

REGULATION WITH DISCRETION: THE NCSC AND SECTIONS 12(O), 57 AND 58 OF THE COMPANIES (ACQUISITION OF SHARES) ACT 1980

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[This paper presents a detailed examination of sections 12(o), 57 and 58 of the Companies (Acquisition of Shares) Act 1980 (Cth). Part A considers the constitutional validity of these sections and suggests that section 58 may well be invalid. Part B describes the manner in which the wide discretionary powers conferred by these sections is exercised by the National Companies and Securities Commission. Part C outlines the avenues for review of the exercise or failure to exercise these powers: section 537 of the Companies Code, Administrative Law Act 1978 (Vic.) and Part VI Companies (Acquisition of Shares) Act. Finally, Part D analyses the policy considerations relevant to these sections.]

Section 12(o) and sections 57 and 58 of the Companies (Acquisition of Shares) Act 1980 and corresponding State Codes ('CASA') confer very wide discretions on the National Companies and Securities Commission (the 'Commission'). Section 12(o) permits the Commission to exempt an acquisition of shares from the operation of section 11;¹ section 57 empowers the Commission to exempt a person from compliance with all or any of the requirements of CASA and section 58 empowers the Commission to modify the application of CASA to any particular case. This paper will examine the constitutional validity of those provisions, the manner in which the Commission has exercised its discretionary powers, the ability of the courts to review the Commission's exercise or failure to exercise its powers and the policy considerations relevant to such provisions.

A. Constitutional Validity of Section 12(o) and Sections 57 and 58

CASA does not specify any guidelines as to the manner in which the Commission should exercise its discretion pursuant to section 12(o). In exercising its discretions pursuant to sections 57 and 58, the Commission is guided by section 59 which requires the Commission to take account of the objective that acquisitions of shares take place in an efficient, competitive and informed market. Further, the section sets out the Eggleston principles:²

- (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 opportunities to participate in any benefits accruing to shareholders under any proposal under which a person would acquire a substantial interest in the company.

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¹ The prohibitions upon acquisitions of shares set out in s. 11 of CASA constitute the legislation's lynch-pin.

² Victoria, *Report to the Standing Committee of Attorneys-General on Disclosure of Substantial Shareholdings and Takeovers* (1969) para. 16.

Section 59 specifically states, however, that nothing therein shall be taken to require the Commission to exercise any of its powers in a particular way in a particular case. In view of the breadth of the discretions conferred upon the Commission by section 12(o) and sections 57 and 58, it has been suggested by some commentators that Parliament's delegations to the Commission constitute an abdication of its legislative function and hence are invalid.³

The validity of a delegate exercising a legislative function was considered by the High Court in *Giris Pty Ltd v. The Commissioner of Taxation*.⁴ That case concerned sections 99 and 99A of the Income Tax Assessment Act 1936 which provide that a trustee shall pay taxation in accordance with section 99A in respect of income of trust estates where there are no beneficiaries presently entitled to such income unless the Commissioner decides that it would be unreasonable to tax the trustee under that section in which case taxation is imposed at the lower rate prescribed by section 99. Section 99A sets out matters which the Commissioner must consider in making his decision and permits the Commissioner to consider such other matters, if any, as he thinks fit.

Barwick C.J. found that sections 99 and 99A conferred a legislative discretion on the Commissioner given that the Commissioner could decide the section pursuant to which a taxpayer could be taxed.⁵ He held 'there is in the Australian Constitution no such separation of powers as would deny the Parliament the power to give an officer of the executive government such a legislative discretion as I have described.'⁶ He noted the width of the Commissioner's discretion and the lack of discernible criteria governing its exercise but found that the delegation did not constitute an abdication of legislative power and hence was not invalid.⁷ Several other members of the Court stated that section 99A conferred a discretion on the Commissioner which was very difficult for him to exercise given that it was not certain as to how it should be exercised,⁸ or even the mischief which the Parliament intended to remedy.⁹ Windeyer J. expressed particular concern and held that section 99A was close to the bounds of constitutional invalidity.¹⁰ Nevertheless all members of the Court held that section 99A was constitutionally valid.

