me.
- the fourth is the desire for continuous disclosure. We have now worked with a number of Australia's largest listed companies in helping them set up internal systems that will enable their boards to have a high degree of confidence that they have the information they need as directors to do their jobs properly, and that the market will, on a timely basis, have so it will be able to do its job properly. Enforced continuous disclosure, enforced not just by the ASC and the ASX but by boards and the market is the real answer to much of our corporate misbehaviour. It was the learned U.S jurist, Louis Brandeis, in in his 1914 book "Other People's Money" that no

doubt inspired a certain Four Corners program, who talked about the "disinfectant of sunlight" which has been a hallmark of the U.S. approach to regulation.

- and the fifth thread is the increasing role of the institutional shareholders and the market itself. Such initiatives as the small book of Corporate Conduct and Practices promoted by the Australian Institute of Directors and others is significant. The formation of the Australian Investment Managers Group is significant, and I could go on.

The beauty of the combination of these threads, the fabric they weave, is that the parts do fit together, although they never really have before.

The beauty of using the accounting standards in place of much black-letter law, as I propose we do, and as is accepted by the Government in some parts of its new reform package, is that these laws are directed principally at people who have to deal with these accounting standards on a day-by-day basis, and will largely understand them. I will have more to say about this in a moment. There will be many who will express concerns about the drafting of the accounting standards. As to that, I will tell you I too share much of that concern. But that doesn't mean it's not a good idea. It remains a good idea, but there does need to be more thought in drafting these standards, along substantive, fuzzy, but clear lines.

SIMPLICITY v. CERTAINTY

Let's leave the umbrella and return to my spoke of Fuzzy Law. A pointed criticism of Fuzzy Law is certainty must suffer. It need not. Indeed, the opposite can be true.

The trouble with much of our black-letter law, supposedly drafted that way because of the need for certainty, is that in reality there is no certainty at all - it doesn't deliver. If you need 27 years of formal education to understand it, how can citizens, not trained lawyers, know what is legal and what is illegal.

Lawyers can excuse themselves by claiming the complexity of modern law mean they couldn't be expected to know all of the law. That's a fine excuse for lawyers. But ignorance of the law is no excuse for the accused citizen.

This criticism is nothing new, nor has it necessarily improved with age. Only 200 years ago, Jeremy Bentham said that laws should be drafted:

> *"...so that every moment in which they ought to influence the conduct of a citizen, he may have presented in his mind an exact idea of the will of the legislator..."*

He went on to say:

> *"...for all the pestilential effects that cannot but be produced by this so enormous flood of literary garbage, the plea commonly pleaded [is]... that it was necessary to precision- or ...certainty. But a more sham plea never was countenanced, or so much as pleaded, in either King's Bench or Common Pleas."*

The truth is even expert lawyers often can't tell their clients the answer to a black-letter law question. How rare it is for a lawyer, when asked to give an answer, to say "it's crystal clear" versus "it could be this" or "it could be that". And that's where we are under black-letter law. Hopeless.

Mr Justice Deane in the already infamous *Hepples case* (1991)65 ALJR 650,657 said:

> *".... the least that a taxpayer is entitled to demand of government is that, once the relevant provisions are finally identified, a legislative intent to impose a tax upon him or her in respect of a commonplace transaction will be expressed in clear words."*

The existing black-letter law rarely gives clear red lights and green lights, which is what certainty means to some people. It is full of amber lights, detour signs, tunnels, bridges, flashing arrows, and worse, too many 'go back, you are going the wrong way' signs. It is too uncertain. Thus it costs millions and years to seek the Holy Grail, but we continue to be disappointed.

SNOUTS IN THE TROUGH BILL

Now, as an example, let me expose my own tale. When the original Snouts in the Trough draft bill was first circulated, I strongly criticised it for its complexity, denseness and loopholes. When I tried to read it the first time, I spent days trying to follow what it was all about.

Indeed, at one stage I bumped into a proponent of the draft Bill in the street. I told him I was having trouble and he suggested that instead of reading the 43 page draft Bill, I should read the 54 page Explanatory Paper!

So I tried to put my money where my mouth is and I redrafted it in 7 pages of Fuzzy Law to show what you might do. But I am no draftsman of legislation. I am only skilled at drafting take-over offers, prospectuses, contracts, and, regrettably for some, speeches.

So I made an offer to the Companies & Securities Advisory Committee responsible for this that they should commission a true Fuzzy Law version of their law. With their blessing, I began a task from which I learnt much. Together with one of Australia's leading drafters I had a go at redrafting the Committee's draft using Fuzzy Law.

The first thing I learned was how large was the task, and how difficult. Unless you've actually had to draft some legislation, particularly under time pressure, as many of you here do regularly, you tend to underestimate the effort and the difficulty.

The second thing I learned was it doesn't matter how much effort goes in, how good the drafter, or what the time pressures are, you judge the product, and it is judged by its readers, afterwards in the cold light of day, when you or they have all the time in the world to be critical, or so it uncomfortably seems.

The third frustrating thing I learned was the policy decisions imposed on drafters may be ludicrous and ill-conceived but despite that they are expected to perform.

The fourth thing was how good our drafters can be. Particularly working under the time and policy pressures imposed on them, it is extraordinary that they cope and often cope so well. It is also a tribute to them that they are able successfully to put aside their own views, often strongly held, while they are doing these tasks.

The fifth thing I learned was, on the one hand, the convenience of the generally-accepted drafting style and techniques, and on the other hand, their inappropriateness as a framework to encase my Fuzzy Law concepts. What we produced was, to my eye and to my dismay, only marginally better than what had been done before. Because of our use of black-letter style and sign-posts, and our eschewing of plain English techniques, our draft was almost as long and as complex as the Committee's version. It was somewhat better, but not by much. It was not the stunning contrast I had hoped for. That is not to criticise my draftsman. He did a fine job operating in that framework. It was apparent to me afterwards that the framework we used was as unacceptable as the black-letter law we were seeking to replace.

So, having ended up with a result I was not happy with, I had yet another go at it. But this time, I threw away 3 things, the Advisory Committee's policy, their and my drafts, and the Commonwealth drafting style as I understand it.

Rather I started with a clean slate — first principles, and tried to draft them as principles. Which is probably what I should've done the first time round. I also used the somewhat unconventional, to many, techniques of plain English promoted by the Victorian Law Reform Commission and I had their assistance in their implementation.

In place of about 50 pages of the Bill that is now before the Parliament, the Fuzzy Law/plain English version has about 10 pages of quite simple, comprehensible rules that any person of average intelligence should be able to understand, probably without a lawyer. Heaven forbid!

Who knows — if the people to whom we direct the laws can actually find and understand them, maybe the laws will have a higher chance of success.

I am not saying my version is perfect or that it contains no loopholes. I have already privately exposed it to a small band of unnamed experts, both academics and practitioners, all of whom have, in the very short time they've had, come up with excellent suggestions for improvement many of which I have incorporated in my draft.

Like the Government's Bill, I now lay my Fuzzy Law/plain English version on the table and invite comments from the public at the same time as they comment on the Government's Bill.

I admitted a moment ago an acceptance that my version is not perfect. No doubt, far from it, but what I do suggest, though, is that because it is so short and, I suggest, simple, more people will be able, and hopefully, willing, to turn their minds to it during the exposure period to improve it by increasing its clarity, enhancing its certainty and eliminating its loopholes.

Now, turning to the Government's Bill for a moment. Let me not leave you with the impression that I condemn it universally. I don't. There is much to commend it. It's just that there is too much. There are some very clever techniques used here. Some of those techniques, which I applaud, and indeed have used in my version, will be the subject of some criticism during the exposure period. For example, the use of the accounting standards to define 'linked companies' — one body corporate which has a 'significant influence, within the meaning of any applicable accounting standard, over another'. That simple phrase, which we will become much more familiar with as the accounting standards become more part

of our wallpaper, eliminates pages of loophole-ridden black-letter drafting. It is a radical, but neat and elegant solution. Many lawyers will be concerned about its breadth and its novelty, and they will fear for the usurpation of the law by the accountants.

Of that, let me say this. The cleverness of using the accounting standards, now we have some, is that boards and management of companies will carry them around, through experience, in their heads. Then, by applying the same techniques and language to the law regulating their behaviour, you are eliminating the schizophrenia they suffer from now — where they understand something on accounting concepts, but the law takes an entirely different and unfamiliar approach. And as problems of interpretation are identified with these accounting concepts, just as they'll be changed for reporting purposes, after the wide consultation required, they'll be automatically changed for the law.

Indeed, the more we can marry the law and the accounting standards, *the more likely the law will be complied with. Because if the auditors* are going to require disclosure in the accounts of the arrangements, they *will be the first signposts of the fraud. Fairly quickly, crooks will* recognise that and see the signpost as a 'STOP' sign.

The use of the accounting concepts has only been used in part, though. They should have been used wherever possible. Let me give you one stunning example of where had the accounting standards been applied more rigorously, some major loopholes would not have been opened.

The Government's Bill would let the late Robert Maxwell repeat his alleged misdeeds in Australia with impunity. That's pretty good, isn't it? So when the next wave of crooks comes along, this law will carry them, not to gaol, but to whichever beach they choose to bask on.

How can this be so? Because this law focuses specifically on bodies corporate and trusts, it assumes crooked directors will be so gentlemanly *as to restrict their shonky activities to those entities. But there are other* entities known to mankind. The Liechtenstein Anstalt, for example. *Some would say one of those is neither a body corporate nor a trust.* So use one of those and this 60-page law leaves you largely alone. Or find *some friendly government somewhere else that will tailor-make an* entity for you so as to escape our black-letter law.

I have sought to avoid that problem in my version by focussing, not on bodies corporate and trusts, but 'entities', a term that is broadly defined in the accounting standards, and appears to be as unlimited in its scope as is the imagination.

I am sick of dense, black letter, loopholable law. Many lawyers think it is some great intellectual game — a challenge. What we must realise is the game we're playing is Russian Roulette. And Australia's credibility is the potential victim.

OTHER VIEWS

This whole question of drafting laws was examined in great detail in the U.K. in the early 70s. The U.K. parliamentary committee chaired by Sir David Renton ("The preparation of legislation", May 1975. Cmnd. 6053) found:

> *"The adoption of the 'general principle' approach in the drafting of ... statutes would lead to greater simplicity and clarity. We would, therefore, like to see it adopted where possible" (paragraph 10.13).*

They also discovered:

> *"...a great willingness on the part of some of those who have different tasks to perform in relation to statute law to accommodate each other's difficulties. Thus the judges would be glad to face the problems of interpretation if statutes gave less detailed guidance but were more simply drafted and more fully expressed the general intentions of Parliament; and the team engaged in preparing the legislation would be more ready to draft by expressing general principles appropriate to the subject matter if Government and Parliament were less demanding in their desire to have every foreseeable circumstance met by detailed drafting which confuses the outline of the draftsman's scheme." (paragraph 7.6)*

The committee concluded that:

> *"interpretation of Acts drafted in a simpler, less detailed and less elaborate style than at present would present no great problems provided that the underlying purpose and the general principles of the legislation were adequately and concisely formulated. The real problem is one of confidence. Would Parliament be prepared to trust the courts?" (paragraph 19.41)*

WHAT HAVE OUR JUDGES SAID?

In *Kingston v Keprose* (1987), Justice McHugh claimed that:

> *"Purposive construction...is the technique best calculated to give effect to the legislative intention and to deal with the detailed and diverse factual patterns which the legislature cannot always foresee...Moreover, it is the technique which may finally induce the draftsman to state broad principles rather than to draw the detailed enactments which now emanate from the legislatures."*

And I have already quoted to you some insights from the Chief Justice.

WHAT DO THE POLITICIANS SAY?

In 1982, the then federal Attorney-General, Senator Peter Durack, Q.C., at the Attorney-General's Symposium on Statutory Interpretation volunteered:

> *"...the essential role of parliament is not to get into the details of legislation at all but to deal simply with general principles. It should leave it to others to work out the details. It is a question of whether you leave it to the courts to work out the details or leave it to the executive or parliamentary counsel or whoever is charged with this responsibility. I think as long as Parliament knows what is being proposed, and what instruments are going to be available to the courts in interpreting and in carrying out its will, then parliamentary sovereignty is satisfied."*

So it's not really about legislative supremacy over the courts, as some may suspect. It's about Parliament accepting the courts will do Parliament's bidding. If they don't Parliament has a number of remedies:

- it can enact new laws to give the courts more direction
- it can appoint new judges

DO WE TRUST THE JUDGES?

Well, should we trust the judges? After all, they are human, and sometimes they will make mistakes. If they didn't, there'd be no appellate system. But they don't always make mistakes. Indeed it is probably easier to make a mistake when interpreting some black-letter provision which happens not to have covered the particular circumstance than a general principle that does.

Let me give you an example. The prospectus sub-committee of the Advisory Committee recently was set up to examine whether the fuzzy, section 1022 prospectus test was workable or not. For those of you who aren't company lawyers, I'll remind you that s.1022 simply says you have to put into a prospectus everything material that a reasonable investor and its adviser would reasonably expect to find.

As part of a submission to them, I reviewed the cases on some similar questions. This dealt with cases on what constitutes full and frank disclosure to a company meeting, disclosure in take-over bids where the obligation is quite similar to the prospectus test, and disclosure under schemes of arrangement.

Approaching these cases from a common sense, commercial point of view, the judges almost universally came to what I thought was the right conclusion. Because the rules were fuzzy, the judges tried very hard to come to grips with what was sensible having regard to the apparent purpose of the disclosure obligation.

So what, you say. Yes, we can all think of decisions that defy reason. I would like to think there are fewer of them today. Why might that be? One reason might be provisions such as those in the Interpretation Act that direct courts to have regard to the legislative purpose.

It's not always easy for a judge to do this, let alone a practitioner advising in a case law vacuum (very common these days), if the parliament has neglected to say what its intention was.

Another novel technique to impose the legislature's will on the community and the judges is the use of examples in legislation. How easy it it should be to use general principles, and give a few typical examples to give readers a true of what the particular law is about. The difficulty at the moment is that (crazily in my opinion) if examples are given, and they conflict with some black-letter drafting, it's the black-letter drafting that wins. That should be changed. But the use of example is beginning. Look at the Broadcasting Services Bill where the very difficult tracing provisions have been reworked in an exciting and effective way. First, they've been put in one place, up the back as it happens, but it makes them easy to find. Second, not only do they use clear examples, they also use charts to make them clearer.

And if that's not enough, why not consider a new provision to go into the Interpretation legislation:

> *"That in construing legislation, substance is to override form, except if substantial injustice can be demonstrated."*

Now, again let me say that my concept of Fuzzy Law is *not* law that is so fuzzy you have to go to court to find out what it means. It is law that uses broad concepts where possible, as opposed to many detailed rules, to capture the idea and to do so in a way that enhances certainty of interpretation.

