CHAPTER 2

INTRODUCTION TO THE ISSUES

Uniformity of Legislation

2.1 It required almost forty years to achieve uniformity of company law in Australia. In the late 1950s moves to achieve uniformity of legislation culminated in co-operation between the Commonwealth and the States in drafting a uniform Companies Bill, which was based largely on the *Companies Act 1958* of Victoria. Enactments more or less along the lines of the uniform Bill were then passed in 1961 and 1962 by each of the States, and the Commonwealth made ordinances for the Australian Capital Territory and the Northern Territory.

2.2 Unfortunately, over time, the legislation became progressively less uniform in each jurisdiction. For example, the major changes recommended by the Advisory Committee on Company Law (chaired by Mr Justice Eggleston) were enacted in Queensland, Victoria and New South Wales in 1971, but Western Australia did not enact them until 1973. They were never enacted in Tasmania.

2.3 The turbulent times on the Stock Exchanges in the 1960s caused by the mining boom, including the notorious Poseidon share price spiral, led to the formation of the Senate Select Committee on Securities and Exchange, chaired by Senator Peter Rae. The Rae Committee

tabled its final report[3] on 18 July 1974. The major reform recommended by the Rae Committee was the formation of a national regulatory body for the securities market. Eventually, this led to the establishment of the National Companies and Securities Commission.

2.4 Proposals for a national co-operative scheme for the regulation of companies and securities resulted in the Commonwealth and the six States signing an agreement (the Formal Agreement), which contained the framework for the scheme, in December 1978. The Northern Territory joined the scheme on 1 July 1986.

2.5 The co-operative scheme entailed the enactment by the Commonwealth of an extensive array of legislation. The package included the *Companies Act 1981* which dealt with the formation and regulation of companies; the *Companies (Acquisition of Shares) Act 1980* (the takeovers code) which regulated the acquisition of shares in companies; the *Securities Industry Act 1980* which regulated the activities of those dealing in securities; and also the *National Companies and Securities Commission Act 1979*, which established the NCSC.

2.6 Under the co-operative scheme the Commonwealth enacted legislation which applied only in the ACT. That legislation was separately adopted by each other jurisdiction by means of passing Application of Laws enactments. The various State and Territory Corporate Affairs Commissions continued to exist, and to administer the applied law in their respective jurisdictions as delegates of the NCSC. The Formal

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[3] *Australian Securities Markets and Their Regulation (Parliamentary Paper no. 98).*

Agreement obliged the NCSC to have regard to 'the principle of maximum development of a decentralised capacity to interpret and promulgate the uniform policy and administration of the cooperative scheme[4]'.

2.7 The Commonwealth Attorney-General relied upon a lengthy list of difficulties with the co-operative scheme as the justification for introducing the national legislation in 1988. The explanatory memorandum for the ASC Bill sets out the list of criticisms of the co-operative scheme. A number of these criticisms related to the inadequate accountability of the NCSC, and to the division of functions between the NCSC and its delegates.

Lessons of the 1980s

2.8 Another major factor contributing to the disillusionment with the co-operative scheme was the string of corporate collapses, and the general corporate excess, of the late 1980s:

> Arising out of the 1980's and their effect on investor confidence in Australian companies and securities markets both nationally and internationally, the Commonwealth and State governments recognised the need for an appropriately funded body with necessary powers and will to administer and enforce corporate law on a nationally consistent basis. This was in response to a widespread perception that the State based co-operative scheme was grossly inadequately funded so that the NCSC was forced to resort to "deals" and "trials by media" rather than court process to enforce the law, that there was no national consistency in the approach to exercise of powers and functions, that generally the administration of corporate law was fragmented and the powers necessary to enforce it effectively were lacking.[5]

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[4] *A J MacDonald and J B North Australian Corporation Law. The National Scheme Butterworths p 11,106.*

[5] *Submissions, No 96 (ASC) p2.*

2.9 Others took the view that the excesses of the 1980s were caused not by poor or inadequate regulation by the NCSC, but by the deregulation of the Australian financial system and the easy availability of credit. On this view, the excesses of the 1980s were corrected by the dramatic shift in market conditions following the stock market crash in 1987. It was argued that the dramatic increase in powers and resources for the ASC was unnecessary and even counter-productive:

> It must be borne in mind that to a considerable degree the financial markets themselves have very effective self-regulatory mechanisms where improper behaviour occurs. Open and efficient financial and securities markets (such as those which operate in Australia) are very effective self-regulators because they penalise or marginalise those whose performance is not up to required standards. In this regard, market standards reflect and enforce the standards of corporate behaviour which are expected to prevail in Australia.
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> I do not suggest that markets should be left entirely unregulated by legislation or external regulators. ..... However, industry self-regulatory organisations like the Australian Stock Exchange, the Securities Institute of Australia, the Australian Institute of Company Directors, the Australian Institute of Corporate Managers and Secretaries, and the various professional bodies governing the activities of banks, merchant banks, lawyers and accountants, have been quite effective regulators of their respective participants in the Australian financial markets in recent years.
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> Along with the very significant additional resources devoted to the operation of the ASC, there was also a significant expansion and improvement in the scope and operation of the Corporations and ASC Laws to ensure that they applied in the widest possible circumstances. In particular, the compulsory investigatory and hearings power of the ASC are some of the widest available to any corporate and securities regulator in the world. I do not criticise this development but simply note that Australia has, relatively speaking, the toughest regime for corporate and securities regulation of any nation with an economy and markets of comparable size in the Western world. Australia's stock markets, for example, represent less than 2% by market capitalisation of international stock markets. Nevertheless we have one of the world's toughest and most comprehensive corporate and securities regulatory regimes. Care must be taken that, in this regard, we do not 'price ourselves out' of what has

become an increasingly global financial marketplace.[6]

The End of the Co-operative Scheme

2.10 The package of legislation enacted in 1989 replaced the applied law regime of the co-operative scheme with a national scheme of legislation based upon Commonwealth legislative power. The 1989 package consisted of the *Corporations Act 1989*, the *Australian Securities Commission Act 1989*, and the *Close Corporations Act 1989*.

2.11 Various provisions of the Corporations Act were challenged in the High Court later that year. The majority of the High Court held[7] that the Commonwealth did not have the Constitutional power to enact laws regulating the formation of trading and financial corporations.

2.12 Following the High Court's decision in *New South Wales v The Commonwealth*[8] the Commonwealth, the States and the Northern Territory reached an agreement, at Alice Springs, on a revised system of regulation for corporations and securities in Australia, taking account of the principles contained in the decision of the High Court majority. Under the Alice Springs agreement the Corporations Act and the ASC Act were to be amended so as to apply as laws for the ACT. The various States and the Northern Territory would then enact application legislation applying the laws in each respective jurisdiction. The ASC was to be the sole administering authority for companies and securities

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[6] *Submissions, No 87 (Mr Norman O'Bryan), pp 3-4.*

[7] *New South Wales v The Commonwealth (1990) 169 CLR 482.*

[8] *Ibid.*

regulation in Australia.

2.13 As a result the Commonwealth enacted the *Corporations Legislation Amendment Act 1990* which converted the 1989 Corporations Act into a law which applied only in the ACT. The ASC Act was similarly converted into an Act applying only in the ACT. Each State and the Northern Territory passed application legislation which applied the Corporations Law and the ASC Law as laws of each jurisdiction.

2.14 One of the major outcomes of this period of transformation of companies and securities law in Australia is that the ASC has sole responsibility for the administration and the enforcement of the relevant law in Australia. The Commonwealth Attorney-General is the Minister having the sole Ministerial responsibility for the Commission.

2.15 The establishment of a national regulator was a watershed development in corporate regulation in Australia. Further, the ASC was not only a first for Australia, it was also charged with more extensive responsibilities than some of its overseas counterparts, such as the Securities Exchange Commission (SEC) in the United States:

> **Mr W Scott** - Before comparing the investigatory powers of the ASC and the SEC, it is important to recognise at the outset the different roles played by the SEC and the ASC. First, the SEC has a much more limited regulatory and enforcement role when compared to the ASC. The ASC is not only a securities regulator but also plays the role of a companies registrar. The SEC's role is limited to the regulation of the US securities laws. Unfortunately, in the US, each different state still regulates corporate behaviour of those corporations incorporated in that state. In contrast, we in Australia have the benefit of having one federal law regulating corporate behaviour, but we must recognise that the role of the ASC and the burdens it is under are far greater than those

on the SEC, and perhaps we are asking the ASC to do too much. [9]

[9] *Evidence, pp 279-280 (Mr W Scott).*