THE NEW TAKEOVER CODE AND THE N.C.S.C.: POLICY OBJECTIVES AND LEGISLATIVE STRATEGIES FOR BUSINESS REGULATION

By
CHRIS MAXWELL*

This article analyses the new Takeover Code and evaluates its approach in the light of the general objectives of takeover regulation. Its significance as a model of business regulation is also canvassed. In particular the role of the National Companies and Securities Commission is examined, and the author raises serious doubts as to the capability of the traditional legal system to cope with the regulation of economic activity. In this light, the author proposes the establishment of a specialist tribunal to deal with disputes arising from the Takeover Code.

I. INTRODUCTION

An important new phase in the statutory regulation of business in Australia began on 1 July 1981. On that day the co-operative national companies and securities scheme came into operation. Established in accordance with a 1978 Commonwealth-State agreement [1], the co-operative scheme consists of three uniform regulatory codes dealing with companies, company takeovers, and the securities industry respectively.[2] Ultimate political responsibility for the scheme rests with a Ministerial Council, but the active regulatory role is filled by the National Companies and Securities Commission (N.C.S.C.). The genesis of the co-operative

*B.A., LL.B. (Melb.); B. Phil. (Oxon).

1 The Formal Agreement, as it is called, appears as the Schedule to the National Companies and Securities Commission Act 1979 (Cth).

2 The Takeover Code and the Securities Industry Code have both been operative since 1 July 1981. The Companies Code is expected to commence 1 July 1982.

3 See R. Baxt, H. Ford, G. Samuel and C. Maxwell, *An Introduction to the Securities Industries Codes* (1982) Chapters 2-3.

scheme, its constitutional background and legislative structure, and the respective functions of its constituent parts are all worthy subjects for the student of business regulation.[3] This article will not, however, be concerned with the regulatory machinery but rather with the particular legislative model adopted for one of the three regulatory codes in the scheme, the Takeover Code.[4]

An analysis of the Takeover Code is useful not merely in revealing the legislative approach to the particular subject-matter of takeovers, but because the Code has a wider significance as a model of business regulation, providing the opportunity for an exploration of some important general themes in the field of government regulation of business. Questions which this model will be seen to raise include:

(a) the need for clear articulation of regulatory objectives, and the possibility of conflict between objectives;
(b) the comparative utility in regulatory legislation of generalised statements of principle on the one hand, and detailed prescriptions of behaviour on the other;
(c) the nature of administrative discretions and the function of statutory guidelines for their exercise; and,
(d) the appropriateness of law and law courts to the task of economic regulation.

The following section deals with the main objectives, economic and non-economic, of takeover regulation. Subsequent sections examine particular provisions of the Takeover Code in which these objectives are given an explicit function, and the concluding section considers the fate of economic regulation in the courts.

II. THE OBJECTIVES OF TAKEOVER REGULATION

> There appears to be general agreement that some regulation of takeovers is necessary to ensure fair treatment of shareholders. At the same time, looked at from the point of view of investors, it cannot be said that takeover bids are disadvantageous . . . In making the recommendations which follow, we have not been actuated by any desire to discourage the making of takeover bids in cases in which the safeguards for the protection of shareholders are observed.[5]

Thus did the Eggleston Committee, otherwise known as the Company Law Advisory Committee to the Standing Committee of Attorneys-General, proclaim in February 1969 its philosophy of takeover regulation. The Committee's report on this subject marked a turning-point in the statutory regulation of company takeovers in Australia. For the first time the underlying policy of takeover regulation was explored, its objectives delineated, and a set of governing principles enunciated which have had a profound influence on the content and administration of all subsequent legislation in this area.[6] This influence is nowhere more evident than in the new Takeover Code.

4 Companies (Acquisition of Shares) Act 1980 (Cth) and corresponding State codes.
5 Second Interim Report of the Company Law Advisory Committee to the Standing Committee of Attorneys-General "Disclosure of Substantial Shareholdings and Takeovers" (Feb. 1969) Section C, paras 14-15.
6 The immediate outcome of the Eggleston Committee Report was the insertion into the Uniform Companies Acts of Part IVB (sections 180A-180Y).

Further, the Committee's statement of its guiding policy exemplifies the central theme in the theory and practice of business regulation in a mixed economy: that it is both legitimate and necessary to place limits on the pursuit of economic goals, to "interfere with the operation of the free market", in order to promote other identified public objectives. Economic activity is essential to the general welfare but it does not of itself constitute or guarantee that welfare. At a certain point there is a divergence between the priorities of participants in the market and the priorities of society at large. To put it more strongly, there is a basic incompatibility between the primary economic objectives of profit maximisation, increasing turnover and dominance over competitors, which characterise the market, and ethical or social values such as equality, fairness and justice. The justification for government regulation of business lies in the need to reconcile these conflicting goals, to strike a balance which promotes the wider public interest, however defined, while at the same time preserving the benefits of economic activity.

In the particular field of takeover regulation the balance to be struck is that between allowing or enabling takeover activity to fulfil its economic function, which necessarily involves takeover participants pursuing what they perceive to be their economic self-interest, and ensuring that shareholdes affected by takeovers are adequately protected. Arguably, the interests of the employees of a company subject to takeover have an even stronger claim to legislative protection but the Australian legislature have yet to recognise such a claim.[7] Questions of foreign ownership, market structure and the maintenance of competition within markets are also directly relevant to takeover regulation but they fall within the province of the Foreign Takeovers Act 1975 (Cth) and the Trade Practices Act 1974 (Cth) respectively, and will not be considered herein.[8]

The assumption that takeovers perform an economically beneficial function is certainly the starting point for Australian takeover legislation. This is amply illustrated by the remarks of the then Minister for Business and Consumer Affairs, Mr Fife, when introducing the Company Takeovers Bill 1979:[9]

> [I]n a free enterprise economy such as ours takeovers can play a very important role in the efficient allocation of resources. In many instances takeovers allow for the introduction of new and better management and technology and for economies of scale. This means a greater return on investment, which is to the benefit of shareholders and provides greater security to creditors. Overall there is a net benefit to the nation through the better use of resources. The Government does not wish in any way to inhibit such takeovers.[10]

7 The National Companies Bill 1976, prepared originally for the Whitlam Labor Government but ultimately introduced as a Private Members Bill following the defeat of that Government, contains a provision (clause 91) empowering the directors of a company when exercising their powers to have regard, *inter alia*, to the interests of the employees and former employees of the company or a subsidiary and their dependents. Section 46 of the Companies Act 1980 (Vic.) is a similar provision to a similar effect.