I am not for one moment supporting those techniques that leave so much unsaid and uncertain that the courts and people's pockets will be further stretched. We should learn from overseas experience, and in many cases, not repeat it. As the Chief Justice said:

> *"... the American experience does not suggest that their techniques have brought into existence a Garden of Eden in which commercial transactions may be freely undertaken without the ubiquitous presence of the lawyer." (same address)*

Australian Fuzzy Law must be drafted with care, with clarity and with certainty. It must be drafted so as to make it blindingly obvious what it is about.

But if people want to operate on the line of the legal playing field, then going to court might well be the price they have to pay for that. That is their choice. There will be plenty of room in centre court where recourse to the umpire will be entirely unnecessary.

Maybe we should also accept the Chief Justice's invitation (same address) to reopen the debate about the use of administrative rulings by the panoply of regulatory bodies that now surround us. He sees "a pressing need on the part of commercial people to obtain rulings on the faith of which they can plan and act." He is right. Much is to be said for that in the context of certainty and reduction of business costs. The role of the courts here needs to be considered. As the Chief Justice says, it should be "a re-definition rather than a marginalization..."

To finish on certainty, let me again quote Sir William Dale:

> *"If a statute is so detailed and complex as not to be intelligible to the majority of people, and therefore has little meaning for them, it has no certainty for them." (p.321)*

And if it's so uncertain to experienced specialist practitioners, what then? What this is all about is balance.

WHAT SHOULD YOU DO?

Even if we moved just a bit towards more conceptual Fuzzy drafting and plain English, I believe we'd all be better off with simpler, more explicable, more defensible, more certain, and more effective laws and more efficient, and honest markets. And Australian business, and so consumers, would save a bundle.

Black-letter law is a major part of the problem. Fuzzy Law is one part of the solution.

How many of you are prepared to join the fight? How many of you will take up the arms for Fuzzy Law?

At the very least, you should think about it. And preferably start doing it.

Use your pen, or your computer, to sign up in my war on black-letter law. If you're with me, pick up your pen, or your mouse, and make sure your next statute uses these techniques.

Don't just say it can't be done. It can.

Don't just pick at the problems it creates. Be creative and help solve them.

Let the war begin! Your country needs you!

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YOUR COMMENTS

If you wish to make comments on the Fuzzy Law draft Bill on loans to directors and related parties, or make comments on this paper, please send them to:

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The Hon. Jim Kennan, Attorney-General of Victoria: In the case of plain english there has I think been a great change in the legal culture in the last decade. It is slow and its difficult and, as John Green says, it is a hard discipline to say what you mean. I think plain english and plain english drafting are difficult for all of us brought up in a traditional legal culture, at whatever level. Because of undue pressure of business, whether you are a politician or parliamentary counsel or a lawyer, it is easier and safer very often to resort to traditional legal language and legal drafting rather than try and break out. The answer to a lot of this requires time and as I'll say at the end of my remarks it may require the use of new technologies, but I believe that nonetheless the work that has happened around Australia and particularly by the Victorian Law Reform Commission has been very significant in making progress.

Certainly it is true to say that the assumption that law and legal documents require to be written in archaic, obscure and a highly detailed way if legal accuracy is to be preserved and justice is to be done is still prevalent. It is certainly that assumption that has lead to the development and maintenance of a legal language which is unquestionably absurdly difficult to read and which creates a totally artificial market for legal services. Some examples are amusing but of course the problem is not funny. It adds needlessly to the cost of justice and its administration and it unjustifiably impedes access to the law.

The High Court recently complained about the wording of the income tax assessment act s.160M6 which reads:

> The disposal of an asset that did not exist (either by itself, or as part of another asset) before the disposal, but is created by the disposal, constitutes a disposal of the asset for the purposes of the part that the person that so disposes of the asset shall be deemed not to have paid or given any consideration or incurred any costs or expenditure referred to in paragraph 160 ZH 1(a), (b), (c), or (d), 2(a), (b), (c), or (d), 3(a), (b), (c), or (d) in respect of the asset.

I suppose that that is a good example of why we should have decimal numbering amongst other things.

The judges took that section to task. Mr Justice Dean referred to the fact that successive administrations have allowed the act to become a legislative jungle in which even the specialist lawyer and accountant are likely to lose their way. Mr Justice McHugh thought the relevant subsection was properly described as having been drafted with such obscurity that even those used to interpreting the utterances of the Delphic Oracle might falter in seeking to elicit a sensible meaning from its terms.

The assumption that has led to us tolerating monstrosities like that section is of course under challenge. In May 1985 I made a ministerial statement to the Parliament directing that in future a number of specific changes should be made to drafting styles in Victoria including that reference to the Parliament should replace reference to the Queen, the Legislative Assembly and the Legislative Council; the removal of latin phrases; the removal of references to regnal years; the removal of unnecessary self-serving qualifications and the use of 'must' in place of 'shall'. You will recall those cases which

said that 'shall' sometimes meant 'may' and so for seven years we have been using must. Those changes were intended to facilitate the development of simpler and more straight forward legislation but they were only a start, and I'm well aware of the need for a much more radical change than simply those.

The Victorian Law Reform Commission was then given a reference on plain english and has produced two major reports on the subject of plain english legislation. It has also been involved in numerous drafting exercises as an agent for both the public and private sector by way of delivering expert services in this area. The Commission has demonstrated beyond doubt that a plain english style can be adopted without putting accuracy at risk.

In its first report on plain english in 1987 the Commission concentrated on the defects in the language used in legislation, it analysed a vast amount of Victorian and Commonwealth legislation and identified the major ingredients of the barely intelligible drafting style that had generally prevailed in this country. Difficulties included the misuse of definitions; the creation of numerous unnecessary artificial concepts and the use of long complicated and unwieldy sentences. I must interpolate that I find this business of the number of words in a sentence something that is extremely hard to bear down on. As a politician examining a bill I regularly find sentences of 130, 140 words plus. I think that is a fundamental barrier to understanding and I cannot for the life of me understand why we can't have shorter sentences. It is something that is very hard to instil and something that I think is so inculcated in drafting styles, particularly when you have amendments to acts, that it's very hard to overcome, but the use of long complicated unwieldy sentences is still very prevalent.

The Commission's efforts to improve the language in which legislation is drafted has now received wide spread recognition by parliamentary counsel and lawyers throughout Australia as well as by leading experts overseas. There was a conference of legislative drafters arranged by the Commission at Bond University in 1991 and without dissent the proposition that legislation must be written in the clearest possible terms consistent with legal accuracy was accepted. I noticed a reference in John Green's paper to the Chief Justice saying that we could have some emphasis on plain english. I would like to respectfully disagree. I think that is like being a little bit pregnant. I think that there is nothing wrong with total emphasis on plain english and whilst that might only lead in fact at the end of the day to some emphasis on plain english I think we must really be seeking total emphasis on plain english and saying what we really mean.

The Victorian Law Reform Commission through the work that David Kelly and Robert Eagleson produced the 1987 report which was a manual of clear expression and is useful I think to lawyers and indeed any occupational group. It could usefully be introduced into the Universities as well. (Robert Eagleson was a professor of english at Sydney University who was appointed to the Law Reform Commission in Victoria to do this report; he wasn't a lawyer but he was an expert in english which was an important thing to have).

The Law Reform Commission has taken a role beyond simply producing reports and trying to influence the drafting of legislation. It has taken on various commissions and is now sought out by other agencies both in the public and private sector to do some plain

english work in a range of ways. This is where the role of the Victorian Law Reform Commission has been so important. It drafted the takeovers code without persuading the federal parliament to pass it in plain english form. In drafting it and testing it with corporate lawyers in Melbourne the VLRC met with widespread support and recognition that in fact it could be done. That was a great example of the fact that the takeovers code as it then stood could be drafted in plain english and, when circulated amongst the financial community and the commercial legal community, stood the test of scrutiny. The Credit Act 1984 is another example. They redrafted part of the Income Tax Assessment Act and the Medical Procedures and Fertility Act of Victoria. The Road Traffic Regulations the Commission drafted, which are still circulating for discussion, include the use of diagrams in the margins. This is another breakthrough in getting away from reliance on complex language in the drafting of laws.

In each case I think its fair to say convoluted and disorganised legislation was reduced to simple and straight forward messages which people could understand after 10-12 years formal education rather than 25-30. The Commission has also written or assisted in writing the Mineral Resources Act in Victoria, the Defamation Bill that's now before the three parliaments in the Eastern States, the Crimes (Sexual Offences) Act in 1981 and it has drafted an Equal Opportunity Bill which has been used as one of the models for the Queensland Anti-discrimination Act.

These are examples of the way in which the Commission has been able to draft various pieces of legislation, some of which have been used directly while others have been used, if you like, as a propaganda vehicle for saying to people 'Look this can be done.' The Commission has gone further and offered assistance to both Government and private bodies throughout Australia and I'll give you some examples;

- the State Training Board in Victoria produced a rewrite of the apprentices contract in plain english;
- for the Childrens Court of WA a suggested rewrite of their information pamphlet;
- the Ministry of Consumer Affairs in Victoria - a guide for people who live in rooming houses and a guide for people who live in caravans;
- the Standing Orders Committee of the Legislative Assembly in Victoria received assistance in the rewriting of the Standing Orders;
- and the Standing Review and Advisory Committee on Infertility Assistance was assisted in rewriting the Infertility (Medical Procedures) Act.

The most recent assistance of this type that is particularly noteworthy is in the context of its work on the reform of the law in relation to rape. The commission sought to facilitate the development of a code of practice to be followed by Police and by Rape Crisis Centres in assisting rape victims. The Commission rewrote in plain english a draft prepared by the community policing squad in consultation with womens' groups. The document now has a consistent format and structure and is written in a way which makes it clear and intelligible to its users. We believe it will demonstrate its effectiveness and

help reduce the trauma experienced by rape victims in their dealings with police. It is being launched today by the Premier in Melbourne.

In the private sector the Commission has been equally active in assisting Australia's leading banks to rewrite their guarantee and mortgage documents. The Commission's work in relation to banks was noted and approved by the House of Representatives Standing Committee on Finance and Public Administration in its report A Pocket Full of Change which dealt with banking and deregulation. Bank mortgages have long been regarded as the least intelligible of legal documents and, as the Martin Committee noted, the first sentence of the current Westpac home mortgage document is more than 1000 words in length. Perhaps I really have things badly out of proportion when I complain of sentences of 130 words. Bank guarantees are equally difficult to read and its vitally important that they be made more intelligible, particularly because of the widespread misunderstandings about the nature and effect of guarantees. As you know the failure of banks to resolve those misunderstandings has been a major factor in the development of the new legal standard of unconscionable behaviour.

In the field of insurance the Commission has also made a significant contribution. Its two main projects have been with Norwich Union Life and with RACV Finance. For Norwich the Commission has rewritten their Dimension Superannuation contract, their Solitaire Guarantee Renewable Disability contract and their Advantage Disability Income contract. The insurer is so pleased with the results that it is presenting, jointly with the Commission, a major paper to the Insurance Industry Conference (being held in Sydney next Wednesday) on Reducing Costs and Increasing Efficiency in the Life Insurance Industry.

For RACV Finance the Commission has rewritten its proposed consumer credit policy, remarkably improving its layout and language. Consumer credit policies have given rise to great disquiet about their value. Reports of abuses in relation to their marketing led to a recent *Trade Practices Commission inquiry and it recommended the simplification* of policies to make them more intelligible to purchasers. The Commission rewrite achieves that goal and it is the first of what I hope will be a new series of improved policy wordings in that field of insurance.

Another major contribution by the Commissioners is in the field of housing contracts. Some time ago it redrafted Standards Australia's proposed uniform housing contract. The project hasn't been completed at this stage but in the mean time the Commission has been approached by the Housing Industry Association of Victoria to rewrite the Housing Industry's own contract and that project will be completed by May. At the same time as the rewrites are being prepared the substance of the document is being reviewed by the HIA in consultation with the Ministry of Consumer Affairs. When the document is complete it is hoped that the problems to which housing contracts give rise will be sharply reduced. The document will for the first time strike a fair balance between the

builder and the owners and most importantly the parties will be able to read it and understand it.

That review of the more important projects undertaken by the Commission will give some idea of the range of its work and of its increasing influence. It also demonstrates

the way in which a law reform commission can branch out and get into those other areas working directly with both the public and the private sectors, actually changing the use of english and the culture of expression on the ground on a day to day basis, rather than simply make recommendations for someone else to do it. I think that it is profoundly important if we are to make real progress in this area because, as John Green said, the information and examples are there, actually getting things done is the key thing.

The work that the Commission has done directly has been enormously important. I remember when I was Minister for Planning when giving grants to the owners of historic buildings to do up their buildings, we would have a seven page legal document to sign. I sent it to the Law Reform Commission and said 'Look, I'm sure this can be reduced to a much shorter document'; so they then produced a one and a half page document that achieved the same thing. Of course, just in terms of understanding it is important, but it also saves an awful lot of time and money because all these documents were separately prepared.

It has also demonstrated the fact that in practice the Commission's plain english doesn't distort meaning or get rid of necessary legal concepts. What we are seeking is to get rid of the overlay of convoluted, repetitious and artificial language and of the disorganisation and fragmentation of information. I suppose a lot of the examples we refer to in these discussions are just examples of that disorganisation and fragmentation of information. I was trying to read for instance the proposed new legislation for the regulation of non-bank financial institutions, with two other lawyers - the 31st draft that's just landed on our desks. It is extraordinarily difficult to sit down and decide whether we can agree to the document. A lot of the difficulty arises because the way in which some of this material is presented is disorganised and fragmented.

The Commission goes to extraordinary lengths to make sure that its rewrites don't change the meaning of the original. They did that in their rewrite of the takeovers code for example. They said 'Look we are not going to interfere with its legal impact or the policy of it, but we just want to give an example of saying simply and clearly in fewer words what the existing takeovers code says'. The Commission has exercised great discipline in doing this and has consistently got experts in the field to check the work against that test and to correct inadvertent errors.

Of course the success of the Commission's work has also been seen in the reactions of its clients. It has a plain english wing called Legal Hawk which has been congratulated by its clients in a range of areas. For instance the national manager of personnel insurance at Norwich Union said that the quality of Legal Hawks' work is spot on. They took Norwich's superannuation policy document, their most important and complex contract, reordered it, rewrote it, removed numerous unnecessary interfield concepts, removed the legalese and made it simple. Their policy holders and agents love it.

A further measure of course of the success of plain english is whether and to what extent it contributes to micro-economic reform and saves money. An assessment of savings in any particular case is difficult. In England in the 1980's there was a program run out of the Prime Minister's office where agencies had to report on an annual basis on improvements they were making in standardising and simplifying forms. They also had to specify the savings made in each department. A wonderful example was given in that

program where sheep farmers in Welsh valleys received complicated forms for subsidies and other interactions with Government. As the forms were complicated the farmers couldn't understand them. Hordes of public servants had to go out and explain the forms. If the documents had been simple in the first place all of that would have been saved. It would be nice to see governments do more of that on an institutional basis in this country. We have been doing that via the Law Reform Commission with a large measure of cooperation from agencies and departments. There is no doubt scope for more of that without building up a new bureaucracy as happened in the UK.