In view of the decision in *Giris's* case, it would seem that sections 12(o) and 57 of CASA are constitutionally valid. Like section 99A of the Income Tax Assessment Act, sections 12(o) and 57 of CASA permit the legislature's delegate to lessen the severity of the legislation. Although the Commission's discretion pursuant to section 12(o) is not fettered and its discretion pursuant to section 57 is subject only to the broad guidelines in section 59, CASA, in its detail, establishes a sufficient framework within which the Commission is to exercise its discretions. Moreover a court reviewing section 12(o) or section 57 of CASA

³ Maxwell, C., 'The New Takeover Code and the N.C.S.C.: Policy Objectives and Legislative Strategies for Business Regulation' (1982) 5 *University of New South Wales Law Journal* 93, 99-100.

⁴ (1969) 119 C.L.R. 365.

⁵ *Ibid.* 372.

⁶ *Ibid.* 373.

⁷ *Ibid.* 373-4.

⁸ *Ibid.* 380.

⁹ *Ibid.* 387.

¹⁰ *Ibid.* 385.

would probably recognise the necessity for flexibility in take-over regulation and hence would find policy reasons to justify the validity of section 12(o) and section 57.

Different considerations may apply to section 58 of CASA. It has been argued by some commentators (see below) that the Commission's discretion pursuant to section 58 to modify the application of the Code may permit the Commission to extend the operation of CASA by either imposing additional requirements on acquirers of shares or by applying CASA's prohibitions to transactions otherwise outside the regulatory scheme. Whilst the courts may be sympathetic to the delegation of a discretion to mitigate the severity of legislation, the courts may be reluctant to approve a virtually unfettered discretion to expand the operation of legislation. In this regard, section 58 may be contrasted with section 60 which permits the Commission to deem an acquisition of shares to be in contravention of section 11 only where one or more of the four Eggleston principles is not satisfied. Of course, a decision by the Commission pursuant to section 58 to modify CASA by lessening the rigours of the legislation in its application to a person may be challenged by a third party on the grounds that section 58 is invalid because it permits the Commission to increase the rigours of the legislation. To this extent, section 58 constitutes a dangerous source of power for the Commission.

B. Manner of Commission's Exercise of its Powers

The Commission has issued a number of policy releases relevant to its powers pursuant to sections 12(o), 57 and 58.¹¹ The justification for such policy releases can be found in the Commission's first release. That notes that clause 32 of the Formal Agreement, which forms the Schedule to the National Companies and Securities Commission Act 1979 (the 'NCSC Act'), makes the Commission responsible for 'the entire area of policy and administration with respect to company law and the regulation of the securities industry', subject only to the directions of the Ministerial Council. Section 9 of the NCSC Act obliges the Commission to perform its functions in accordance with the Formal Agreement. In order to promote commercial certainty, reduce business costs, increase capital markets efficiency and maintain investor confidence (the policy objectives set out in the recitals to the Formal Agreement), the Commission has issued policy releases that seek to interpret the legislation and explain the manner in which the Commission will exercise its powers. Whilst the Commission has recognised that the construction of the legislation is ultimately the task of the courts, the Commission has stated that its policy releases should be regarded as 'persuasive statements of desirable commercial and financial practice'.¹² Release 101 is a general statement of the Commission's objectives when exercising its functions and powers pursuant to CASA:

¹¹ The Commission has also issued relevant practice notes, for example, NCSC Release No. 337, which provides format guidelines for submissions to the Commission seeking the exercise of its discretionary powers.

¹² NCSC Release No. 100 paras 6-8.

- (i) that the market for securities is efficient, competitive and informed;
- (ii) that fair dealing and equity exist between all members of a company involved in a takeover bid and that, as far as practicable, each member has equal access to information, equal opportunity to deal in the market and equal opportunity to participate in any benefits accruing to members under a bid;
- (iii) that the premium for control of a company is shared by all members;
- (iv) that all members of a company in receipt of a takeover offer are supplied with sufficient information to assess the offer's merits;
- (v) that the directors of a company whose members are in receipt of a takeover offer do not, by exercising managerial powers, do anything to frustrate the offer before members have had an adequate opportunity to consider it; and
- (vi) that actual or potential market manipulation is promptly detected.¹³