8 The N.C.S.C. has announced that it "will consult, as necessary, with other authorities having responsibilities embracing actual or prospective takeover activity e.g. The Trade Practices Commission and the Foreign Investment Review Board." N.C.S.C. Policy Statement, Release 101, para. 3(v).

9 An earlier version of what became the Companies (Acquisition of Shares) Act 1980 (Cth) (The Takeover Code).

10 H. R. Deb., 20 November 1979, 3197.

The benefits are not only macro-economic. The threat of a takeover is seen to provide a unique stimulus to the efficiency and profitability of the company under threat. It is regarded as axiomatic that the possibility of a takeover will operate as a spur to management to improve its own performance and that of the company, and to disclose to shareholders the true worth of their holdings.[11] It is not necessary for present purposes to explore the economic justification for takeovers in any greater detail.[12] In approaching this as a model of business regulation it is sufficient to acknowledge, as the N.C.S.C. Chairman Mr Masel has said, that the concepts of the market place viewed as a prophylactic against poor and inefficient management and the takeover viewed as a better allocation of resources are now seen in Australia as the basic philosophy of the takeover legislation.[13]

Integral to the proper functioning of the takeover as an economic mechanism is the efficient operation of the secondary securities market. This is the market, dominated by the stock exchanges, in which shares and other issued securities[14] change hands, as distinct from the primary securities market in which the issuers of securities offer them to the public. Takeover regulation is directly concerned only with the secondary market, which must be efficient in the sense that the price of securities is sensitive to market forces and a flow of readily available information, and that the transfer of ownership is effected quickly and economically. These are the objectives connoted by the phrase "efficient, competitive and informed market" which appears in section 59 of the Takeover Code as a beacon to guide the N.C.S.C.[15]

The operation of the secondary securities market does, however, have a wider significance than simply the efficient facilitation of takeovers. It has direct consequences for the effective capital-raising function of the primary market for, if investors do not believe that they can dispose of investments readily and at a fair price on the secondary market, they will be less inclined to subscribe for new issues of securities in the primary market. The key element is investor confidence:

> [T]he principal objective in securities regulation is to instil confidence in the securities market in order to create an environment that will induce greater savings, or at least greater investment of existing savings in equity and long-term debt securities; to enable Australians to acquire securities issued by Australian corporations; and to generate sufficient market activity so that an investor can realise his investment at its full value at any time.[16]

The best recipe for investor confidence, at least in the view of the N.C.S.C., is the maintenance of fairness in the market:

> The Commission believes that the confidence of investors will be significantly influenced by their perception of the integrity and propriety with which takeovers are effected . . .[17] In fulfilling their regulatory role, the Commission and the

11 See *e.g.*, Eggleston Committee, *Report*, note 5 *supra*, section C para. 14.
12 See further, M. Weinberg, M. Black and A. Greystole, *Weinberger on Takeovers and Mergers* (1971).
13 "Towards an Efficient, Competitive and Informed Market" address to the Securities Institute of Australia (Sydney, 2 July 1980), (1980) (No. 2) JASSA 10, 13.
14 The term "securities" is defined in the Securities Industry Act 1980 (Cth) s.4.
15 See section 2(2) below.
16 L. Masel, "The National Companies and Securities Commission — A Synoptic View" (1980) (No. 5) *The Australian Director* 48.
17 N.C.S.C. Policy Statement, Release 101, para. 3(ii).

> business community must constantly consider how public confidence in the secondary market and securities can be instilled and maintained. This confidence depends on rules applied to all which are not only fair but which are also seen to be fair. A loss of confidence by household investors in the securities market as a result of acquisitions arising out of a takeover offer poses significant harm to the public interest.[18]

N.C.S.C. Commissioner John Coleman has made the point rather more colourfully:

> But if we are to attract shareholders back we must also convince them that the market *does* have integrity and is well-policed, that sleazy or unfair business behaviour *will not* succeed, and that shareholders *will not* be cheated by adventurers or by insiders who are privy to company plans or by large operators who can plunder their share price. We must also reassure them that the necessary legal and administrative framework for this purpose is in existence and can be used.[19]

So investor confidence depends on fairness in the market, which entails the provision of adequate protection for investors. In the context of takeovers this means the protection of investors *qua* shareholders.