Some indication may also come from the reduction in the length of documents achieved by the Commission. In most cases documents are reduced by 60-70%. I remember when we put in a particular effort it took us about 18 months to repeal the Town and Country Planning Act in Victoria and introduce a new Planning and Environment Act. I think we got the number of words and the content down by about 60% although the new act was in fact doing more than the old. The savings in reading time are enormous but the financial savings are also great because the users have fewer problems and all the difficulties caused between individuals when they don't understand things are smoothed over.

To estimate the actual dollar savings in relation to the Commission's proposal to rewrite the Income Tax Assessment Act 1936 a pilot project has been completed and the Commission has estimated that if the Act were to be rewritten in full the savings in administrative and compliance costs could be as high as $150m annually. That is based on what the Commission regards as conservative assumptions - first that a mere 5% reduction would be achieved in the total administrative and compliance costs and second that the present compliance costs are in fact only half as much as the estimate recently made by the WA Tax Research Foundation. Even on those very conservative assumptions the value of a rewrite would be enormous. At an estimated cost once off of $10m over 3 or 4 years to do the project the annual savings would be significant. Imagine what savings could be achieved from a rewrite of all tax and commercial legislation across the country at commonwealth, state and territory level. I think there is real micro-economic reform and a real saving in public administration here as well as just making the life of lawyers easier.

The Commission has also presented a report on the structure and format of legislation, advocating the introduction of decimal numbering which is also of great relevance if we are going to use computer software, and arguing for illustrations in bills rather than explanatory memoranda and so on. The Commission is now working on a third report dealing with the question of whether legislation can be simplified by concentrating on principles, as John Green has argued; and leaving it to the courts to apply them in particular cases. This conference I see as an important part of that process. John Green has spoken about it and I think Alan Fels will also be touching on that question. I look forward to receiving the Commission's report in due course, but there are other ways apart from fuzzy law of improving our legislation.

Many of them flow from increasing the use of modern technology in relation to the law. There are three ways in which using modern technology can help simplify the law and make it more accessible. I say this because I think we must remember, those of us who like myself might be seen as very zealous about this issue from time to time, that people

are working under pressure. The change of culture is slow. There is a very considerable discipline and command of the language that's required to change the legal culture - to shift from things that you are familiar with. To shift from precedent to saying what you mean in clear english requires a very good command of the language in the first place and it also requires a great deal of time. It is all very well in one sense for a law reform commission to be able to do it because it has the time at its disposal to try. In the business of government or private practice on the run and under great pressure it is a lot harder and it is unreasonable to expect too much of a change too quickly for those reasons.

I believe that the use of software and so on can provide some very real radical breakthroughs in the 1990's to overcome this problem. The first thing I would refer to is the style sheets or software programs that will be written to assist drafters to perform tasks more quickly and more effectively. Drafters, and indeed their instructing officers will be machine prompted into covering all aspects of the subject in a coherent order. Remember that another source of problems for drafters is that they get conflicting instructions and instructions delivered with insufficient time to deal with them properly. Because of the way in which instructions are delivered the task of Parliamentary Counsel can be made much harder or much easier.

One of the things that law reform commissions have been very successful at in this country is delivering to governments draft bills for us to pick up with a lot of the material organised. If we don't like certain sections we can change them or take them out, but the material is well organised which makes for a better bill. Also of course these programs can prepare precedent outlines for common drafting exercises such as establishing terms and conditions of employment which appear in so many pieces of legislation. There are a whole range of common things which need to go into legislation whether your setting up the ASC or you are setting up the NBFI Commission. If there is a common set on software of plain english terms which are used for things that are really off the shelf then that can produce good results.

Expert computer systems will be devised to assist with administration and application of complex legislation. Systems of that type are already being developed in relation to some Commonwealth and Victorian legislation. They will improve access to the law and cut substantially the cost of administration. In due course the logical demands of those systems will themselves impose a discipline on drafters.

The whole of the legislation of the Commonwealth and the States will soon be put into electronic form. Diskrom, a joint venture between the AGPS and Computer Law Services, has already done that for Commonwealth Acts. Victoria, again through the VLRC, is going a step further - not only is Victorian legislation being converted through a scanning process into electronic form, it is also being consolidated at the same time. By the end of 1992 Victoria statutes will be fully consolidated in electronic form. They will be kept up to date in consolidated form with the help of a special software package being developed for the Commission. The electronic Victorian Statutes will be commercially available on a CD Rom Disk which itself will be able to be updated regularly so you will be able to subscribe and get the disk or whatever every month. The legislation will have value added to it through hyper-text links allowing, for example, the immediate movement to cross references in the same statute or another statute. Through

a searching facility this has quite amazing capacities across the whole or any part of the information contained on the disk. This development is easily the most significant of those that I've mentioned because it will create new opportunities for access to the law and will cut the cost of research and of legal advice. It will enable us for the first time to attempt a real rationalisation of the statutes.

The technological possibilities are enormously exciting and they must be combined with a firm approach to plain english principles. I think Professor Scott who did the Civil Justice report in Victoria a few years ago said 'Evaluate before you Automate'. It would be a terrible loss if in using all this technology, particularly in putting things on disk, we didn't take the opportunity to introduce plain english concepts and see as much of that incorporated as possible. At the moment of course the statutes contain innumerable inconsistencies in the way in which identical problems are dealt with. That is understandable because again we must be realistic, the statute book was written by parliamentary counsels and parliaments going back hundreds of years. It is a wonderful academic notion to say it should speak with one voice. However the new technology gives us the opportunity to seize that and deal with it. This issue came up in Victoria where we were trying to rationalise criminal penalties across the Crimes Act and all other acts that impose criminal penalties. We limited ourselves in the first place, I think, to the 2 or 3 major acts but to go back and do it for all of them requires the assistance of the whole of the statute book on a disk with easy cross referencing. The possibilities are enormously exciting and as in many of these areas we face the opportunity for more change in the next ten years than we've had in the last hundred. The challenge for drafters will be to devise ways of making maximum use of their new opportunities with the aim of rationalising and simplifying the legislation. That is a challenge for lawyers and I must say the lawyers in Victorian Law Institute have taken to plain english very well and promote it.

Can I just touch finally on one matter referred to by John Green about lawyers. A lot of what he said has been echoed or foreshadowed by Robert Wright, I think back in 1985 in The Next American Frontier in his chapter on paper entrepreneurs, when he talked about the best legal, financial and accounting minds being involved in takeovers and paper shuffling but not contributing anything to the real wealth of the country. In his most recent book The Work of Nations he says that the plethora of lawyers in the US doesn't seem to have added noticeably to the quality of justice nor have the plethora of financial brains manipulating markets added to the creation of real wealth. He talked about the need for legal minds to be diverted into more productive behaviour and he analysed the number of lawyers in the U.S. compared to the number of lawyers in places like Japan or Taiwan. Taiwan for instance has 3000 lawyers for a country of 20m people - a fabulously productive country. He talked about the emphasis on engineering and those occupations that create real wealth in those countries that have become enormously productive and competitive compared with cultures like the US and I suspect, to a lesser extent, Australia. Indeed having to have conferences of this kind, is an illustration of the problem we are in . But one area in which I think lawyers can make an enormous contribution is in this area of plain english at all levels, both in the drafting of legislation and in dealings with their clients and the documents they produce. I think there is an enormous capacity there to contribute to real wealth and productive behaviour rather than just the paper shuffling. So thank you very much and can I say how important the conference is and hope that it leads to good things.

THE CASE FOR AND AGAINST A SIMPLIFIED TRADE PRACTICES ACT: NOTES FOR A PRELIMINARY DISCUSSION

PROFESSOR ALAN FELS
CHAIRMAN, TRADE PRACTICES COMMISSION

I am please to participate in today's conference on making legislation more intelligible and effective.

The objective of the Trade Practices Act is to help ensure Australian consumers, both business and domestic consumers, have the widest choice of goods and services at the lowest prices and with the highest quality. To this end the Act seeks to foster a competitive, efficient market place that is free of anticompetitive and unfair trading practices by corporations and others.

Today, I intend to discuss the case for and against moving towards simplification of Part IV of the Trade Practices Act (Cth) 1974. I do not necessarily support such a change but I believe it should be discussed. At its starkest, Part IV would simply say:

> *any behaviour which substantially lessens competition in a substantial market for goods and services would be prohibited unless authorised.*

This is indeed the broad principle which underlies the Trade Practices Act already, but there are detailed deviations from it. The principle underlying the simplification is that the statute is an economic one. It should prohibit behaviour that substantially lessens competition, nothing more and nothing less, but authorisation should be possible if the economic or other benefits outweigh the detriment to competition.

My comments will be directed specifically at Part IV of the Act which covers Sections 45 to 50 on restrictive trade practices. This Part of the Act is quite long and complex. I shall discuss some of its details later. A summary is given in Appendix One.

The USA and EEC

It is worthwhile contrasting the Act with the relative brevity of the Sherman Act in the USA and Articles 85 and 86 of the EEC Treaty.

In A.D. Neale and D.G. Goyder's book on The Antitrust Laws of the United States of America[1], (see Appendix Two) the two authors state that:

> *"the substantive provisions of the antitrust laws are few and brief: they are contained in seven sections taken from three statutes - the Sherman Act of 1890 and the Clayton Act and Federal Trade Commission Act of 1914. The two latter statutes have been amended in important ways by subsequent measures which will be mentioned below. There are some other minor laws, for example in connexion with resale price maintenance ... and with imported goods, but these three Acts contain the essentials of the system.*

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[1] A.D. Neale and D.G. Goyder, The Antitrust Laws of the United States of America: a study of competition enforced by law, 3rd edn. Cambridge, Cambridge Univ Press, 1980. p3.

The Sherman Act of 1890 contains two main prohibitions:

Section 1. "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States or with foreign nations, is hereby declared to be illegal..."

Section 2. "Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanour..."

The simplicity of the Sherman Act was reduced by subsequent specific legislation and to this extent weakens somewhat the thesis that the USA has a very simple piece of legislation.

The Clayton Act of 1914 declares illegal four specified types of restrictive or monopolistic practice. They are in brief:

(a) price discrimination (section 2),

(b) exclusive-dealing and tying contracts (section 3),

(c) acquisitions of competing companies (section 7),

(d) interlocking directorates (section 8).

All these sections are qualified by provisions (some more elaborately defined than others) to the general effect that the practice concerned becomes unlawful only when its 'effect may be to substantially lessen competition or tend to create a monopoly'. The section dealing with price discrimination was revised in the Robinson-Patman Act of 1936 and that dealing with acquisitions in the Celler-Kefauver Act of 1950."

The EEC

Competition policy for the member states of the European Economic Community (E.E.C.) is concisely stated in Articles 85 and 85 of the Treaty of Rome of 1957 document. These Articles read as follows:

Article 85

1. The following shall be prohibited as incompatible with the common market: all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the common market, and in particular those which:

(a) directly or indirectly fix purchase or selling prices or any other trading conditions;

(b) limit or control production, markets, technical development, or investment;

(c) share markets or sources of supply;

(d) apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;

(e) make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

2. Any agreements or decisions prohibited pursuant to this Article shall be automatically void.

3. The provisions of paragraph 1 may, however, be declared inapplicable in the case of:

- any agreement or category of agreements between undertakings;

- any decision or category of decisions by associations of undertakings;

- any concerted practice or category of concerted practices;

which contributes to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit, and which does not:

(a) impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives;

(b) afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question.

Article 86

Any abuse by one or more undertakings of a dominant position within the common market or in a substantial part of it shall be prohibited as incompatible with the common market in so far as it may affect trade between Member States.

Such abuse may, in particular, consist in:

(a) directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions;

(b) limiting production, markets or technical development to the prejudice of consumers;

(c) applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;

(d) making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

I acknowledge that both the Sherman Act and the EEC Articles are different in substance and procedure. They also do not stand alone. There is substantial case law which has developed over time and considerable regulations supporting the EEC articles. Nevertheless the basic competition legislation is expressed briefly but comprehensively in these two examples. Yet it is arguable there is about the same degree of certainty - or uncertainty - about the meaning of this legislation as there is in regard to the Australian legislation.

The Trade Practices Act

Part IV of the Trade Practices Act prohibits the following anticompetitive trade practices:

- anticompetitive agreements and exclusionary provisions, including primary and secondary boycotts (s. 45);
- misuse of market power (s. 46);
- exclusive dealing (s. 47);
- resale price maintenance (ss. 48, 96-100)

- anticompetitive price discrimination (s. 49); and
- mergers that result in market dominance or an enhancement of market dominance (s. 50).

In general, authorisation is available in relation to much or all of Sections 45, 47 and 50, but not to Sections 46, 48 and 49 at all.

I shall briefly comment on some features of the Act particularly those which deviate from the broad principles embodied in the two-line concept. For those not familiar with the Act, Appendix One contains a brief summary.

S. 45 This section bans outright price fixing schemes but only schemes that relate to goods and not schemes which involve services. The latter can be authorised. It is somewhat difficult to understand why the two categories are treated separately. A distinction beween goods and services which also applies to some other sections, would not occur in the simplified "two line" Act.

The *per se* ban on price fixing agreements on goods means of course that there is no exemption by the processes of authorisation. This is also a deviation from the general precepts which I have enunciated. It is the deviation from the general principle that I would most support.

In general most, but not all, Section 45 behaviour can be authorised.

SS. 45 D & E At present these sections relate to certain types of behaviour which can be generally called secondary boycotts. The present treatment of secondary boycotts (apparently under current review) distinguishes between boycotts intended to substantially damage a company's business and boycotts which substantially lessens competition (s. 45D). Agreements with an organisation of employees which prevent or hinders the customary or contractual dealings of an individual or an individual company are prohibited in s. 45 E. These two divisions again form something of a departure from the general principle that only behaviour which damages competition, rather than individual firms, is prohibited. Most 45D and E behaviour can be authorised.

S. 46 Section 46 prohibits a business that has a substantial degree of power in a market from taking advantage of that power for the purpose of -

. eliminating or substantially damaging a competitor;

- preventing the entry of a person into any market; or
- deterring or preventing a person from engaging in competitive conduct in any market (**s. 46(1)**)

Section 46 is concerned with the misuse of market power and on its face represents a general departure from the principle that behaviour must substantially lessen competition. There is no explicit test for the impact on competition. What is taken into account is the extent to which the activities of the business in its market are constrained by the conduct of its competitors or potential competitors but not it is not constrained by its effect on competition. I believe that it should be a test on the effect on competition and not a test on the effect to competitors. Damage to competitors is a normal feature of competition and should be of no concern. Fortunately the High Court has been tending to interpret s. 46 in a manner not so different from the first part of my test.

Section 46 behaviour cannot be authorised. The case for authorisation of Section 46 behaviour is not as strong as it is under other sections.