Section 5A of the Companies and Securities (Interpretation and Miscellaneous Provisions) Act 1980 and corresponding State Codes direct that the provisions of CASA shall be interpreted in a way which promotes the purpose or object of CASA.¹⁴ The purpose or object of CASA can be found in the recitals to the Formal Agreement¹⁵ (referred to above) and the Eggleston principles¹⁶ (also referred to above). The latter are, of course, concerned with procedural fairness.¹⁷ Accordingly the Commission, in exercising its discretionary powers, cannot evaluate the merits of a proposal but rather can only concern itself with market efficiency and procedural fairness. Moreover the Commission cannot use its powers to make substantive amendments to the application of CASA in any particular case or to correct what it may perceive as shortcomings in the legislation. Clearly the recitals to the Formal Agreement and the Eggleston principles justify all of the objectives referred to in Release 101 with the possible exception of the objective that the incumbent directors of a target company do not prematurely frustrate a take-over offer. Even that objective is probably valid given the underlying theme of the Eggleston principles that shareholders should be able properly to consider a take-over offer. Clearly that will not occur where the target company board prematurely frustrates the offer. Of course, the Commission's discretionary powers, even those set out in sections 57 and 58, are not restricted to the Eggleston principles. Accordingly the Commission is entitled to give a broad interpretation to those principles.

Release 115 refers specifically to the manner in which the Commission will exercise its power pursuant to section 12(o). In that release, the Commission notes that section 12(o), unlike section 57, does not direct the Commission to take into account any particular criteria, it does not permit the Commission to impose conditions and it does not require the Commission to publish a copy of

¹³ NCSC Release No. 101 para. 2.

¹⁴ This section was introduced by amendment in 1983. Mr I. Cameron's study of cases concerning CASA suggests that the introduction of s. 5A has not affected judicial interpretation of CASA and that both before and after the 1983 amendment courts referred to and sought to elucidate the purpose of CASA. 'Now You See Me, Now You —' Section 5A and the Interpretation of the Legislation to which it Relates' (1985) 3 *Companies and Securities Law Journal* 46.

¹⁵ Mr J. R. Nosworthy, a founding Commissioner, has stated: 'For the Commission the public interest is carefully defined in the recitals to the Formal Agreement' 'Changes in Law and Procedure on the Corporate Scene' 55 *The Australian Law Journal* 533, 537. Surprisingly, courts, when discussing the purpose of CASA, have not referred to the Formal Agreement: Cameron, *op. cit.* 52.

¹⁶ *NCSC v. Consolidated Gold Mining Areas N.L.* 9 A.C.L.R. 706, 710; Greenwood, A.B., 'The Right of Shareholders to Equal Opportunity on the Proposed Acquisition of a Substantial Interest in their Company' Paper presented to the Committee for Economic Development in Australia, 12 March 1982, p. 1.

¹⁷ Digby, Q., 'The Principal Discretionary Powers of the National Companies and Securities Commission under the Takeovers Code' (1984) 2 *Companies and Securities Law Journal* 216, 218.

the instrument of exemption in the Gazette. Given the absolute nature of the exemption, the Commission has resolved to use the power sparingly. In its annual report at the end of the first year of operation of CASA, the Commission stated:

The Commission's approval of acquisitions pursuant to this paragraph [12(o)] has been limited to exceptional cases. Nevertheless it is a commentary on the unique circumstances of each takeover that during the year 30 such applications were submitted to the Commission. Of these, eight were approved.¹⁸

Release 115 suggests that the Commission will exercise its discretion pursuant to section 12(o) where:

- (a) an acquisition is prohibited by section 11 as a result of the broad definition of 'relevant interest' but the acquisition is in fact of an artificial or technical nature;
- (b) an acquisition which results in an artificial or technical change of entitlement as a result of the application of the interpretation of 'associate';
- (c) an acquisition the circumstances of which fall within the spirit or purpose of one of the paragraphs in section 12 or sub-section 13(1), 13(3), 14(1) or 15(1).¹⁹

By way of illustration, Release 115 describes some acquisitions of shares approved by the Commission pursuant to section 12(o).²⁰ As the business community and their advisors have become familiar with the approach the Commission takes to section 12(o), the number of applications to the Commission pursuant to section 12(o) has declined and the proportion of successful applications has correspondingly increased.²¹

The Commission has delegated to the respective State Corporate Affairs Offices the power pursuant to section 12(o) to approve acquisitions of shares in the situations described in Release 115.²² This is in conformity with clause 35(2) of the Formal Agreement which provides: 'In performing its functions and exercising its powers, including the power of delegation, the National Commission shall have regard to the principle of the maximum development of decentralized capacity to interpret and promulgate the uniform policy and administration of the scheme.' The Commission has recognised that the policy of delegation permits applications for exercise of the Commission's discretions to be handled more quickly and frees Commission resources to monitor compliance with scheme legislation and investigate breaches of it.²³ Accordingly the Commission has willingly pursued a policy of delegation. The Commission is, however, of the view that any scheme of delegation should acknowledge that ultimate responsibility for the exercise of a delegated function or power is borne by the grantor of the power, that the grantor should be able to provide or be assured of the availability of sufficient resources for the delegate to exercise the delegated function or power and that the grantor should be able to overcome shortcomings

¹⁸ *Third NCSC Annual Report* 5.