It will be recalled that the Eggleston Committee acknowledged the necessity of takeover regulation "to ensure fair treatment of shareholders". What that meant in the context of a particular bid for control of a company was defined by the Committee in terms which have now been incorporated, almost verbatim, into the Takeover Code.[20] Fair treatment required, in the Committee's view, that the freedom of action of the bidder or "offeror" be limited to the extent necessary to ensure that:

(i) the identity of the offeror is known to the shareholders and directors of the offeree company;
(ii) the shareholders and directors have a reasonable time in which to consider the proposal;
(iii) the offeror is required to give such information as is necessary to enable the shareholders to form a judgment on the merits of the proposal; and,
(iv) so far as is practicable, each shareholder should have an equal opportunity to participate in the benefits offered.[21]

While these principles of market fairness undoubtedly have an economic function, for example, the promotion of investor confidence and hence of capital investment, they are nevertheless largely antithetical to the notion of a free and efficient market.[22] Takeover regulation is directed at reconciling these antimonies,[23]

18 L. Masel, "The Sale and Purchase of Corporate Control in an Efficient, Competitive and Informed Market", address to CEDA Trustees (Adelaide, 20 August 1981) 16.
19 "Corporate Responsibility — How Wide?", address to Institute of Chartered Accountants (Canberra, 15 March 1982) 14.
20 Ss.59 and 60, see *infra*.
21 Eggleston Committee, *Report*, note 5 *supra*, Section C, par. 16.
22 For a discussion of the concepts of fairness, equality and efficiency as used in the context of economic regulation, see D. Harding, "Lawyers and Economic Activity" in A. Hambley and J. Goldring (eds.), *Australian Lawyers and Social Change* (1976) 183, 219-225.
23 The term is used by the N.C.S.C. to refer to "free market forces on the one hand and investor protection on the other" (N.C.S.C. Policy Statement, Release 100, para. 9).

and at the "need to temper the power and efficiency of free market forces with notions of fairness, justice and a degree of economic equality".[24] The four criteria of shareholder protection, listed above, are ultimately based on these ethical values and require no economic justification, though it undoubtedly exists. N.C.S.C. Commissioner Greenwood has stressed the independent importance of the non-economic objectives:

> The establishment of the National Companies and Securities Commission signifies that in human affairs there are issues and values that transcend questions of efficiency measured merely by price. In securities regulation and the administration of company law there are many considerations of equity, or to put it more plainly, right and wrong, that cannot or ought not be translated into economic terms. If further justification is needed for rules of right and wrong in a market context, it may be said that they are fundamental to investor confidence and thus the long term economic health of the market.[25]

The efficacy of business regulation depends on the clarity with which its objectives in each field are identified. In the field of takeover regulation, the objectives, market efficiency and shareholder protection, are clear, though the interplay between them is complex; part conflict, part complementary. The Takeover Code is an attempt to achieve the best of both worlds.

III. THE N.C.S.C. AND THE TAKEOVER CODE

The N.C.S.C. was established by the National Companies and Securities Commission Act 1979 (Cth). Under the Formal Agreement between the Commonwealth and the States which governs the co-operative companies and securities scheme,[26] the N.C.S.C. is responsible for "the entire area of policy and administration with respect to company law and the regulation of the securities industry".[27] It is, however, subject to ultimate control by the Ministerial Council which comprises the responsible Commonwealth and State ministers.

The Takeover Code is contained in the Companies (Acquisition of Shares) Act 1980 (Cth) which applies as a separate State Code in each State by virtue of an "Application of Laws Act".[28] The key provision of the Code[29] is section 11 which prohibits a person from acquiring shares in a company if the acquisition would result in any person being entitled to more than 20% of the voting shares in the company or if the acquisition would increase the entitlement of any person already entitled to 20% or more of the voting shares. This prohibition is subject to a number of exemptions which are, in effect, the approved takeover methods. The most

24 L. Masel, "The National Companies and Securities Commission and the Capital Markets", address to the Australian Finance Conference (Canberra, 2 June 1981) 16.

25 "The National Companies and Securities Commission: Its First Year and Future Strategies" (N.C.S.C., December 1980) 38.

26 Note 1 *supra*.

27 Cl. 32(1).

28 See R. Baxt, *et al*, note 3 *supra*, Ch. 3, especially paras. [302] and [304].

29 References to "the Code" should be read as referring compendiously to the Commonwealth Act and the corresponding State Codes. Section references are identical for Commonwealth and State Codes.

important of these are the making of a written offer on equal terms to all shareholders[30] and a procedure by way of announcement on the stock exchange to the effect that all shares in the target company offered for sale will be purchased at a price specified in the announcement.[31] The Code prescribes in great detail (it contains 64 sections and runs to over 80 pages) the procedures which must be followed in order to attract one or other of these available exemptions. Criminal penalties are provided for contravention of the Code and for other specified offences. In addition the Supreme Court is given wide powers to make orders compelling compliance[32] or protecting rights,[33] and to nullify a prohibited acquisition.[34]

The most striking aspect of the Takeover Code is the powers which it confers on the N.C.S.C. Three powers in particular, contained in sections 57, 58 and 60 respectively, are virtually without precedent in Australian legislative history and they merit careful analysis. In stark contrast to the "black letter" quality of the rest of the Code, these sections neither prohibit nor require particular conduct, but confer upon the Commission wide and highly flexible powers to deal with situations for which the Code has not provided or is otherwise deemed unsuitable.

1. Sections 57[35] and 58[36]: Powers to Extend and to Vary

Powers of the kind conferred by these sections may fairly be described as quasi-legislative.[37] They endow the N.C.S.C. with a seemingly unfettered discretion to vary or modify the application of the Code to particular cases: in short, to decide when and how the legislation should apply. Since section 57 allows only permissive exemptions, and since the Commission has exercised its section 58 power of modification and variation only to relax the application of the Code,[38] there has been no challenge yet to the validity of these powers. In the event, however, of an exercise of discretion in favour of one person but opposed by some other party to the takeover, or in the less likely but technically possible event of a variation of the Code under section 58 so as to impose a more rigorous requirement than that provided for in the legislation, a challenge could be confidently expected. Serious questions would almost certainly arise, at least in relation to section 58, as to the