S. 47 The somewhat long section prohibits exclusive dealing if it has the purpose or effect of substantially lessening competition in a relevant market. It can gain protection from the prohibition through notification.

However the type of exclusive dealing known as **third-line forcing** is prohibited outright. It can be protected by authorisation but not through notification. But there is no "substantially lessens competition" test. Furthermore these exclusive dealing provisions may not cater for all vertical constraints that are of concern.

S. 48 Suppliers cannot specify a minimum price below which goods cannot be resold or advertised for resale. Again services are treated differently. It is arguable that resale price maintenance that lessens competition should be prohibited but not otherwise. Resale price maintenance is also not able to be authorised. Economic thinking on resale price maintenance changed in the 1960s. The US courts have since moved away from a strict ban on vertical trade restraint and regarded them as legitimate in certain circumstances. There could be some scope for this to happen in Australian with resale price maintenance under a two line Act.

S. 49 This section on anticompetitive price discrimination does not apply to services but only to goods. While there is a "substantially lessens competition" test in this section (s. 49(1)) there is no opportunity for the behaviour to be authorised. There is a wide body of opinion that Section 49 should be dropped.

S. 50 Mergers that would result in market dominance can be granted authorisation by the TPC. This section does not permit any substantially lessening of competition test and is inconsistent with the rest of the Act in that regard.

General Comments

One view is that Part IV of the Act is a carefully balanced piece of legislation which has arrived at the right answers for each class of anti-competitive practice. The alternative view is that the deviations from the principle for the most part are arbitrary reflecting interest group pressures.

The Trade Practices Act's approach of proscribing specific behaviour rather than laying down general precepts was adopted at its introduction in 1974. But seventeen years later there is a body of experience and case law which makes it clearer what forms of behaviour are of concern to competition policy.

As stated earlier, the kind of simplification I have in mind is that Part IV would be replaced by two principles:

1. **That any behaviour which has the purpose or effect of substantially lessening competition in a (substantial) market should be prohibited.**

2. **Such behaviour should be able to be authorised on the basis of the current authorisation tests.**

The Commission believes that the possibility of such a simplification of the complex concepts of Part IV is worthy of consideration.

The two principles are roughly what the Act says at present.

The adoption of simple precepts would have the great advantage of focusing clearly the attention of business, the courts and the Commission on the essence of trade practices law - the maintenance and fostering of competition. It would give a much clearer, sharper focus to the economic motives of the law and its significance in the micro-economic reform process.

The complexities of the present Act tend to distract attention from the key economic requirements of competition policy. The present Act may not be particularly suitable for the process of microeconomic reform in coming years where the policy requirements could prove to be a little different from those involved in the application of the Act to other sectors and more general wording is appropriate.

The principle proposed would encompass all sections and not just those covered by the Trade Practices Act. One of the advantages of the simplification is the likelihood of the two line Act being recognised as something that should be applied to all areas of competition policy. The need for specific legislation such as that developed for telecommunications and petrol marketing, is therefore less likely to arise as any competition matters would be covered in the general two line Act

Part V

The structure of Part V of the Trade Practices Act is a relevant guide to the kind of precept I have in mind. Section 52 contains a general prohibition:

> *52(1) A corporation shall not, in trade or commerce, engage in conduct that is misleading or deceptive or is likely to mislead or deceive.*

(2) Nothing in the succeeding provisions of this division shall be taken as limiting by implication the generality of subsection (1).

The terms of this general prohibition are very broad; it is a comprehensive provision and it has a wide impact.

Following this Section of Part V there are specific provisions, ss. 53-65A, which are largely specific examples of the general prohibition contained in s. 52 or alternatively variations which deviate in comparatively minor respects from s. 52. Some of the breaches of these sections could be caught by s. 52, possibly others would not. On the other hand some behaviour not caught by ss. 53-65A is caught only by the more general proscriptions of s. 52. Section 53 for instance, deals with false representations such as falsely representing goods are of a particular standard or quality (s. 53(a)). Such behaviour could well be described as misleading or deceptive. Likewise the behaviour of a business which accepts payment for goods but does not intend to supply or intends to supply something that is materially different from those which were paid for, as covered in section 58, could also be described as behaviour with misleads or deceives.

The application of the general prohibition described in s. 52 seems to have worked well despite its generality and it

is a generally accepted part of the Trade Practices Act. The proposal for a simplified Part IV has some of the characteristics of the current Part V where there is an initial comprehensive provision with some specific sections backing it up.

Conclusion

Part of the issues of a more simplified Act turns on whether this is purely an economic statute or whether it is a mixture of economic and moral concepts. If it is the former then it can be reduced to a few lines.

Some argue that the simplified Act will cause more uncertainty as it does not contain a clear description of proscribed behaviour. However the current Act is already complex and sometimes hard to read. I do not believe there has been greater uncertainty due to the brevity of the US Sherman Act or the EEC Articles 85 and 86.

To progress this proposal further it would need to be examined and debated by the legal and business world. It is an idea that would need to be considered over the long-term. But as I have mentioned there is growing recognition that the current Act may be inadequate to cope with the outcome of micro-economic reform. The details were designed for different problems.

There are many segments of Australian industry being increasingly exposed to international trade and other sectors of industry being exposed to competitive forces for the first time. I think it would be worthwhile having in mind both the implications on the Act of the changing environment and the two principles I have just stated when amendments are proposed and when amendments to the legislation are drafted. It might be possible to relate any future amendments to the Act to these two principles - and at a later stage achieve a general simplification.

During the development of this paper I have not considered whether the remedies underlying the Act would need to change. On the whole I do not favour this but I acknowledge that one might take the view that injunction is the most appropriate remedy for breaches of a very general Act.

If the change was made, there would be some challenges for our Courts. They would have to make complex economic judgments. In fact, they already do this. It might be, however, that a greater economics input into other decisions might be required.

A changeover might be facilitated if the general principle was written into the Act whilst guidance notes would indicate that many of the specific practices proscribed in the current Act would continue to be prohibited.

Anticompetitive practices — part IV

PROHIBITIONS

Part IV of the Trade Practices Act prohibits the following anticompetitive trade practices:

- anticompetitive agreements and exclusionary provisions, including primary or secondary boycotts (**s. 45**);
- misuse of market power (**s. 46**);
- exclusive dealing (**s. 47**);
- resale price maintenance (**ss 48, 96–100**);
- anticompetitive price discrimination (**s. 49**); and
- mergers that result in market dominance or an enhancement of market dominance (**s. 50**).

Some of these practices can be exempted from legal proceedings by the processes of authorisation or notification (see section on Exemptions).

Anticompetitive agreements — sections 45–45E

Agreements between businesses — for example on market sharing or on the restriction of the supply or quality of goods — which have the purpose or effect of **substantially lessening competition** in the market in which these businesses operate are prohibited by **s. 45**.

Prohibited **outright** are

- agreements that contain an 'exclusionary' provision, commonly known as a **primary boycott**. These are agreements that exclude or limit dealings with a particular, or a particular class of, supplier or customer (**s. 45(2)**) ('exclusionary provision' is defined in **s. 4D**); and
- agreements that fix prices including those which purport to 'recommend' prices but which, in fact, amount to fixing prices by collusion (**s. 45A**). Certain kinds of joint ventures or collective buying groups are not affected.

Secondary boycotts are prohibited by **s. 45D**. This is action, by a group of people such as members of a union or trade association, that hinders or prevents a third person from

- supplying goods or services to a business;
- acquiring goods or services from a business; or
- engaging in interstate or overseas trade or commerce.

This k...d of boycott will be prohibited if it **substantially lessens competition** OR if it is intended to **substantially damage** another company's business.

It is a defence under **s. 45D(3)** if the main purpose of the action concerns employment — hours of work, remuneration, working conditions, termination.

Section **45E** prohibits a person from entering into an agreement with an organisation of employees, such as a union, to stop dealing with an individual or an individual company, or to deal with them only on certain newly imposed conditions, thus preventing or hindering customary or contractual dealings.

Disputes involving possible breaches of **s. 45D** and **s. 45E** may, in some instances, be referred to the Conciliation and Arbitration Commission.

Misuse of market power — section 46

A business that has a substantial degree of power in a market is prohibited from taking advantage of that power for the purpose of

- eliminating or substantially damaging a competitor;
- preventing the entry of a person into any market; or
- deterring or preventing a person from engaging in competitive conduct in any market (**s. 46(1)**).

Whether or not a business has a substantial degree of market power will depend on the circumstances in each case. The court will take into account the extent to which the activities of the business in its market are constrained by the conduct of its competitors or potential competitors, or by the behaviour of those to whom it supplies or those from whom it receives supplies (**s. 46(3)**).

Even if there is no direct evidence that the business used its market power for any of the proscribed purposes, the court may infer the necessary purpose from the corporation's conduct, the conduct of other persons or businesses, or from other relevant circumstances (**s. 46(7)**). [The intention of a servant, agent or director of a corporation is deemed to be the intention of the corporation (**s. 84**).]

It is the **misuse of substantial market power** that is prohibited, not the mere acquisition or possession of such power.

In a decision handed down in February 1989 in Queensland Wire Industries Pty Ltd v The Broken Hill Proprietary Company Limited and Anor the High Court clarified **s. 46**. It ruled:

- the object of **s. 46** is to protect the interests of the consumer, the operation of the section being predicated on the assumption that competition is a means to that end
- the objective of the section is also the protection and advancement of a competitive environment and competitive conduct

- the phrase 'take advantage of' does not require a hostile or reprehensible intent by the company using its market power. It is simply whether a firm with a substantial degree of market power has used that power for a purpose proscribed in the section
- that for the purposes of the Act a 'market' may exist for goods if a demand exists, even if there is no supplier of, or trade in, those goods at a given time
- that 'market power' be defined as the ability of a firm to raise prices above the supply cost without rivals taking away customers in due time
- in determining the degree of market power a court should consider the extent to which the conduct of [the defendant] in that market is constrained by the conduct of...competitors or potential competitors

Exclusive dealing — section 47

Section 47 prohibits suppliers from **anticompetitive exclusive dealing**, ie interfering with the freedom of buyers to buy from other suppliers or to sell to whom they choose. They cannot supply goods or services to a purchaser **on condition** that the purchaser

- will not acquire, or will limit the acquisition of, goods or services from a competitor of the supplier (**s. 47(2)(d)**);
- will not resupply, or will only resupply to a limited extent, goods to particular persons or a particular class of persons or in a particular place or a particular class of place (**s. 47(2)(f)**).

Exclusive dealing is prohibited **only** if it has the purpose or effect of substantially lessening competition in a relevant market. It can gain protection from the prohibition through **notification** of the conduct to the TPC. When a notification is made, the business gains immunity from legal proceedings unless the TPC makes a decision revoking that protection.

A supplier cannot refuse to supply goods or services to a purchaser because the purchaser will not comply with conditions like these (**s. 47(3)**).

A purchaser cannot impose these types of conditions on a supplier when buying goods and services (**s. 47(4)**).

Exclusive dealing is prohibited ***outright*** if it involves the supply of, or refusal to supply, goods or services on condition that the purchaser will acquire other goods or services from another person or even a related company, or lease provisions to similar effect (**s. 47(6), (7), (8)(c), 9(d)**). This is known as **third-line forcing**. It can be protected by **authorisation** but not through notification (see section on Exemptions).

[For further information see the TPC's leaflets, *Refusal to deal*; *Notification*; *Authorisation*.]

Resale price maintenance — sections 48, 96 -100

A supplier (either a manufacture or a wholesaler) cannot specify a **minimum** price below which goods cannot be resold or advertised for resale. This type of conduct, known as **resale price maintenance**, includes a supplier

- agreeing with a reseller that the latter will not advertise or sell below a specified price (**s. 96(3)(c)**);
- setting a minimum price at which resellers should advertise, display or offer their goods for sale (**s. 96(3)(a)**);
- inducing resellers not to discount, for example by giving special deals to resellers who agree not to (**s. 96(3)(b)**);
- taking or threatening to take action against a reseller to force the reseller to sell the goods at or above the minimum specified price, for example by refusing to continue supplying them (**s. 96(3)(d), (e)**);
- indicating a price that is taken by the reseller as a price below which the reseller should not resell (**s. 96(3)(f)**).

A supplier can recommend a resale price for goods, provided that the document setting out the suggested price makes it clear that it ***is* a recommended price** only and provided that the supplier takes no action to influence the reseller not to sell below the price (**s. 97**). Suppliers can specify a ***maximum*** price for resellers without infringing the resale price maintenance prohibition. **Section 98(3)** provides a defence if the goods are loss leaders.

[For further information see the TPC's leaflet, Refusal to deal.]

Anticompetitive discrimination — section 49

Suppliers of goods can normally give preferential prices (for example, discounts) to their purchasers. However, suppliers will be in breach of the price discrimination prohibition

- if there is discrimination between different purchasers of goods of like grade and quality; and
- if the discounting is so large and happens so often that its effect is to ***substantially lessen competition*** *either in the supplier's or the reseller's* market (**s. 49(1)**).

Suppliers will not be in breach of this prohibition if their preferential pricing has a procompetitive effect on the market or if they can show that the difference in prices reasonably reflected the difference in costs, or likely costs, of manufacture, distribution, sale or delivery of the goods (**s. 49(2)(a)**). Suppliers can also give preferential discounts to meet a competitor's price (**s. 49(2)(b)**).

Purchasers are prohibited from inducing a supplier to discriminate in this way or from benefiting from preferential pricing if they are aware that the effect or likely effect will be to substantially reduce competition (**s. 49(4)**). A purchaser who is in this position may also be at risk under **s. 46** (misuse of market power).

Mergers resulting in market dominance — sections 50, 50A

A merger is prohibited if

- it would result in a corporation or a person being in a position to dominate a substantial market for goods and services in Australia or in an Australian State or Territory; or
- the acquisition substantially strengthens the power of a corporation or person already in a dominant position.

A merger is ***not*** prohibited if it merely results in the transfer of a position of dominance in a market from one business or person to another unless the acquirer *is* then in a stronger position to dominate the market (**s. 50(2C)**).

Activities of associated or related corporations will be looked at to determine whether a corporation or person is in a position to dominate a substantial market in Australia or in an Australian State or Territory (**s. 50(2)**).

A corporation will be considered to be 'associated' with another if it is able to exert a substantial degree of influence over the other's activities, for example through a major shareholder or by representation on the board.

Mergers that would result in market dominance can be granted authorisation by the TPC (see section on Exemptions).

Acquisitions outside Australia

Mergers that result from acquisitions outside Australia and that have the effect of giving a person a controlling interest in a corporation ***and*** the ability to dominate a substantial market in Australia or in an Australian State or Territory are not necessarily prohibited.

However, provided the acquisition is not covered by **s. 50**, the TPC, the Attorney-General or any other person can apply for a Trade Practices Tribunal declaration that an acquisition producing the proscribed dominance has occurred and that the merger has no resulting public benefit that would allow the acquisition to stand. Such an application must be made within 12 months of the acquisition.