¹⁹ NCSC Release No. 115 para. 4.

²⁰ *Ibid.* para. 6.

²¹ See schedule.

²² *Sixth NCSC Annual Report* 27.

²³ *Ibid.* 26.

in the delegate's ability to exercise a function or power.²⁴ The Commission cannot, of course, assure the availability to delegates of sufficient resources nor can it overcome shortcomings in a delegate's ability to exercise a function or power. '[I]t is expressly constrained, by the Formal Agreement, from giving any direction concerning the facilities and services available to its Delegates;²⁵ and no machinery exists to satisfy either the Ministerial Council or the Commission that those resources are provided on a reasonably consistent and uniform basis, having regard to the extent of individual Delegates' obligations. . . . Without the assured availability of such resources, the development and maintenance of administrative uniformity may be seriously impeded.'²⁶ These problems are caused by the federal nature of the scheme.

The Commission has exercised its powers under sections 57 and 58 more frequently than that under section 12(o). During the year ending 30th June, 1987, the Commission approved 167 applications pursuant to sections 57 and 58 of CASA whereas it only approved 17 applications pursuant to section 12(o).²⁷

As noted above, section 59 of CASA provides the Commission with guidelines as to the manner in which it is to administer sections 57 and 58. In *O.P.S.M. Industries Ltd v. National Companies and Securities Commission and Others*,²⁸ the Supreme Court of New South Wales held that it would be difficult to invalidate a decision of the Commission under section 58 by reference to section 59. Needham J. stated: 'the defendants have submitted, with some force, I think, that sec. 59 is a philosophical section, and have also pointed to the last two lines in the section, namely, that nothing in the section shall be taken to require the Commission to exercise any of its powers in a particular way in a particular case.'²⁹

The *O.P.S.M.* case concerned the validity of a section 58 declaration varying section 8(9)(a) of CASA for the purposes of a take-over offer for shares in the plaintiff so as to permit the offeror's brokers to execute crossings of shares in the plaintiff provided that its brokers informed proposed sellers that they were acting for the offeror and thus were unable to give advice regarding the proposed sale and the brokers did not give any such advice. Needham J. rejected the plaintiff's argument that section 58 gave the Commission a power which was analogous to a power given to a delegate to make by-laws or regulations pursuant to an Act. 'It is clear, I think, that sec. 58 is not a power to make by-laws, but is a power to omit, modify or vary portions of the legislation'.³⁰ 'I do not think I should, on such an application, without full argument from all parties, construe sec. 58 of the Code in such a way as to limit the apparently wide powers given by the legislature to the Commission. It may be on a final hearing that some limitation will be found to be proper to sec. 58, but at this stage the plaintiff has not

²⁴ *Fifth NCSC Annual Report* 19.

²⁵ Clause 38(2).

²⁶ *Fifth NCSC Annual Report* 19. See also Bosch, H., 'The Role of the NCSC in Shaping the Takeover Situation' Address to Takeovers Mergers and Acquisitions Conference, 23 June 1986, p. 7.

²⁷ See schedule.

²⁸ (1982) 7 A.C.L.R. 192.

²⁹ *Ibid.* 196.

³⁰ *Ibid.* 194.

really put to me any philosophical basis for any limitation which it suggests might be placed upon sec. 58, nor have I had the benefit of any suggestion as to the nature of the limitation which should be found to exist.³¹

Section 59 incorporates the objectives found in the recitals to the Formal Agreement and the Eggleston principles. To that extent, section 59 should, I think, be regarded as a limit on the Commission's freedom. The section should, however, be construed liberally in view of its concluding disclaimer. As stated by one commentator: '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.'³²

The Commission has extensively exercised its authority to delegate to the respective State Corporate Affairs Offices the power to approve applications under sections 57 and 58.³³ In particular the Commission has delegated the power to approve an application under section 58 so as to permit an offeror to make contemporaneous take-over offers and a take-over announcement in respect of shares in the same company.³⁴ Release 127 explains the Commission's reasons for its view that a modification of CASA is necessary in such circumstances. It states that the acquisition of shares under the take-over scheme would be a benefit not provided for by the terms of the take-over announcement and the acquisition of shares under the take-over announcement would be neither a benefit provided for under the take-over scheme nor an acquisition in the ordinary course of trading on the stock market. Unless a modification is obtained, the Commission considers that a breach of section 40 of CASA occurs.