30 S.16.
31 S.17.
32 S.46.
33 S.47.
34 S.45.
35 S.57(i) provides:
The Commission may, by instrument in writing, exempt a person, as specified in the instrument and subject to such conditions (if any) as are specified in the instrument, from compliance with all or any of the requirements of this Act.
36 Section 58(1) provides:
The Commission may, by instrument in writing, declare that this Act shall have effect in its application to or in relation to a particular person or persons in a particular case as if a provision or provisions of this Act specified in the instrument was or were omitted or was or were modified or varied in a manner specified in the instrument, and, where such a declaration is made, this Act has effect accordingly.
37 *Cf.* J. Nosworthy, "Change in Law and Procedure on the Corporate Scene" (1981) 55 *A.L.J.* 533, 537.
38 The power has been used predominantly to grant extension of time and to allow changes to documentation. Copies of all instruments executed under ss.57 and 58 are published in the Government Gazette.

validity of an apparent abdication by the Parliament of its legislative Power.[39]

The granting of these discretionary powers is a significant concession to the requirement of adaptability and flexibility in the administration of laws governing complex and volatile commercial activity. It is an acknowledgment by the legislature that no set of detailed prescriptions can ever cater for every future contingency,[40] and, in the present context, that "acquisitions of substantial interests in a company and conduct in relation to takeover bids cannot be adequately regulated by precise statutory forms".[41] The particular utility of sections 57 and 58 will be in enabling the Commission not so much to require something *more than* compliance with the letter of the law,[42] but rather to permit *less than* compliance in cases where the cost of strict compliance would clearly outweigh any possible benefit or where the relaxation of a prohibition would itself have beneficial results.

Such legislative devices enable the regulatory body to respond sensitively to legitimate commercial considerations in particular cases. At the same time, the exercise of these discretions is made expressly subject to the policy of the legislation. Section 59 supplies the criteria of public benefit which the Commission must apply:

> 59. In exercising any of its powers under section 57 or 58, the Commission shall take account of the desirability of ensuring that the acquisition of shares in companies takes place in an efficient, competitive and informed market and, without limiting the generality of the foregoing, shall have regard to the need to ensure —
>
> (a) that the shareholders and directors of a company know the identity of any person who proposes to acquire a substantial interest in the company;
>
> (b) that the shareholders and directors of a company have a reasonable time in which to consider any proposal under which a person would acquire a substantial interest in the company;
>
> (c) that the shareholders and directors of a company are supplied with sufficient information to enable them to assess the merits of any proposal under which a person would acquire a substantial interest in the company; and
>
> (d) that, as far as practicable, all shareholders of a company have equal opportunitities to participate in any benefits accruing to shareholders under any proposal under which a person would acquire a substantial interest in the company,
>
> but nothing in this section shall be taken to require the Commission to exercise any of its powers in a particular way in a particular case.

We immediately recognise here an interweaving of the objectives of takeover regulation identified earlier, that is, the efficiency and competitiveness of the secondary securities market, and the protection of shareholders in accordance with

39 *Cf. Giris Pty Ltd* v. *Commissioner of Taxation* (1969) 119 C.L.R. 365.

40 An interesting comparison may be made with the City of London Code on Takeovers and Mergers. The City Code began in 1968 primarily as a collection of general principles, thought to be better adapted than detailed rules to the regulation of takeover activity, but its subsequent development has been by the inclusion of a steadily increasing number of highly specific detailed rules to buttress the general principles.

41 N.C.S.C. Policy Statement, *Discretions Vested in Commissioner* (1981) Release No. 105 para. 5.

42 That is the function of the Companies (Acquisition of Shares) Act 1980 (Cth), s60; See Part III, section 2 of this paper *infra*.

the four Eggleston principles. The use of the drafting formula, "without limiting the generality of the foregoing", might suggest that the principles of shareholder protection are to be taken as merely exemplifying the general objective of "an efficient, competitive and informed market". Such an interpretation would not do justice to the complex relationship between investor protection and market efficiency alluded to earlier, nor, in particular, to the inherent conflict between the objectives of takeover regulation. The correct inference would seem to be that considerations of market efficiency and investor protection are simultaneously to govern the Commission's exercise of its powers, and that section 59 demands the maximum pursuit of each objective consistent with the pursuit of the other.

The broader significance of section 59 as a legislative model is the clear and unequivocal statement it gives to the objectives of the legislation. Not only is the regulatory agency given specific guidelines for the exercise of its broad discretions, but those having to apply and interpret the legislation, the business community, investors and the courts, are on notice as to its governing purposes and as to what considerations are likely to influence the regulators. N.C.S.C. Commissioner Greenwood has underlined the guiding function of sections 59 and 60:

> Those sections state the ground rules for exercise of discretion by the NCSC but we can safely assume that the legislature intended that most of the other provisions of the law would in some way promote those ground rules.[43]

Following an amendment to the Acts Interpretation Act 1901 (Cth), courts interpreting Commonwealth Acts are now obliged to have regard to the underlying object or purpose of the legislation.[44] It is impossible to predict, and it may be very difficult to judge in retrospect, what influence this rule will have on statutory interpretation. Undeniably, however, the task of the courts in eliciting statutory purpose will be greatly simplified by the insertion of clear legislative signposts such as section 59. The Interpretation Code[45] for the co-operative scheme will need to be similarly amended to ensure that State courts are obliged to prefer purposive interpretations of the corresponding State Acts[46] under the scheme. It is to be hoped that any such amendment will also direct all courts when interpreting the legislation to have regard to the scheme legislation as a coherent whole and to the objectives of the scheme as set out in the Formal Agreement.

2. Section 60: The Concept of "Unacceptable"

Section 60 confers on the National Commission a wholly new discretion, to declare an acquisition of shares or other conduct relating to a takeover to be "unacceptable". Sub-section 60(1), for example, provides:[47]

43 A. D. Greenwood, "The Right of Shareholders to Equal Opportunity on the Proposed Acquisition of a Substantial Interest in Their Company", address to the Committee for Economic Development of Australia (Melbourne, 12 March 1982) 1.