If a declaration to this effect is made, the relevant business has up to six months (which may be extended to a maximum of 12 months) in which to cease carrying on business in the market in which the dominance has occurred (**s. 50A**).

[For further information see the TPC's *Guidelines for the merger provisions of the Trade Practices Act 1974*.]

Source: Trade Practices Commission, Summary of the Trade Practices Act 1974, April 1989.

book is to provide an account of the actual working of the antitrust laws, so that the American approach to the subject may be fairly assessed and weighed against our own and other methods.

2. *The main provisions of the Sherman Act, Clayton Act and Federal Trade Commission Act; the means of enforcement*

The substantive provisions of the antitrust laws are few and brief; they are contained in seven sections taken from three statutes – the Sherman Act of 1890 and the Clayton Act and Federal Trade Commission Act of 1914. The two latter statutes have been amended in important ways by subsequent measures which will be mentioned below. There are some other minor laws, but these three Acts contain the essentials of the system.

The *Sherman Act* of 1890 contains two main prohibitions:

Section 1. 'Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States or with foreign nations, is hereby declared to be illegal. . . .'

Section 2. 'Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor . . .'.

The *Clayton Act* of 1914 declares illegal four specified types of restrictive or monopolistic practice. They are in brief:

(a) price discrimination (section 2),
(b) exclusive-dealing and tying contracts (section 3),
(c) acquisitions of competing companies (section 7),
(d) interlocking directorates (section 8).

All these sections are qualified by provisos (some more elaborately defined than others) to the general effect that the practice concerned becomes unlawful only when its 'effect may be to substantially lessen competition or tend to create a monopoly'. The section dealing with price discrimination was revised in the Robinson-Patman Act of 1936 and that dealing with acquisitions in the Celler-Kefauver Act of 1950. and in the Antitrust Improvements Act of 1976.[1]

[1] It will be convenient to defer quotation in full of the provisions of the Clayton Act and its amendments to the chapters dealing with the case-law under these statutes (see Chapters VII and VIII).

The *Federal Trade Commission Act* of 1914 is concerned largely with the setting up of the Commission and the mechanics of its operation. Section 5 of the Act, however, contains one important substantive provision, which reads (as amended by the Wheeler-Lea Act of 1938) as follows: 'Unfair methods of competition in commerce and unfair or deceptive acts or practices in commerce are hereby declared illegal.'

The prohibitions of the Sherman Act create criminal offences punishable by fines and even imprisonment. Their enforcement, like that of any other criminal law, is a police function and is directed by the United States Department of Justice. The Sherman Act, however, also charges the Department of Justice with the duty of instituting proceedings in equity to prevent and restrain violations of the law. The significance of this is that a federal court may translate the general terms of the Act into a set of detailed injunctions regulating the future conduct of businesses found to be in violation of the law, and may even order the dissolution of such businesses or divest them of subsidiary parts, where these measures are found to be necessary to prevent continuing violations. From the point of view of maintaining competition these measures of equity relief have been more important to the Department of Justice than criminal penalties. Much of the Sherman Act case-law therefore consists of suits in equity; civil and criminal actions are sometimes taken concurrently or in quick succession.[1]

The Department of Justice may also institute civil proceedings under the Clayton Act, but this is a shared responsibility because section 11 of that Act vests in the Federal Trade Commission the authority to enforce compliance with its provisions. The substantive provisions of the Clayton Act do not create criminal offences and the Commission has no criminal jurisdiction: it is an administrative agency with quasi-judicial powers entitled to conduct hearings in respect to suspected violations of the law and, if violations are found, to issue 'cease and desist' orders against further infringement. The Commission's 'cease and desist' order under the Clayton Act is subject to review by appellate courts, and is broadly equivalent to a trial court's equity decree in civil proceedings under the Sherman Act.

The Federal Trade Commission is also charged with securing compliance with the general ban on 'unfair methods of competition' in section 5 of the Federal Trade Commission Act.[2] This Act, like the

[1] The various procedures and the considerations determining the choice between civil and criminal suits are described below, Chapter XII.

[2] Many 'unfair or deceptive acts or practices in commerce', such as misleading advertisements, the use of lotteries for sales promotion and so forth, are covered by section 5 but not subject to the Sherman Act; these practices, however, are more in the realm of consumer protection than of antitrust law proper.

Clayton Act, does not create criminal offences, but section 5 is of great importance, because the courts have ruled that the phrase 'unfair methods of competition' covers conduct that would also violate the Sherman Act (or the Clayton Act) and consequently that the Commission may exercise jurisdiction over what could equally well be Sherman Act cases in addition to its wider jurisdiction under that section. It will thus be found in the case-law that proceedings that are; in all but name, Sherman Act cases are taken by the Federal Trade Commission. The Supreme Court has more than once affirmed that some forms of restrictive conduct may be 'unfair methods of competition' without assuming the proportions of Sherman Act violations.[1] In practice it is not easy to identify cases where it is clear that conduct has been held to be in breach of section 5 but not of one of the other statutes, though the Commission has certainly used the section successfully as a means of attacking practices which might not technically amount to violations of the Clayton Act.

The enforcement of the antitrust laws does not depend exclusively on the Department of Justice and the Federal Trade Commission. The Sherman and Clayton Acts permit any private person who suffers damage as a result of violations to sue offenders and recover 'threefold the damages by him sustained'. A number of the cases described below will be 'treble-damage' actions of this kind and in view of the increased numbers and importance of these actions they are dealt with more fully in Chapter XIV. No action for damages is available under the Federal Trade Commission Act.[2]

3. *Sectors of the economy with partial or total exemption from the antitrust laws: labour, agriculture, public utilities and transport, insurance, banking and securities; position of professional services*

The content of the antitrust laws cannot be fully described without mention of exemptions from the statutes. The Sherman Act is all-

[1] Thus in *Federal Trade Commission* v. *Motion Picture Advertising Service Company* (1955) the Court held 'that the Federal Trade Commission Act was designed to supplement and bolster the Sherman Act and the Clayton Act ... *to stop in their incipiency acts and practices which, when full blown, would violate those Acts*'. In *Federal Trade Commission* v. *Sperry and Hutchinson & Company* (1972) it was held that section 5 empowered the Commission to 'define and proscribe an unfair competitive practice, even though the practice does not infringe either the letter or the spirit of the antitrust laws'.

[2] This is because the Federal Trade Commission Act is not technically one of the 'antitrust laws' enumerated in section 1 of the Clayton Act; it is, however, an integral and essential part of the canon of antitrust law for ordinary purposes.

Source: A.D. Neale and D.G. Goyder, The Antitrust Laws of the United States of America: a study of competition enforced by law, 3rd edn. , Cambridge, Cambridge Univ Press, 1980.

Articles 85 to 90 of the EEC Treaty

Article 85

1. The following shall be prohibited as incompatible with the common market: all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the common market, and in particular those which:

(a) directly or indirectly fix purchase or selling prices or any other trading conditions;

(b) limit or control production, markets, technical development, or investment;

(c) share markets or sources of supply;

(d) apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;

(e) make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

2. Any agreements or decisions prohibited pursuant to this Article shall be automatically void.

3. The provisions of paragraph 1 may, however, be declared inapplicable in the case of:

— any agreement or category of agreements between undertakings;

— any decision or category of decisions by associations of undertakings;

— any concerted practice or category of concerted practices;

which contributes to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit, and which does not:

(a) impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives;

(b) afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question.

Article 86

Any abuse by one or more undertakings of a dominant position within the common market or in a substantial part of it shall be prohibited as incompatible with the common market in so far as it may affect trade between Member States.

Such abuse may, in particular, consist in:

(a) directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions;

(b) limiting production, markets or technical development to the prejudice of consumers;

(c) applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;

(d) making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

Article 87

1. Within three years of the entry into force of this Treaty the Council shall, acting unanimously on a proposal from the Commission and after consulting the Assembly, adopt any appropriate regulations or directives to give effect to the principles set out in Articles 85 and 86.

If such provisions have not been adopted within the period mentioned, they shall be laid down by the Council, acting by a qualified majority on a proposal from the Commission and after consulting the Assembly.

2. The regulations or directives referred to in paragraph 1 shall be designed in particular:

(a) to ensure compliance with the prohibitions laid down in Article 85 (1) and in Article 86 by making provision for fines and periodic penalty payments;

(b) to lay down detailed rules for the application of Article 85 (3), taking into account the need to ensure effective supervision on the one hand, and to simplify administration to the greatest possible extent on the other;

(c) to define, if need be, in the various branches of the economy, the scope of the provisions of Articles 85 and 86;

(d) to define the respective functions of the Commission and of the Court of Justice in applying the provisions laid down in this paragraph;

(e) to determine the relationship between national laws and the provisions contained in this section or adopted pursuant to this Article.

DISCUSSION:

Tony Hartnell: John Green is a man I admire. He's got wonderful youth, confidence and optimism (and so does Jim Kennan). I feel deflated just watching them. He's a genius unlike most of us; he can perceive the standards that the society imposes on us through general words.

My thesis in my five allotted minutes is that judges wear the black hats; judges are the people at fault. I'm very conscious that Justice Malcolm follows me, but that always happens. Judges always get the last say. I spend a lot of time thinking about judges frankly. The ASC is one of the largest serious litigants in the country and I seem to be constantly reading judgements from various courts around the country - sometimes we win and I think that is very sensible and most times we don't quite win or lose and I wonder how it is that such a stupid person has managed to get to such high office.

But judges do drive the culture in statutory interpretation; they do drive the social perspective of complex regulatory law. The one thing that really gets me excited is when at the end of a complex judgement on statutory interpretation the judge looks you in the eye and says 'if the legislature had really intended to cover the situation you want it to they would have said so - it would have been quite easy to say so'.

That little phrase I tell you from experience is quite frequent from the pearly lips. It is something that drives the culture of our drafting; 'if the legislature had intended it'. This legislature tried in 1974 enacted the Trade Practices Act and decided to try fuzzy law in Section 45. I remember sitting through innumerable seminars, John Green I'm sure was there, about analysing section 45 which prohibited anti-competitive agreements of any kind, and hearing learned people from the Bar telling me that we had to worry about purchasing bus tickets which was a contract in restraint of trade because you couldn't go on any other bus company. Well we all assured them at the time that judges could understand social issues and they could sort out the chaff from the wheat and they could work out *de minimus* situations. The very first case that was confidently brought before them was a case that I stood up in a private seminar not far from here and said 'Look the judges will get this right'. It was a case about an agreement that underpinned a restrictive covenant on land which prevented the selling of liquor in liquor outlets, clearly anti-competitive - even blind freddy could see that; but the judges managed to say that the legislature didn't intend to cover that sort of situation - if they had of they would have said so. And that resulted in a few pages of black letter law.

Ever since then I've been a bit gun shy. Now I watch the ASC in operation and I see all sorts of moral, ethical, quasi-legal situations under debate as to whether the ASC should take action or not. You go to innumerable conferences with counsel and counsel looks you solemnly in the eye and says 'You know the legislature never intended to cover that sort of nuisance'- and so we slink back to our office and try to live another day. Every now and then you get one case through and you get to the court: we had one recently in the courts where the magistrate started the judgement by saying a magistrate should be quick courteous and wrong and he certainly proved that. I'm dealing with a situation where a person who is charged in relation to the conduct of his directorship hadn't attended a board meeting for five years. I shouldn't say anything more because the case is, I think, on appeal.

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The point I'm getting to is that when you come to administer these fuzzy laws, when you come to try and enforce them firstly you have to get through your own staff what it is the law means and that is a not an inconsiderable debating effort in its own right; then getting the laws enforced certainly at a criminal standard of proof is, in my experience, almost impossible. So I say "Yes its wonderful to have the youth and enthusiasm and drive of John Green. Its a wonderful thing and Australia definitely needs him, but don't for one minute think you are making life easy to enforce the laws - you are in fact making it incredibly difficult."

I've now spoken for 7 minutes but I want to say one further thing. John Green was slightly provocative by saying that the governments reform bill no.3 in its dense detail of black letter law would not have caught Robert Maxwell in relation to the disappearance of half a billion pounds or there abouts. I had occasion to study that situation for the purposes of a presentation to this parliament earlier today, a Senate Committee on Superannuation. Just in case there is anyone keeping score I said to the Senate Committee exactly the opposite, and I believe it, that the reporting requirements and the approval requirements if met in the proposed dense black letter law would have actually prevented that situation in Australia. Thank you

Senator Beahan: Does anybody want to pick up on those challenges to John Green including John Green or in fact take up challenges to John Green. Yes up the back.

Geoff Kolts: I happen to be a partner of John Green's. Its with some regret that I have to disagree with him and support Tony Hartnell. In my view any proposal that as a rule statutes should be expressed in general principles will encounter serious difficulties under our constitutional and legal system. The proposals don't take account of the problem that the citizen and his legal advisers have in ascertaining how a statute would apply in particular cases where only general guidance is given.

I was going to refer to the prospectus provisions but that has already been dealt with. But the problem is exacerbated when you bear in mind that legislation on general principles may well be in a situation where non-compliance with the statute renders you liable to substantial criminal penalties or to civil liability. Now the practicalities of the matter are these - if the government wants to have particular policy given effect to in the statute it is entitled to have the statute declare specifically how the policy is to apply in all relevant situations that can reasonably be contemplated.

I noticed some Commonwealth Ministers and others on record as having supported the principle of fuzzy law but I've always suspected that they tend to support this idea for other minister's bills but not for their own. Notions like this are never put forward by legislative drafters because they know perfectly well that legislation of that kind just wouldn't be acceptable.

If Parliamentary Counsel have to give an assurance to the government, as they do, that legislation carries out the Government's policy they simply can't discharge that obligation if the legislation doesn't go into adequate detail. It's no use saying to the minister, 'I think the courts will interpret this bill in the way that suits your objective, but I can't be sure.' The minister will say, and he is entitled to say, please redraft it so that the courts must apply it in the way we intend. It is simply not appropriate to leave it to the courts to try

and speculate as to what Parliament intended in a particular situation if the legislators have not envisaged that situation in formulating the policy.

It is also unfair that the public should be put at the risk of acting unlawfully because the perimeters of the legislation are deliberately left unclear and they can't be clarified until the courts have expounded the meaning of the statute. This is an approach which must increase and not diminish litigation. Consider for example the period it took and the enormous volume of case law before there was any fair idea as to the scope of the expression 'injury by accident arising out of the course of employment'. Now if the courts are being asked to decide how fuzzy law operates in particular cases they are quite likely to get it wrong, by which I mean they are likely to come to conclusions which were not intended by the sponsors of the legislation. The case to which Tony averted is the prime example of that. The simplicity of original provisions of s.45 of the Trade Practices Act, which were copied from the Sherman Act, completely disappeared because our High Court approached the interpretation of the legislation in a completely different way from the way in which the Supreme Court of the US approached the Sherman Act.