44 Section 15AA(1) of that Act provides:
In the interpretation of a provision of an Act, a construction that would promote the purpose or object underlying the Act (whether that purpose or object is expressly stated in the Act or not) shall be preferred to a construction that would not promote that purpose or object.

45 Companies and Securities (Interpretation and Miscellaneous Provisions) Act 1980 (Cth) and corresponding State Codes.

46 See R. Baxt, *et al*, note 3 *supra*.

> The Commission may, within 90 days after an acquisition of shares in a company, by instrument in writing, declare that acquisition of shares to have been an unacceptable acquisition and, where such a declaration is made, the person who acquired those shares shall be deemed, for the purposes only of section 45, to have acquired those shares in contravention of section 11.

Sub-sections (3) and (4) of section 60 confer upon the Commission the power to declare conduct engaged in by a specified person in relation to shares in, or the affairs of, the target company, during the currency of a takeover offer, to have been unacceptable conduct.

These are arresting provisions. Notions of "unacceptable conduct" or an "unacceptable acquisition" are not only novel but they are, by their very imprecision and non-legal character, at odds with the remainder of the Takeover Code. Their function may be compared to that of the versatile concept of reasonableness. By adopting imprecise and adaptable concepts the law provides itself with a safety-valve against rigidity and formalism, an in-built mechanism for flexibility.

The making of a declaration under section 60 applies the automatic penalty of adverse publicity. It also activates all the other enforcement powers under the Code. A declaration under section 60(1) — that an acquisition was unacceptable — has the effect of deeming the acquisition to have been in breach of the basic prohibition in section 11. This in turn activates section 45 which entitles the Commission and certain other persons[48] to apply to the Supreme Court for any one of a range of orders restricting dealings with the shares so acquired. A declaration under sections 60(3) and (4) — that certain conduct was unacceptable — has no equivalent "deeming" effect but directly entitles the Commission, or the target company or a member of it, to apply to the Supreme Court for orders to protect the rights of any person affected by the relevant conduct or "to ensure, as far as possible, that the relevant takeover . . . proceeds as if that conduct had not taken place".[49] In either case, the court may, instead of making the orders sought, declare that the acquisition or conduct was not unacceptable, in which case the Commission's declaration ceases to have effect.

The insertion of a new section 60A into the Code[50] gives the declaratory power an even greater potency. As an alternative to applying to the court for orders, the Commission will be able upon making a declaration of either kind to make a range of orders itself, by instrument in writing published in the Government Gazette. The range of orders available to the Commission is similar to that available to the court under section 60, enabling a variety of restrictions to be imposed on dealings with specified shares, and is identical to that available to the Commission itself in the

47 This and other provisions of the co-operative scheme legislation were amended recently by the Statute Law (Miscellaneous Amendments) Act (No. 1) 1982 (Cth) passed by the Federal Parliament. The Takeover Code was amended by Part XVI of that Act. Although the amendments were not in force at the time of writing, all references in this article are to the Code in its amended form.

48 The company in which shares have been acquired, a member of that company, or the person from whom the shares were acquired.

49 S.69(5).

50 Inserted by Statute Law (Miscellaneous Amendments) Act (No. 1) 1982 (Cth), s.133. See further R. Baxt, *et al*, note 3 *supra*.

course of an investigation under either the Securities Industry Code or the Companies Code.[51] Importantly, while the power under section 60A to make orders is not tied to an investigation, orders made under the section expire after 30 days unless renewed.[52] Any person aggrieved by an order of the Commission may apply to the court for its variation or revocation[53] and no such order may be made unless the person to whom it is directed has been given an opportunity to appear before the Commission and to make submissions or give evidence.[54]

The symbolic importance of the power of declaration is unmistakable. Its practical utility has been greatly enhanced by the addition of section 60A and the resultant shifting of the burden of persuading the court; away from the Commission and on to the person aggrieved. Whereas previously the court had to be convinced that orders should be made, it must now be persuaded that they should be unmade. This procedural reversal will enable quick and decisive action by the Commission at a time when speed is of the essence, while at the same time ensuring a proper appeal mechanism for those adversely affected.

Section 60 is a particularly important feature of this statutory model of business regulation because it recognises that there will be circumstances where the strict dictates of the legislative code have been complied with but where conduct has been engaged in which is nevertheless unacceptable having regard to the objectives of the legislation. To recall an earlier distinction, where sections 57 and 58 can be used to permit something less than compliance, section 60 is clearly intended to be used to require more than bare compliance, to require substance as well as form. N.C.S.C. Chairman Masel affirmed this view recently:

> It has been said by some eminent lawyers that laws which regulate market activities, such as the Companies (Acquisition of Shares) Act, are "black letter" laws and, therefore, subject to the principle that what is not prohibited by the law is lawful. Any such assertion tends to overlook the fact that takeovers also need to conform with general principles of organised public markets. I would suggest, therefore, that in the context of an organised securities market, Section 60 should be looked at in the light of forestalling any belief that anything which on the face of it is not illegal is within the realm of the acceptable.[55]

The Commission has announced publicly its intention to use this and its other discretionary powers "to secure compliance with and acceptance of the spirit and intent of the legislation and to deter attempted avoidance through reliance on artifices".[56] Inevitably the suggestion that something more might be required than mere compliance has attracted criticism. A recent declaration that an acquisition of

51 Securities Industry Act 1980 (Cth), s.35; National Companies Act 1981 (Cth), s.311.

52 S.60A(7); Orders made by the Commission under the other two Codes are not subject to a time limit.

53 S.60A(4).

54 S.60A(8).

55 L. Masel, "Companies and Their Shareholders — An Uneasy Relationship", address to the Australian Shareholders' Association (Sydney, 29 March 1982) 9. Again the parallel with the non-statutory City of London Code is instructive. The City Panel expressed the view in its 1970 *Annual Report* that "where precise legal rules are imposed, experience often shows that there is a tendency to regard anything not expressly prohibited as permitted".

56 Note 41 *supra*, para. 6.

shares was unacceptable brought a protest from the acquiring company that its acquisition was "entirely in accordance with the Companies (Acquisition of Shares) Act", while a spokesman for another company involved retorted: "Unacceptable for what? What is unacceptable? They can't say that. That is up to the courts."[57]

Cooler heads in the business community have acknowledged the need for powers of this kind. The *Australian Financial Review*, for example, gave strong editorial support, identifying the special conditions which justify special powers:

> It is true that the complexities of the stock market make it necessary that any regulatory authority should have more or less arbitrary powers . . . The amounts of money involved, the rewards to those who flaunt the spirit of the legislation, and the talents involved, are just too great for clear cut legislation to be able to deal with...(The N.C.S.C.'s) function will have to be, essentially, that of a watch-dog to ensure that the spirit of companies legislation is observed, as well as its letter.[58]

The power of declaration is arbitrary only in the sense that the Commission retains the power to adjudicate or arbitrate, and certainly not in the sense that its exercise can be unprincipled or capricious. For the legislation ensures, as with sections 57 and 58, that the "spirit and intent" which the Commission must promote is not a matter of conjecture or inference but is clearly stated by the legislation itself. Sub-sections 60(7) and 60(7A) prohibit the making of a declaration unless the Commission is satisfied that there has been an infringement of at least one of four guiding principles; the four canons of shareholder protection laid down by the Eggleston Committee.

These sub-sections provide that before making a declaration, the Commission must be satisfied that in relation to the relevant conduct or acquisition of shares —

(a) the shareholders and directors of a company did not know the identity of a person who proposed to acquire a substantial interest in the company;
(b) the shareholders and directors of a company did not have a reasonable time in which to consider a proposal under which a person would acquire a substantial interest in the company;
(c) the shareholders and directors of a company were not supplied with sufficient information to enable them to assess the merits of a proposal under which a person would acquire a substantial interest in the company; or
(d) the shareholders of a company did not all have reasonable and equal opportunities to participate in any benefits accruing whether directly or indirectly and whether immediately or in the future, to any shareholder or to any person associated with a shareholder, in connection with the acquisition, or proposed acquisition, by any person of a substantial interest in the company.

To refer again to the legislative model, this is a salutary example of the function of guided discretions. Guidelines for the exercise of a discretion are familiar enough when the discretion is entrusted to a court[59] and when wide powers (especially a

57 Comments reported in the *Australian Financial Review* (7 April 1982) 6, in relation to a declaration by the N.C.S.C. on 5 April 1982 that an acquisition of stock units in Bradmill Industries Ltd by a subsidiary of Bruck (Australia) Ltd was unacceptable.
58 *Australian Financial Review* (19 November 1980) 14.
59 *E.g.* Family Law Act 1975 (Cth), ss.75(21) and 79(4).

power like section 60 which will operate outside rather than within the bounds of the substantive or black letter law) are conferred on a regulatory body, it is all the more desirable that the considerations which should govern their exercise be clearly stated.[60] Not only will this promote certainty in the law and consistency in administration, but it maximises the likelihood that the legislative objectives will be achieved.

Certain other aspects of the model should be noted. First, by virtue of section 60A giving the N.C.S.C. power to make orders subject to penalty, unacceptable behaviour is susceptible to more decisive action by the N.C.S.C. than a breach of the Code itself. On one view this makes the person who complies with the letter, but not the spirit, of the law more vulnerable than the person who complies with neither and breaches the Code.[61] Equally, there is nothing in section 60 to prevent the Commission from declaring as unacceptable that conduct which breaches the Code, and if the power of the N.C.S.C. to make orders itself is not extended to cases of direct breach, the Commission will have a very real incentive to make such declarations in order to create the pre-condition for the making of orders under section 60A.

Secondly, the making of declarations under section 60 is not, unlike the exercise of the discretions in sections 57 and 58, constrained by any reference to the objective of "an efficient, competitive and informed market". Where in those other sections this objective complemented the objectives of shareholder protection, it is conspicuously absent from section 60. The Eggleston principles stand alone here, leading to the inference that, while considerations of market efficiency may be relevant to the dispensing powers in sections 57 and 58, the Commission's power under section 60 to require something more than compliance is reserved exclusively for the protection of shareholders. Perhaps we may go further and suggest that the Commission will here disregard the dictates of market efficiency, to the extent that they might entail a different result, when one of the four principles, the "fundamental notions of equity", has been infringed.

Certainly the Commission's published reasons for its first declaration of unacceptable conduct were firmly rooted in the statutory criteria of shareholder protection. The notice issued under section 60 recited the conduct complained of and continued:

> J. The National Companies and Securities Commission is satisfied that as a result of the matters referred to in recitals G, H & I hereof and each and every one of them the shareholders of N— have not or did not have equal opportunities to participate in benefits accruing to shareholders under the proposal under which E — acquired a substantial interest in N — in that the shareholders have not and did not have the opportunity to sell their shares in N— to E— on the same terms as the N— shares referred to in recital C hereof were sold to E—.[62]

60 *Cf.* Income Tax Assessment Act 1936 (Cth), *e.g.* s.99A(3).

61 "A further absurdity of the proposed s.60A is that a person who commits an alleged breach of the Act will actually be in a more favoured position than the person who complies with its provisions" — excerpt from an open letter to the Minister for Business and Consumer Affairs from Mr R. A. Brierley, Chairman, Industrial Equity Ltd, *Australian Financial Review* (23 April 1982) 79.

62 N.C.S.C., *Media Release*, No. 17/81, 10 September 1981, in relation to the takeover bid by Endeavour Resources Ltd for Northern Mining Ltd.