I think that a change in the approach to the form of legislation along the lines that John Green has proposed could only take place if it were possible to make two other changes. The first is that the courts would have to be prepared to chance their arm - not only lay down rules applicable to the instant case but also, even though its not being argued, to give general guidance as to how the legislative provision would operate in other ancillary cases. I made this point at Australian Legal Convention in 1975 and Sir Ninnian Stephen who was present said that the courts would never do this and I accept that. The second change that would have to occur would be an approach that would allow administrative agencies to give definitive interpretation of the legislation that they administer. The ASC and the Commission of Taxation give rulings but for constitutional reasons they can only be advisory. Under our constitution the only definitive way in which detailed rules can be prescribed outside a statute is by regulations and there are serious limitations as to what can be prescribed by regulation. In any event if a matter is important enough to be included in the regulations surely it should be included in the statute.

John Green quoted extracts from what the Chief Justice of the High Court said recently. One statement that he didn't quote was this, the Chief Justice said: "I'm by no means convinced that recourse to American drafting techniques, (mainly sketching the broad outlines and leaving the courts to fill in the large interstices and concentrating on plain english) will solve the problem. I'll acknowledge these techniques offer some scope for improvement but the American techniques may create as much uncertainty of a different kind until the courts spell out the details and they generate a greater need for recourse to the courts in order to fill in the interstices".

Senator Beahan: That was Geoffrey Kolts who is a partner of Freehills and a former Parliamentary Counsel. Can I get speakers to in future introduce themselves by name so that people know who they are. Does anybody want to respond to that?

Bob Gardini, Consultant: I'm speaking in support of John Green's view that we need to move towards fuzzy law. The example that Tony Hartnell brought up about a trade practices case is only one example. It doesn't go to the real experience of the Trade Practices Commission in administering the whole Act. We have also heard Professor Fels

argue for perhaps taking general principles one step further but in the life of the act I've never heard the Commission ar ue its act is unworkable. If we look at its success record I think that it has been very successful in the cases brought before the courts. It is based on a number of important general principles and they are both successful in the courts and they also have another important function, they enable those being regulated to understand the concepts that they have to comply with and that is a very important point. We should not get carried away with making life easier for the regulators - that's only one important consideration. Those being regulated must be in a position to understand the principles and the laws they have to comply with.

If we look at the Corporations Law at the moment we seem to be rushing headlong towards a great expansion of the law and the great danger, as John Green has indicated, is that those being regulated will not comprehend the concepts and principles and requirements that they have to follow. I think we are now at such a stage and it's not a question of whether or not we should go down this path, I think in the area of the Corporations Law we have to. We are at a stage where the law is becoming too complex for directors. You not only have to comply with the requirements under the Corporations Law but you also have to look under very many other pieces of legislation. For example, in the environmental field in the last few years we have seen directors become more and more subject to requirements for environmental controls. One department can look at one particular area and say "Look we need to spell all this out," but that is not to say that all these other requirements being put forward by other portfolios are being put forward in such a way that the ordinary director is able to understand and comprehend what the requirements are.

Senator Beahan: Thank you very much. I'd like perhaps to add to that and get a response from Tony; there are two sections of the Corporations Law which in fact are fuzzy law, one is the prospectus provisions and the other directors responsibilities. I'd would like your responses to whether you think they work well and, if they do, why are you so opposed to fuzzy law?

Tony Hartnell: Well I do think one of them works well and one of them works badly. The one that I think works well is the prospectus provisions and it works well because it is operating in a relatively sophisticated end of the market. The people that lead the intellectual debate on prospectus' are people like John Green and even other law firms and they are sophisticated people. The directors duties does not in my opinion work well at all. It is not well enforced, it is not to this day well understood and of course the difference there is that it applies to say 800 000 companies in Australia whereas the John Green s.1020, s.1022 prospectus provisions apply to, let's say, 1000.

Senator Beahan: Does anybody want to pursue that at all. I'll call on Athol Yeomans who is one of our panellists and is representing the Institute of Company Directors. He might like to comment on that or generalise and open up a bit.

Athol Yeomans: Certainly; In fact just before I talk about what I should talk about, Tony has put a finger on something which is not really a problem to this meeting today and that is the fact that we have got 800 0000 companies on the register all but 40 000 are of individual insignificance economically and really shouldn't be on the companies register. One of the problems we have is that the Corporations Law is designed for 1000

big companies and a few thousand smaller companies and yet we are clogged up with 800 000 little ones. That's another story which we are addressing elsewhere.

Do you remember when the Attorney spoke about John Green's two page prospectus that he was carrying around at the meeting? I have to tell you that it was not a two page prospectus, one page was the prospectus the other page was the bill.

I think that the argument about whether we are having fuzzy law or black letter law is concealing something which is worrying me and that is that the objectives of the Government are not clear enough to be drafted. I think that there are sufficient worrying things in the draft corporate law reform bill which should induce the Government to delay the introduction of this legislation for some considerable time. I don't see why we cannot emulate New Zealand's example. Those of you who have seen the New Zealand Companies Bill will say that it probably is representative perhaps of the John Green and Jim Kennan camp, and they have left it on the table for twelve months. I understand that very little substantial change to that bill has been suggested.

With respect to the bill here and Tony's comments about directors duties, I think that any change to those is unnecessary until Tony has worked over his hit list of 16 company groups and I think that at the end of that period he may become more optimistic himself about what effect those sanctions have. Moreover the proposals in the draft bill, which have not been talked about, will remove the criminal standard of proof from those sections that Tony was talking about. We are now looking at a regime where there will be civil penalties similar to those introduced in the Trade Practices Act. But we are now talking about disqualifying people from there livelihood on the basis of civil standards of proof. That is a very far reaching step and that goes much beyond this debate. When those principles are clear, when the Government really knows what they want to do, then the drafting problem really disappears.

Senator Beahan: Are there any comments on that or other matters which people want to raise. Well perhaps if we could move on from fuzzy law, not to get away from it because I think its threaded through the whole debate but there is a whole other range of issues that we need to discuss in terms of plain english drafting, structure of bills, and so on, the sort of experiments which are being carried out successfully in Victoria .

I would like Ian Turnbull, another one of our panellists, to comment on what Jim Kennan had to say and what the Victorians are doing and in fact what the Commonwealth itself is doing. I know Ian's got views about how far you can go down that track and some of the limitations. So Ian perhaps you would like to comment.

Ian Turnbull: I, like most drafters in their work, find myself with very little time and I have been told I can speak for 5 minutes so I'll do my best.

It may come as a surprise to some of you that Commonwealth drafters have the same goals as the VLRC. I must in all honesty accept a lot of the criticism made by Mr Kennan of what I would call a traditional Commonwealth style of drafting although I must say at the same time it's extremely precise. I have vast respect for the people who drafted it, however during my time in the office I did think that some of it was a little over complex and a little over convoluted.

In 1986 we started the policy of clear drafting. By this I mean we are committed to making laws as simple as possible but without losing precision. Our strategy has three main elements:

> The first is to use well known rules of simple writing, that is to use short words, short sentences and well constructed sentences.
>
> The second is to identify and avoid traditional legalese expressions.
>
> The third is to use aids to understanding which are not just linguistic, like examples.

We have several cases where we have put examples in Acts; the *Broadcasting Services Act* which was mentioned by John Green is one done by a consultant to this office with my approval. We also use purpose clauses for parts divisions or even long sections. We are using graphic material like the flow chart in the new *Patents Act 1989.* We are also using calculations in steps like the rate calculators in the new *Social Security Act*; we also put road maps, as I call them, by which I mean clauses that tell you how the act works, like s.206AA of the Corporations Law which introduces the division on buy backs. We also put explanatory notes in the text here and there; and we also use, what we call user friendly algebraic formulae in which we use words instead of the traditional symbols.

As a general comment on our drafting I am happy to say that Professor Davis, the legal adviser to the Senate Scrutiny of Bills Committee, has said 'that Commonwealth Bills are much easier to read than they used to be'. Some particular bills have also received favourable comments these include; the *Patents Act*, the *Industrial Relations Act*, the *Lands Acquisition Act, Aboriginal and Torres Strait Islanders Act, Social Security Act* and the *Motor Vehicle Standards Act.* I would say with confidence that many other Acts are also simpler but have not received any comment, because it takes a very perceptive observer to see when an Act is well drafted and to say so.

In the area of tax law Professor Bernard Marks of Melbourne University has said that the drafting of the Income Tax Laws has improved considerably over the last 7 years.

Having said that, I have to concede that in spite of these improvements, many of our bills are still far too complicated. There are several reasons for this perhaps the most important are:

> first, the need for precision; we regard it as our duty to make a bill have the right effect;
>
> second, complex policy; this inevitably makes a bill more complex however hard you may try to keep it simple;
>
> third, lack of time to work out the best structure and language; the *Corporations Act 1989* ran to a 1000 pages - it took 3 drafters 5 months; it was a fantastic effort on their part. The *Social Security Act 1991* on the other hand also went to a thousand pages and was drafted by 3 drafters but they were allowed to take 18 months to do it and so we were able to

plan it properly and make it much clearer; and

fourth, while a bill is being drafted the policy is often changing as you go along. It's like building a sports car and then being told to turn it into a sedan and then being told to turn it into a bus.

Inevitably our bills are being compared with those of the Victorian Law Reform Commission. If we have the same aims, why don't our bills look as simple as theirs? I have to concede that they don't. Well first they are rewriting laws and I suspect that they don't have the time problem we have to cope with, nor the changes of policy. Second but much more importantly, there is a difference of emphasis, we put precision first while they put simplicity first. The result is our bills are precise but often too complex, their bills are easy to read but the meaning is often unclear. By using very simple statements they leave out a lot of detail necessary for precision; in this respect their drafts resemble fuzzy law.

In its 1987 report Plain English and the Law, the Victorian Law Reform Commission defined plain english as containing all the information necessary for accuracy. Applying this definition I have to say that they are not drafting plain english. I would end by asking the question, is the Victorian Law Reform Commission really drafting fuzzy law? If so perhaps they should make this aim clear so that people can decide whether they want plain english or fuzzy law. Because they are not the same thing. Thank you very much Mr Chairman

Senator Beahan: David Kelly for the Victorian Law Reform Commission.

David Kelly: I had the intention when I came here to say absolutely nothing but just to listen. But Ian has managed to provoke me out of my seat. I don't want to take up very much time, except to answer his question are we drafting fuzzy law.

The answer is when we are asked draft fuzzy law as John Green asked me to do some time ago, that's what we do. When we redraft existing legislation, we don't draft fuzzy law at all, we redraft existing legislation by getting rid of the overlay of language that Jim Kennan referred to; by getting rid of the absurdly bad convoluted writing, by getting rid of the disorganisation of information which is typical of most legislation in this country. Not perhaps in the past 5 years but certainly before that.

In relation to accuracy I absolutely deny the proposition put forward by Ian. I'm sure he has put it forward in perfect good faith. In legislation perhaps from time to time mistakes are made in the rewriting. In the case of the job we did on the *Income Tax Act*, for example, even to this day we are uncertain what some of the original meant and it is very difficult to get it accurate when you don't know what the original means. That is a problem with the whole of the income tax law and also with a large part of the *Corporations Law*, and certainly with the most recent draft of the directors duties laws.

As Jim Kennan said it is not our aim to communicate first and not to bother too much about accuracy, you are quite wrong Ian. We share your views more closely than you realise. Accuracy for us is paramount, but unlike you we think that communication is as vitally important and we put them at the same level. I think we have managed to achieve

both aims. Thank you.

Ian Turnbull: David you refuted point blank my statement that your drafts are not legally accurate. I do not want to get into detailed argument at this stage but we are writing an analysis of your rewrite of division 16E, we'll be sending that to you shortly.

Senator Beahan: Any further comment on that, or any question of the panel, or anybody else for that matter, yes Athol.

Athol Yeomans: It's rather salutary for me to be here amongst the experts about drafting. I in a way represent the constituency for whom the laws are drafted and I would thoroughly support the gentlemen who said that he thought that communication was so important. It would be a big step forward if the Corporations Law's next reincarnation could be thoroughly reorganised from beginning to end so that people can see what the Government is trying to tell them to do or not to do. It is impossible at present for any layman to use the Corporations Law.

Ian Turnbull: My reply to that is that we to would like to have had the opportunity to reconstruct that law. The point I had been trying to make is that it was such a massive task and we had to do it in such a short time that it was just impossible to put the whole thing together in the proper way. When we do get the opportunity to take a bit of time to rewrite the law, I maintain we do it well and of course one of the main objectives is to think out the structure thoroughly and logically before we put pen to paper.

Tony Hartnell: I believe the Corporations Law is a stunning piece of work. Not only given the time involved but in particularly the complexity and the underlying subject matter and I for one stand up and applaud the draftsmen on it. I cannot resist however, in noting that the most obscure part of the law in my opinion, the most difficult to understand in my opinion and certainly the most difficult to apply is the bit that was added by the judgement of the High Court, that is the bit at the start. So I was somewhat amused by the comments of Chief Justice of the High Courts seeking simpler law. That is mind boggling stuff when you actually come to try and apply it.

Senator Beahan: Would David Edwards or Jim Murphy want to defend themselves as people who are involved in writing the law or do you think we have taken that one far enough.

David Edwards: Thank you Mr Chairman I was not looking forward to such an opportunity, but you have thrown the challenge and I cannot walk away from it.

I agree with Ian that if we have a lot more time then all of us would like to see the Corporations Law in a more simplified fashion.

Just a couple of points I want to make. There is a tremendous ground swell of objection at the moment to the volume of the Corporations Law. People are quite taken aback by the latest draft, which with explanatory material goes into some six hundred pages; the bill is over two hundred pages.

I think that one of the things that I find is not focused on very well in the debate is this;

let's examine how complex the provisions are, lets really focus on complexity rather than come to the assertion, volume means unreadability and complexity. Now certainly there are a lot of complex provisions but in the last several weeks I have had a number of people asserting to me that the complexity is overwhelming. I have in fact asked a number of them to tell me whether they have read it. Overwhelmingly they haven't. Secondly, those who have read it found it very very difficult to construct arguments as to real complexity.

I think that we have to divide the two things; we have got to divide volume and complexity. Having said that I will in a sense contradict myself by referring to what Tony said about the complexity of the provisions, the covering provisions. Denis Murphy is someone who could comment on that because Denis was a member of the Commonwealth State Steering Committee which I had the honour to convene which constructed those.

They are complex and I endorse Tony's comment about the Chief Justice's remarks. But the key thing when you look at those provisions is that those are not the provisions that are causing great trouble to practitioners or to judges. The reality is that the investment of time in those complex provisions has delivered something which was an imperative the Commonwealth set down at the beginning at the process. It was that this scheme will not work unless we have a single law and a single fabric. Now those provisions are complex, I should know them better than most and I find it hard even revisiting them to explain them to people sometimes, because I have to refresh myself.