The relevant conduct was accordingly declared to have been unacceptable conduct.

There is, of course, no positive obligation on the N.C.S.C. to use the power contained in section 60 whenever one of the four principles is flouted: their function here is one of restraint rather than an imperative command. Yet there is an express prohibition on its use in any other circumstances. Given the utility of the power and its function as a springboard for order-making by the N.C.S.C. under section 60A, the treatment of shareholders during takeovers may be expected to be very closely scrutinised.

IV. THE N.C.S.C. AND THE COURTS

The effectiveness of the N.C.S.C.'s regulatory weapons depends in the first instance on the readiness of the Commission to use them. Experience during the first year of its full-time operation has shown that the Commission is prepared to utilise the full range of powers available to it, and to act decisively and frankly in doing so. Ultimately, however, the effectiveness of these weapons, and of the legislation as a whole, will be determined by the response of the courts. The exercise by the N.C.S.C. of its discretions is expressed to be subject to judicial review and, given the particular combination of wide discretions, an active and idealistic Commission and the large sums of money at stake, it seems inevitable that the high level of litigation which has hitherto characterised takeover regulation in Australia will continue if not increase.

The legislation provides a general right of appeal for any person aggrieved by "any act, omission or decision of the Commission", except in circumstances where an appeal procedure is already specifically provided or where the act or decision in question is declared to be conclusive or final.[63] A rehearing on the merits is clearly envisaged since the court is empowered to confirm, reverse or modify the act or decision or to remedy the omission, and to make all necessary orders. The court is also given an express power of review in relation to sections 60 and 60A. A person to whom a declaration under section 60 relates may apply to the court to have it nullified,[64] and a person aggrieved by an order made by the N.C.S.C. under section 60A may apply to the court for its variation or revocation.[65]

To date only two cases involving the N.C.S.C. have been the subject of published judgments. Both cases involved provisions of the Takeover Code, though not the particular provisions under discussion here, and in both cases the Commission was defeated. While it would be premature to draw other than tentative conclusions from these results, the judgments nevertheless reveal familiar qualities of judicial reasoning which give little cause for optimism about the future outcome of litigation involving the N.C.S.C.

63 National Companies Act 1981 (Cth), s.537, which is to be read with the Takeover Code by virtue of s.5 of that Code.

64 S.60(6).

65 S.60A(4).

In *National Companies and Securities Commission* v. *Industrial Equity Limited*,[66] where the N.C.S.C. had applied for both mandatory and restraining orders under the Takeover Code following the alleged failure by the respondent company to proceed with a takeover bid, Needham J. in the Supreme Court of New South Wales said in the course of his judgment:

> The plaintiff submitted that, in the light of all the legislation, including the Agreement of 22 December 1978 . . . the Court should give a liberal interpretation to the provisions of the Acquisition of Shares Code and the Securities Industry Code so as to ensure that the general purposes of the scheme should be forwarded. I was invited to be a brave spirit rather than a timorous soul — *Candler* v. *Crane, Christmas and Co.* [1951] 2 K.B. 164 at 178. I would prefer not to enter either category but to apply to the provisions of the scheme relevant to this case the ordinary principles of interpretation of legislation, taking into account, of course, that those provisions are part of a larger whole brought into operation in the commendable hope that company law throughout the Commonwealth will be and remain uniform and effective. However, as the defendant submitted, no beneficial construction of the legislation can create a power or a remedy where none exists expressly or by necessary implication.[67]

In *Gibbs* v. *National Companies and Securities Commission*,[68] a case concerned with the power of the Commission to hold public hearings for the purpose of exercising its powers under the Takeover Code,[69] Sheahan J. in the Supreme Court of Queensland held that the absence from the Takeover Code of an express inquisitorial power corresponding to that provided by section 13 of the Securities Industry Code prevented the Commission from holding a hearing:

> It seems to me that the specific insertion of that precise power in the Securities Industry Code and the absence of any such power (which in my opinion is not only not expressed but not to be implied) in the provisions of s.7 indicate a conscious intention on the part of the draftsman to leave the power of investigation to be specified in any particular Act which involves the supervision and control by the tribunal in question.
>
> I cannot persuade myself that the power to hold hearings for the purpose of the performance of a function or the exercise of a power which, as I have said, is neither conferred expressly or expressed to be conferred on it by the Act, includes a power of inquisition.[70]

The significance for present purposes of the remarks of these two judges lies not in their implications for the particular provisions of the Code involved,[71] but in the

66 (1981) 6 A.C.L.R. 1.

67 *Id.*, 18.

68 (1982) 6 A.C.L.R. 22.

69 The power to hold hearings is conferred on the N.C.S.C. by s.36(1) of the National Companies and Securities Commission Act 1979 (Cth): "for the purpose of performance of any of its functions or the exercise of any of its powers". The hearings power is re-enacted by s.7 of the corresponding State Acts in slightly different terms, such that the N.C.S.C. may hold a hearing for "the purpose of the performance of *a* function or the exercise of *a* power". (Emphasis added.)

70 Note 68 *supra*, 24.

71 In the writer's view the judgment of Sheahan J. placed a restriction on the use of the hearings power which the legislation neither intended nor, from its main terms, warrants. In any case, section 85 of the Statute Law (Miscellaneous Amendments) Act (No. 1) 1982 (Cth) will ensure that an express inquisitional power is part of the Takeover Code.

illustration they provide of the judicial state of mind which this legislation and the regulatory body itself must confront. We can readily identify here the ingrained habit of strict literal interpretation, the prevailing caution in attributing legislative intent, the instinct for detailed scrutiny of provisions in isolation rather than analysis by reference to the objectives and structure of a larger legislative scheme, and the preference for "the ordinary principles of interpretation of legislation" over anything which might be characterised as "liberal" or as signifying a "brave spirit".