The reality is however that those most complex parts of the law are working extremely well. Why do I say that? Because they are not being challenged, they are not being overturned and because people who consult with us or spend the time to look at them, and its an investment that people have to make once, are finding that it works. And it is delivering a comprehensible national law. When I talk to lawyers, as I frequently do around Australia, about the complexity of the law, they do say, as a single national instrument, for the first time in this country, we have something they can pick up and look at something that goes from ocean to ocean, and operates nationally.

Enough of my defence Mr Chairman, I'll just add one little additional point. The Government is about to embark upon the most ambitious and far-reaching consultation process it ever has in relation to Corporations Law. We hope very much that people, rather than coming out with assertions that it's complex, it's too big, it's this and it's that, will in fact accept the Government's invitation which is - look at the law, tell us how you would like to have it changed, analyse it and tell the Government where it is wrong. But most importantly, don't just criticise it and knock it, come forward and offer a simpler way in which you can deliver on the Government's imperatives, the underlying policy.

That is why, however much in many ways I disagree with what John Green's saying, the reality is he is to be admired because he is putting his money where his mouth is. He is actually sitting down and doing that. I think that the challenge that faces us all in the months to come, because we all want simpler better understood laws, is to sit down and take that task on.

Senator Beahan: Thank you David, on that question of consultation my Committee will

be making some suggestions later about how we might help in that process of consultation as a catalyst. John Green is indicating that he wants to say something but I have promised that we will break for lunch now. So we will come straight back to John after lunch.

John Green: This business is in crisis, we are spending a fortune on dealing with what you produce. I accept, I agree and I said I'd learned how hard it is to do what you do, and I'm not being critical of you.

There is a difference between how we do things in Australia and how they tend to do things in what we call the East. In Australia we try to do things perfectly, in the east they try to do things better. What I'm trying to get you to do is to do things better, I keep saying that what I'm suggesting isn't the only way to do anything, but there are things in what I've been putting forward that some of you think might take us forward. As I said in my paper earlier they are not always appropriate. In some cases detail is clearly necessary. You cannot escape from that. When I said let the war begin, I didn't mean that we should be fighting each other. I mean't that we should be fighting together for Australia and making Australian business more able to fight internationally in the world for the benefit of Australians. That's not going to happen if you people keep at each other in the strange way if I could put that way, that I have seen this morning.

I am delighted that the Commonwealth is going to do a critique of the Division 16 E. I can tell you I will be furious if what the critique says, is that there is a loophole here there is a mistake here, look what they did wrong. On the other hand if the critique is 'good try, you could make it better by doing this, you could make it better by doing that,' then I would be thrilled. As I see it as a lawyer advising business, what the VLRC is trying to do is to say given the benefit of time, which they had and the Commonwealth didn't have, this is what could be done better. Now that you have the benefit of time for looking at their version of 16E you should be making it better and not looking at it in a negative way and I hope you won't.

The fact is, regardless of all of us lawyers sitting around talking about the niceties of law and precision and certainty and detail the fact is that what we do crushes business. We have to stop crushing business, business is going to be the salvation of this country. There are lots of promises we hear from people, you know we're getting it right. We're doing better; terrific, lets have more action not just promises.

We are told by some the law really isn't very complex. Well obviously, complexity is only in the eye of the beholder, because I'm used to complex law but I still find it complex. Maybe it's just that, despite what Tony Hartnell said earlier, I'm getting older, I'm finding it harder and harder and I'm getting more and more frustrated at the stuff which I have to read so that I can advise clients who in very short time frames have to take advantage of commercial opportunities that may not be there for a week and a half. They may have a deal they need advice on today and all I can do is say to them, it could be okay, I'm not really sure, the better view is that it probably is, but you know it's going to take me about three weeks to work through this legislation. So detail, while it may to some be an aid to certainty, to those of us who actually are the users of what you do, is just the opposite in many cases, though not all.

On one view a watch isn't a complex instrument, I look at my watch and I can tell the time. The trouble is when we get at legislation we don't get to see the time, we get to see the gears, the levers, the springs, the coils and everything else and what your job is, is to draft the legislation so that the consumers of it - me, and the business people who I advise only get to see the time.

Senator Beahan: Thanks John, Bob Gardini.

Bob Gardini: There are two points I would like to make, firstly, to make it clear that there is some recognition by this parliament that the drafters should have regard to plain english. In the Edwards Committee's report there was some discussion about adoption of plain english, the difficulties of the complexity and wide application of it were recognised, however the committee as I recall it came down in favour of the adoption of plain english where possible.

The second point relates to some comments David Edwards made about consultation. Whilst the business community welcomes such initiatives there are some concerns at the moment that there is really some lip service about consultation. There are two recent examples which I will quote about that. First is the CSAC report about Continuous Disclosure. The letters that went out from the Attorney-General's Department seeking comments on that Advisory Committee's report seemed to indicate that we were going to see a bill at the end of this year; that assumed a number of things. In the mean time we had the Lavarch Committee's report, considering both the statutory option and a non-statutory option in the form of a change to the ASX listing rules. In fact that has now taken place and I think we really need some time for that to settle down before in fact we move to some legislative regime, which appears to be clearly looming very close on the horizon.

The second aspect that concerns a report of the Joint Committee on the privilege against self-incrimination. As I recall, well I don't recall any of my clients receiving notification from the Committee about those particular terms of reference or being invited to attend but nevertheless, the Committee finalised its report last year. There has been no formal response from the Government to that Committee's report but in the last few weeks, legislation has been introduced into the Parliament adopting that Committee's report without an opportunity for the usual 3 months exposure period for comment by the community.

Now the principles at hand here are really very important they go to fundamental rights. Why in a criminal case for example, should someone have this protection, whereas under Corporate Law it is now being proposed that they be denied those important rights. Without a wider community debate about it, it seems to be moving very much down that direction without the requisite consultations. I quote those two areas of concern which are very recent areas and we would like to indicate our fear that in fact we are not being consulted as we should probably be.

Senator Beahan: Having spoken to David over lunch, I imagine David might like to respond to that. David Edwards.

David Edwards: First on the matter of continuous disclosure, there certainly does seem

to be a good deal of misunderstanding about this. In the last few weeks there has been a great deal of reaction. We are conscious of concern in the business community about this report by CSAC about continuous disclosure. There has been a widespread perception, an incorrect one which we seek to address. That the publication of CSAC's report equals a government decision. It does not.

The Attorney-General made it clear last year that he thought the matter of continuous disclosure was of such urgency, that it ought to seek an urgent report from the Committee. He did that and he received the urgent report. Having received it the Attorney-General said that he was committed in his own mind at this stage to the need for a legislatively backed regime for continuous disclosure.

As for the length, breadth and depth of that regime, he made it perfectly clear that that was a matter on which he believed it was necessary to get inputs from every affected group, to take them into account, and it was for that reason that the department sent out request for comments. At the latter part of last year allowing two to two and a half months for people to comment.

The key point of concern there though is that people have had the perception that the report equalled a Government decision, it didn't, and I can only repeat that and say that the Attorney-General is completely committed as he always has been to take in the fullest account of all the community and business concerns that come forward on that.

I don't think that's an indication of a lack of commitment to consultation but rather something that needed explanation and clarification of which I'm very pleased to take to opportunity to put here as I've tried elsewhere.

The Joint Committee report on privilege on self-incrimination is one where I can understand the concerns Bob has. He did mention that he was not aware of any of his clients being advised of the inquiry by the Committee. I'm afraid I'm not in position to respond to that Mr Chairman. However, certainly from our perspective we were aware of the fact that the Committee had opened up it's inquiry, had, as we understood it expressed a willingness to receive representations from all interested persons and that has provided an opportunity for a very robust input and for the Committee to be fully across all the issues.

Now the Ministerial Council for Corporations Law has had briefings from Mr Hartnell and from the Commonwealth regarding the implications of the legislation as it is sought to be amended. The council was of one voice that this was a matter that needed to be redressed and I don't think it's a matter for me to go into detail about the Council's deliberations; I think any comment on that is a matter for the Minister. There was full support from all jurisdictions for the need to move speedily on that matter. All jurisdictions that I'm aware of have voted. Certainly I'm not aware of any dissent from Attorney-General's throughout Australia in agreeing that this was a matter on which it was not necessary or desirable to have a delay. They noted that there had been a full opportunity to put submissions to your committee and in fact the Government was adopting the course recommended by the Committee. So I think again when that is seen in perspective, whatever problems Bob or others who are consultants or there clients had in being aware of it, the reality was that that was taken as a very serious and important,

given the full opportunity of the consultation and for putting views had occurred.

Let me conclude by this, that the Attorney-General in everything that he does reinforces and underscores to us constantly the need for we in the Department to carry consultation, not only with business but with the States to the fullest degree, and we seek to do that, if anybody could come forward with suggestions, recommendations as to how we could do better, our door is open our phone lines are clear, we are very happy to receive criticisms and to do better. Thank you

Senator Beahan: Before you go David, could you just explain what you were explaining to me at lunch time about your proposals for the draft bill.

David Edwards: Oh yes. During the course of the negotiations with the new scheme there was a lot of discussion between jurisdictions about the desire that all jurisdictions had not to be left out of the picture in formulating legislation and for their business communities, professional communities to have an input into legislation of the new scheme. That is one of the reasons of course why there is a usual three month consultation period for bills and why the heads of agreement between governments place emphasis on there being regional liaison committee's in each centre. Arising out of that, the Commonwealth Attorney-General Mr Duffy proposed to his fellow ministers that the Commonwealth, hopefully in consultation co-operation with CSAC, should hold practitioner forums on proposed bills. Recognising that it is hard for practitioners to get across materials it is hard for them to find the time to make inputs that we should not just wait for them to come forward but step out and offer something to them.

This is first time we have done it. There are going to be practitioner forums in Sydney, Melbourne and Adelaide, I'm sorry I'm not too good on the diary but I think they are the 6, 7 & 8 it's the Tuesday, Wednesday and Thursday in the week, the full week before Good Friday. Those forums are going to be between 5 and 8 in the evening, we will be advertising in the Financial Review, I think it's next week for 3 weeks. We are sending out notes to Law Societies we are going to advertise as widely as we can.

That is a very important process, States are very enthusiastic about it and we believe that will provide an excellent opportunity for us to draw out comment. We are going to have three specialists in each place who will make twenty minute presentations on the three main aspects of the bill, to give practitioners what we hope will be a pithy understanding of it and then the second half will be devoted entirely to having inputs and answering questions. Also as part of that scheme, we are offering speakers and panellists from the department to appear in other fora. If you have one, please let us know we are very happy to provide a speaker. Phillip Noonan (our expert on directors) and myself are appearing Monday and Tuesday next week at seminars organised by the Institute of Directors and Business Council of Australia, there are other engagements coming up.

We believe that these are an important thing, because the key fundamental is that there is a commitment by Mr Duffy, one which the department overwhelmingly and enthusiastically supports that the best laws for a national dilemma that we have and have had in companies regulation, the best laws will be prepared by inputs from all people. That I hope is consistent with something that struck a chord with me and that was John Green's comments; That's twice I've supported you today John. But we have to have this

national approach so we seek your support in keeping us involved and giving us very full inputs. Thank you.

Senator Beahan: Thank you David, and if I could just add to that too. I did mention briefly earlier that the Joint Committee, my Committee will also being carrying out a series of consultations, I don't think that's necessarily in conflict with what David's saying rather an addition to although we obviously will have to liaise with David about that and our idea is to act as a catalyst to go around the country with somebody from the Attorney-General's Department and to draw together the various key players to comment on the draft bill. So there will be plenty of consultation in that regard.

There is probably another five minutes for any further comments that people want to make. I remind you that this is more general than Corporations Law. The Corporations and Securities Committee is jointly running this with the Victorian Law Reform Commission but the issue of plain english drafting or better drafting of legislation is a much broader issue. And I welcome comments from anybody in the audience.

Athol Yeomans: I just want to know, what is the haste that is involved in this? Why do we, in contrast to New Zealand, have to produce a substantial draft bill. We have three months in which to provide input and it will take even Mr Green two months to understand it. Then the Government is going to redraft it, and propose to put it to the House in the Autumn session. Why are we in such a hurry, what pressing public need exists to be addressed so quickly? If there is a pressing public need I'll lie down and die, but I cannot see it, all I can see is that we are producing unsatisfactorily thought out legislation in a hurry, and for what purpose.

Senator Beahan: We can't get off corporations, do you want to respond to that David, or anybody else. No.

David Edwards: I don't want to hog the floor there is nothing worse than that, but there certainly must be a response to that.

What Mr Yeomans has neglected to say is that each of the three main planks of this legislation arrives out of reports of some standing, both in the quality of the people who put them together and the time they have been around. The Harmer Report from the Law Reform Commission, the report of CSAC (the Companies and Securities Advisory Committee) on Loans to Directors, Senator Cooney's Committee Report on Directors Duties. Each one of those processes involved massive consultation with business. Added to that, so there is nothing new about these things, each of those bodies has either in its report or in the people who presented the atmospherics about these reports urged upon the Government with the support of the community that these are areas in need of pressing reform.

Added to that, as the bill has been put together, we have prepared a number of position papers setting out options that the Government would need to face. We have aggressively sent those around to all leading organisations, the accounting bodies, the Business Council of Australia, CAI, the Institute of Directors and we have told them our doors are open to discuss, some have come and discussed others have neglected the opportunity.

So I think that to suggest that they are ill thought out and there has been insufficient consultation - that there is only this three month period - is with respect just plainly not doing justice to the situation. As for the other point, I think I touched that as to whether these are urgently required matters. The people who from the grass roots of our society brought forward these reports and brought forward submissions from which they came, emphasised the need for these areas of reform to be addressed as a matter of priority. The Government has decided that call is the correct one and is responding accordingly. Thank you.

Senator Beahan: Thanks David. Duncan Kerr I should have acknowledged earlier is a member of the Committee and he is the member for Denison in the House of Representatives from Tasmania.

Mr Duncan Kerr: I was unfortunately tied up in the national executive meeting so I wasn't here earlier so acknowledging my presence would have been difficult.

Can I say firstly, having missed much of this mornings proceedings I unfortunately have not been party to the obvious debate that occurred between some of the parties.

I came to the legislature when I was in my mid thirties, having before that practiced, principally as a constitutional and administrative lawyer, as crown council of the Tasmanian government and then as the Dean of a law school; and I must say that as a legislator I share the comments of John Green. Very frequently I find myself in considerable unease simply because I am part of rubber stamping drafts that come before us; often of such complexity that in a sense unless I was to spend almost all of my waking life trying to submerge myself in the detail, that I really find myself sometimes wondering the role of the legislator in that process.

I think that, if I could go back to a comment I heard about pithy substance, that the draft bill will be exposed and there will be about a 20 minute explanation getting down to the pithy substance. What we really should have is that the bill itself is the pithy substance, it should be supported by necessary explanations, examples, footnotes and the like that enables it to be more readily accessible.

I don't think it is just the Tax Act that is an obvious example of complexity. For my own part I've long since ceased to have the self assurance that I could give anybody any advice whatsoever, about tax. Increasingly as the legislation confounds itself and complicates itself and turns in on itself, there are too many areas where this legal complexity has become quite byzantine.

I've been delighted over the last 4 or 5 years to become aware of the work of Professor Kelly and of John Green. I think that we do too frequently pat ourselves on the back and say, 'Yes we are using plain english", when in practice we still end up with drafts which are over complex, too difficult to understand and require a reading age well beyond that of the average lawyer and the average person in the street.

More power to the arm of those who are involved in this process. Obviously it is not something that will change overnight, there does need to be a long process of change in the culture in which legislative drafting operates. That is no criticism of those who are

involved in the legislative drafting process. They do work in an area which is difficult, and they respond to short deadlines they have to try, at the same time as they are doing the routine work that the parliament and the Ministers demand of them, to look to changing the way they operate. That is a very difficult task to ask of anybody.

Nonetheless I think that if we are not to be criticised by the business community and ultimately indeed by the legal profession, because they themselves are finding it increasingly difficult to have a broad grasp of the work that the parliament is producing by way of law, we have to ask more of our draftsmen and women and I hope that this conference today does give some strength to those who would urge that we need to have a much more comprehensive look at how we prepare legislation.

Senator Beahan: Thanks very much Duncan. I am afraid I am going to have to call it there because I don't want to go too far overtime. I do not want to cut David short in his summation because I think it is very important. So I'll call on David Malcolm, Chief Justice in Australia to give the summation.

David Malcolm: Thank you Mr Chairman, I suppose that there will be some that say that it is a judicial privilege to have been given the last word and there are some like Tony Hartnell who have expressed some envy of the judiciary for having that position. I must say that in the last 5 hours, since we gathered here at 9.30 this morning, there have been times when I wanted to leap to my feet as I once did at the bar with an objection or an intervention.

I feel very sorry for parliamentary counsel. They are responsible for drafting legislation and they have long been easy targets for members of the legal profession and judges called upon to read, interpret and apply the legislation which they produce. Much of the criticism has been unfair, and we have heard today of the difficulty, when you have been instructed to prepare a draft for a sports car and along the way the policy changes and its going to be sedan and than later it's going to be an omnibus. Obviously this causes great difficulties.

We have to think about the time pressure under which the draftsmen operate. Not all the criticism of course can be so easily dismissed and I thought that Ian Turnbull QC was very frank when he admitted that there was still a long way to go.

What does emerge I think from today is that we are all in favour of plain english, and perhaps that only means no more than we are all in favour of motherhood in this context, because obviously plain english means different things to different people.

We heard a somewhat colourful, emotional plea from John Green in order to remove the obstacles to what may be described as a freewheeling opportunity for businesses to get on with the job. A plea which in terms of a plea for plain english and keeping statute short and simple seemed to me to be not notable for its brevity. It was, however, notable for its confidence and its persuasion and of course, like the Attorney-General of Victoria, I don't think that John Green has got any problems about self esteem.

Lawyers generally come in for a lot of criticism for making difficult that which is simple, complicated that which should be uncomplicated, technical that which should be non-

technical and convoluted that which should be straight forward. There are occasions when I remember wrestling with the *Income Tax Act*, as I did in the past, that I thank very much the Australian Parliament for taking income tax out of the jurisdiction of the Supreme Courts of the States. Now we can chip away, cast insults and throw stones with impunity from that particular point of view.

The *Income Tax Act* is an act which is designed to close loopholes; it is perhaps our perfect example of black letter law which is applied and interpreted by a group of people who spend all their time trying to find loopholes in it. We should pause for a moment and think about some of the statutes which have been referred to today where a simple statement of principle has had a major impact upon corporate and other behaviour in our community.

I would cite s.52 of the *Trade Practices Act* as a prime example of that kind of legislation. When it was introduced in 1974, there was a tremendous amount of opposition to it. There were many people who said that it exposed corporations to unlimited amounts of liability for damages from an unlimited range of potential litigants; that has not in fact occurred. However, in the context of corporate behaviour, how many times does one see the apology in the newspaper for a mistaken piece of information, which was given even about a local department store sale. There is clearly a consciousness in the corporate mind of the impact of that legislation. It may be thought that adverse reaction to the introduction of a particular piece of legislation from those to whom it is directed, is not always indicative of the fact the legislation is not worthy of appropriate consideration and should be withdrawn.

In one case which I had some years ago, I decided to take a punt and get on in the Federal Court quicker than I could get on in the Supreme Court of Western Australia, by alleging libel and misleading and deceptive conduct against the West Australian newspaper. They were outraged, the media across Australia were outraged, the decision went against them, they petitioned parliament, they lobbied Ministers but they remained, notwithstanding that, subject to s.52 of the *Trade Practices Act*.

Another example, which I think changed not only corporate attitudes in Australia but lawyers and accountants attitudes was the enactment of part 4A of the *Income Tax Act*. It's a pretty straight forward, simple statement of policy and principle in terms of anti-avoidance. It cast the net wide and it seemed to me that almost overnight the people who were marketing the Curran scheme, the commodity scheme, the bottom of the harbour scheme and all the rest of it, practically went out of business. There was a lot of opposition, most of it because of the retrospective character of the legislation. So far as it went to the future I think the community had got to the position where tax rorting was getting out of hand.

It is not always necessary to enact legislation. John Green indicated this morning that he thought that legislation dealing with the duties of company directors, what used to be s.229 of the code and is now s.232 of the code, was a good, effective example of enacting a general principle. Directors must act honestly and with due diligence. It follows from that that the subsidiary provisions apply, they are specific examples of the application of the general principle; you shouldn't make improper use of information, which comes into your hands as a director, for your advantage or to cause detriment to the corporation;

you must not make improper use of your position to obtain an advantage for yourself or another or to cause detriment for the corporation.

They seem very simple, but the most extraordinary thing is they have been ineffective except in the area of civil liability. In one form or another those provisions have been in the law since the 1930's. They have been uniform throughout Australia since s.124 of the Uniform Companies Act was enacted and they've been carried forward into s.232.

The extraordinary thing is that it was not until the Court of Criminal Appeal of my State was called upon to determine two cases last year that these issues were considered. On the one hand was a case about improper use of position to gain an advantage for yourself - transferring the assets of the corporation to your family and its entities in simple terms, and on the other a by-product of the Rothwells saga where the money of Western Collieries was being used to its detriment in order to prop up Rothwells.

It wasn't until those two cases came before us, that the basis for criminal liability in relation to those provisions was fully explored. We found that there was no authorative decision in any Australian Court on that legislation.

The implication to be drawn from that is that there had been no prosecutions which had gone past magistrates courts, which had been tried on indictment, in which issues had been raised about, for example, what is the mental element, what is the guilty knowledge or criminal intention which is required. Interestingly enough it was only last year that the Senate Committee considered that criminal liability for company directors should depend upon criminality, and not depend simply upon proof beyond reasonable doubt of breach of a civil duty.

We have within that legislation, unfortunately as it stands at the present time, a combination of civil and criminal liability flowing from the same set of provisions. Nothing is spelled out really about the mental element except in terms of aggravation of some of the offences.

We now have the draft bill which has been the subject of quite a deal of criticism. It seems to me that we have been told I think by the Attorney very effectively, at the beginning of the day, that there is a question of balance. Those who are agreed about plain english are not necessarily agreed about its effectiveness in every area. We have on the one hand the black letter lawyers represented today by Tony Hartnell, maintaining that you must close every loophole, lock every door and spell it all out. You must be precise because you can't trust the courts.

I feel a little injured by that statement, because only last year the ASC scored three out of three in the court of Western Australia in three major appeals. They had a major breakthrough in a case called Jenkins and Enterprise Gold, a case concerning the IRL Group which is continually in the ASC's sights. The court found oppression, under the shareholders oppression provisions, where money was going round and round a particular group in the interests of various people in the group but not necessarily at the interest of the particular companies. So the court appointed a receiver and manager of that particular company Enterprise Gold.

It seems to me that the assertion that if you state the principle you'll leave questions unanswered and a lack of guidance that can be overcome by providing the necessary guidance in relation to the purpose of the legislation. That is a tendency which is increasing as legislation becomes improved and the courts now virtually universally, as I understand the current law, adopt a purposive approach to legislation.

Simply because Parliament may on occasions in the view of the court have failed to make its intention sufficiently clear, it does not mean that you have to abandon the idea of expressing a principle in legislation coupled with appropriate purposive guidance and go back to spelling out in words of one syllable, but in a hundred provisions, every aspect of the legislation which parliament would like a court to recognise.

John Green of course, found it necessary to adopt what some might describe as an extreme position to drive home his point. Sir Anthony Mason in the passages which he quoted from his recent address on Tuesday of this week to the Corporations Law Teachers Workshop, did advocate what I thought was a very balanced approach and that was that we ought to consider in relation to each piece of legislation, just how much do we need to descend into detail.

When I was at the University of Western Australia trying to study law, Alan Fels was making a reasonable fist of economics at the same time. So we have known one another for a very long time. I thought that his contribution in relation to the *Trade Practices Act* in the 22 minutes which he allowed himself was a very interesting one. Because, there in those provisions s.45 to s.50 of the *Trade Practices Act*, we have the enactment of economic policy and the prohibition of actions which are contrary to economic policy.

Recognising the success which the Sherman/Clayton Acts had in the US and the provisions of articles 85 and 86 of the Treaty of Rome have had, he was prepared to drop a number of the provisions in the *Trade Practices Act* in that area and come back to two simple provisions which would enshrine the whole of the policy and in fact do it in a way more consistent with the basic economic policy reflected in the legislation pro competition, than is the case at the present time.

It would seem to me that it is not necessary to adopt the kind of position that Tony Hartnell adopted in relation to distrust of the judges. Judges from time to time may get it wrong, Parliament from time to time may get it wrong, those who are regulated by the law may from time to time get it wrong and those who are called upon to regulate may from time to time get it wrong. That is because we all have to make value judgements about the meaning of words. If we were all perfect communicators who understood plain english to mean precisely the same thing, then we would not have any of these difficulties at all. As long as the human race retains the quality for disagreement, the formulation of opinion and the perception that different words mean different things to different people there will be arguments. The task is to reduce scope for argument to the minimum.

I have been very impressed by the work of the VLRC in this whole area, as it was outlined by the Attorney-General of Victoria, Mr Kennan. It does seem to me that there is a great deal to be learned from that. It is right, I think as Ian Turnbull has expressed it, to have reservations in the search for accuracy and perhaps we ought to be reserving

judgement about the final extent of the accolades that we give to the Victorian Law Reform Commission, until the Commonwealth Parliamentary Counsel's office has had an opportunity to work over the redraft of 16E of the *Income Tax Assessment Act*.

It does seem to me that looking at a number of the redrafts of legal documents which have emanated from the VLRC that there is a lot to be gained by going a little further in that direction and being perhaps on the face of it less precise, in the way in which that is reflected in Commonwealth legislation.

One of the pieces of Commonwealth legislation which the judges are having a lot of trouble with at the moment, is that part of the Crimes Act, recently introduced by way of amendment, which imposes a new Commonwealth sentencing regime. It has been difficult even for most experienced judges to apply, it has been difficult for the Commonwealth Director of Public Prosecutions office, and those who appear instructed by him in courts, to interpret and apply. Conflicting views have been expressed in submissions which have been made on successive days in the same court about the affect of that legislation.

I think that does show that although there are these valiant attempts to use plain english, they do not always succeed and we must be forever vigilant in pushing that work.

The Institute of Company Directors has drawn attention to the fact that although there are 800 000 companies on the register the Corporations Law probably only needs to impact upon 40 000 of them and that of those the main provisions such as those dealing with accounting standards, prospectuses and the like are directed about a thousand of the leading companies in Australia. Perhaps one thing that might be considered is whether we need a first rank Corporations Law for the omnibus, a second rank Corporations Law for the sedan and perhaps a third rank Corporations Law for the sports car. They are perhaps unfortunate analogies but I adapt them simply because they were made earlier in the day. The two dollar family company that does nothing more than hold the family home, may need a completely different regime of regulation and accounting standards than BHP or CRA or some of the high-flying corporations which are under investigation at the present time.

It would seem to me that the message has got through at almost every level in our community today, that we should be working towards simplicity without sacrificing certainty. The debate is how simple can you get without sacrificing certainty. That is not a debate which can be resolved in a forum like this where we are talking about generalities. That is a debate which can only be resolved in the context of individual drafting exercises in relation to particular statutes bearing in mind the object sought to be achieved by them.

It does seem to me that to be talking in general terms about how simple you can get without sacrificing certainty, without reference to a particular piece legislation is not necessarily a positive or constructive way to try and resolve what I perceive to be Commonwealth and Victorian tensions in this particular area.

I hope that an accommodation can be found because one thing which has really impressed me during the last decade, has been the development of a national approach

in so many different areas of our national life which is regulated by the legal system. The movement towards establishing uniform standards, uniform legislation in so many different areas is one way of making corporate and business life and individual lives in this country more simple, so that people can more readily understand, what it is that they have to comply with in relation to the legislation.

It does seem to me that there is now a ground swell which is developing towards making legislation more intelligible and more effective. All of those who are engaged in the exercise, must continue that and be encouraged by those who engage them, employ them, run them or administer them. If that process continues I am sure that we will continue to make advances in this area. I would wish them well because it seems to me that from where I stand my task can only be made easier if they work harder at theirs and achieve success.

Thank you very much for the opportunity to be with you today.

Senator Beahan: Thank you David for a very thorough and learned summation. If I could apply the Chairman's prerogative and have the final comment that will ensure that the law does not always get the final comment. First of all to say that I was very heartened to hear your support for a national approach to things, coming from a West Australian that's always heartening. Secondly on your reference to the ASC's success in three appeals in West Australia, I would like to draw your attention to the fact that two of those I think were catching minnows not sharks. I hope that's not a mark of the ASC's success because I don't think that is how we should measure its success. Having said that I won't comment any further.

It remains to me to thank all of you for your attendance to day, I said at the outset that this is a remarkably widely representative group of people and it includes some very influential members of all of the groups you represent. Some more high profile than others but all influential. The venue wasn't the ideal place to have a seminar of this sort, it is too much like a star chamber. We do need to get in a circle and exchange ideas and I think that a less intimidating venue might have made it a little less difficult.

I thank those who did participate from the audience. I'd like to thank in particular the speakers, David Malcolm again, Michael Duffy, Jim Kennan, John Green, Alan Fels and the panel, Ian Turnbull, Denis Murphy, Tony Hartnell and Athol Yeomans for giving up your time. I would like to finally thank the staff of the secretariat supporting the Corporations and Securities Committee, Derek Abbott and his staff and the Victorian Law Reform Commission for their assistance in putting on this seminar.

We intend to follow the issue up, and we are not the only ones that will. As I said already the House of Representatives Committee on Legal and Constitutional Affairs are examining a reference in this area.

Thank you for your attendance and it was good meeting you all.