These are the traditions of the common law judge, as venerated as they are long established. Whatever their merits, such entrenched judicial techniques are a likely obstacle for any regulatory commission exercising wide discretionary powers: *a fortiori* in the case of the N.C.S.C. whose powers enable it to modify, dispense with and exclude the letter of the law,[72] and to make declarations and orders even where the letter of the law has been complied with.[73] As the Commission's chairman has predicted, "the Commission is likely to be concerned with the substance and realities of economic transactions and is unlikely to be confined to mere form. This can give rise to conflict in the courts".[74]

It may be argued that judges confronted by highly detailed legislation such as the Takeover Code have no alternative but to employ literal techniques of interpretation in order to construe it accurately, but this argument tends to confuse cause with effect. Had courts in the past exhibited a capacity for giving full effect to rules couched in more general terms, the welter of legislative detail might have been avoided. As N.C.S.C. Commissioner Greenwood states,

> to a large degree it is the refusal of the courts to adopt a flexible, purposive approach to general statements of principle in the legislation which has led Australian legislatures to attempt detailed prescriptions of a highly technical kind.[75]

To return to the particular provisions under discussion, it is difficult to imagine statutory formulae less compatible with traditional judicial methods than the section 60 concept of "unacceptable conduct" or the four indefinite criteria of commercial conduct by which it is to be judged. What, it may be wondered, will the courts take into consideration when asked to nullify a declaration of unacceptable conduct? In what circumstances will it be considered reasonable to revoke or vary an order made by the N.C.S.C. under section 60A?[76]

In conducting the review on the merits which each of these appeal procedures envisages, the court will necessarily have to explore the meaning of the four principles of shareholder protection set out in section 60. It must be open to serious doubt whether any court in Australia possesses the requisite familiarity with the practical operations of the securities markets or with the intricacies of takeover

72 Ss.57 and 58.
73 Ss.60 and 60A.
74 L. Masel, "Regulatory Commissions and the Courts — An Uneasy Relationship", address to the Committee for Economic Development of Australia (Sydney, 4 May 1982) 12.
75 A.D. Greenwood, note 43 *supra*.
76 On these and related questions see generally R. P. Austin, "The Administrative Law of the N.C.S.C.", paper presented to a seminar on *The Securities Market and the National Companies Scheme* (Sydney, 25 September 1981).

activity to understand or apply these principles correctly. The N.C.S.C., through its daily contact with, constant oversight of and frequent investigations into the operations of the securities market, is better equipped than any other adjudicative body to make sense of the canons of shareholder protection.

This raises the broader question of the capacity of the courts equipped with their legal tools, to deal effectively with legislation based on economic objectives and commercial practices. The four principles of shareholder protection in section 60 do not owe as much to economic theory as do the concepts of "competition" and "market" as they are used in the Trade Practices Act 1974 (Cth), but the commercial context from which the four principles draw their meaning is no less foreign to the disciplines of the law. In any case, the concept of an "efficient, competitive and informed market" in section 59, and the general objectives of the co-operative scheme as set out in the Formal Agreement[77] and to which the N.C.S.C. in all its operations is subject, have a predominantly economic or commercial content. The interpretation of these concepts and the implementation of these objectives demands an expertise which the common law courts cannot reasonably be expected to possess. This is particularly so when, as under this scheme and in contrast to the Trade Practices Act 1974 (Cth), cases fall to be heard by the State Supreme Courts which, with one or two exceptions, have not had the opportunity, afforded the Federal Court because of its legislative specialisation, to develop their commercial know-how beyond a rudimentary level.

Similar questions about the role of the courts in economic regulation have been raised in the context of the Trade Practices Act 1974 (Cth). Professor Brunt in a 1974 paper[78] provided an admirable summary of the problems associated with entrusting to the courts questions involving competition policy, and her remarks apply with equal force to the takeover legislation:

> Yet whatever the justification of the courts' decisions and approach in the past, very fundamental question are raised as to the contribution the courts might make to competition policy in the future. They centre upon the appropriateness of courts of law to handle economic subject matter, to adjudicate upon issues intimately concerned with the public interest and to interpret statutory language in the field of government policy rather than in terms of received categories of common law thought. They raise the question of how — or even whether — words may be found for the statute that so blend economic and legal concepts that the law may be used for purposes of economic policy . . . The core problem is that, in this field, procedural and substantive law are both important and intermixed, as also are economic and legal concepts and skills. In Australia we have the further problem that the law as a discipline is much more contained than in the United States, more inward-looking, more governed by precedent, more narrow in interpretative practice.[79]

77 Recital A sets out the objectives. See R. Baxt, *et al*, note 3 *supra*, [303] and Appendix I.

78 M. Brunt, "Lawyers and Competition Policy" in A. Hambly and J. Goldring (eds.), note 22 *supra*, 266-297.

79 *Id.*, 272. See generally D. Harding, note 22 *supra*.

The co-operative scheme and the Takeover Code are still in relative infancy, and the number of decided cases is still small. Yet a persuasive case can already be mounted, on principle as well as from the experience of the N.C.S.C. to date, for the establishment of a quasi-judicial tribunal, comprised of suitable experts in the field, to hear appeals from decisions of the N.C.S.C. If this particular scheme of economic regulation is to fulfil its stated objectives, the power to review the actions of the regulatory body must be entrusted to a tribunal adequately equipped for the task. The Trade Practices Tribunal would be the obvious paradigm. Pending the establishment of such a tribunal, it remains to express the hope that the courts will be sensitive to the wider context of the legislation which they are asked to interpret, that they will favour expansive and purposive interpretations over narrower, literal interpretations, and that they will resist the temptation, as far as possible, to substitute their own economic judgment or market analysis for that of the Commission's.