In my view, section 40 of CASA provides tenuous justification for the Commission's policy in relation to contemporaneous take-over schemes and take-over announcements. After all, both a Part A statement and a Part C statement must disclose all information material to the decision of the offerees as to whether to accept the offer³⁵ and hence both statements would have to disclose the offeror's dual approach. Provided that such disclosures are made, a shareholder who accepts an offer made by a take-over announcement is receiving a benefit provided for by the Part A statement and a shareholder who accepts a take-over offer is receiving a benefit provided for by the Part C statement. Given that there are no other provisions of CASA which directly or indirectly impact upon the situation, it seems likely that a successful court challenge could be brought if the Commission or its delegate refused to register a Part A statement on the grounds that a contemporaneous take-over announcement was being made.

The Commission has also been willing to exercise its discretion pursuant to section 58 to modify section 12(g) to permit an acquisition of shares as a consequence of the conversion of convertible notes where at the time of the issue of the

³¹ *Ibid.* 195.

³² Maxwell, *op. cit.* 101.

³³ See NCSC Annual Reports; Rainey, P. 'Legislation to Curtail Partial Takeover Bids & Advance Discretionary Power of the NCSC' in Bartlett, C. (ed.), *Current Legal Developments. Takeovers. Papers from a Seminar Sponsored by the Centre for Commercial Law and Applied Legal Research* (1986) 49.

³⁴ *Sixth NCSC Annual Report* 28.

³⁵ CASA Schedule Part A 4(f); CASA Schedule Part C 4(f).

notes it is not known what the noteholder's exact entitlement to shares upon conversion of the notes will be by reason of the formula governing the method of conversion. Such a modification is necessary in view of the finding in *National Companies and Securities Commission v. Consolidated Gold Mining Areas N.L.* that shareholders, whose approval of an acquisition of shares is sought pursuant to section 12(g), must be provided with 'proper and full disclosure of the relevant facts upon which alone their decision can be determined' and, in particular, be informed as to the number of shares to be allotted.³⁶

In Release 105, the Commission has indicated that it may be prepared to approve an allotment of shares outside the terms of section 12(g) where the company is in such serious financial difficulties that the allotment appears to be the only way to save the company.³⁷ In such circumstances, the City of London Panel on Take-overs and Mergers will likewise provide a dispensation from the rule requiring an acquirer of shares to make an offer for all shares in the company.³⁸

Although no release has been issued on the subject, the Commission has publicly stated its view that sections 57 and 58 of CASA permit it to exempt from or modify the application of provisions in the Companies Act 1980 and corresponding State Codes (the 'Companies Act') where such provisions are interconnected with the provisions of CASA. This has been justified by section 7 of the Companies (Acquisition of Shares) (Application of Laws) Act 1981 and corresponding State Codes which provides that the provisions of CASA are incorporated with and shall be read as one with the Companies Act.³⁹ Accordingly, the Commission has taken the view that the references in section 57 to 'the requirements of this Act' and in section 58 to 'the provision or provisions of this Act' incorporate a reference to the provisions of the Companies Act. The Commission has already used its power pursuant to section 58 to modify the substantial shareholdings provisions in the Companies Act. It considers that sections 57 and 58 may also be used to exempt from or modify the definitions in the Companies Act of 'relevant interest' (section 8) and 'associated persons' (section 9).

It is established by case law that where a provision of an Act states that the Act shall be read with another Act, every part of each Act must be construed 'as if it had been contained in one Act, unless there is some manifest discrepancy, making it necessary to hold that the later Act has to some extent modified something found in the earlier Act'⁴⁰ or internal evidence suggests that a complete incorporation is not effected.⁴¹ When construing sections 57 and 58 of CASA, the effect of section 215C of the Companies Act must be carefully considered. That section empowers the Commission to exempt a person from

³⁶ (1985) 3 A.C.L.C. 520, 522.

³⁷ NCSC Release No. 105, para 33.

³⁸ Notes on dispensations from Rule 9 of The City Code on Take-overs and Mergers.

³⁹ Section 5 of CASA provides that CASA has effect subject to and in accordance with the Companies and Securities (Interpretation and Miscellaneous Provisions) (Application of Laws) Act 1981.

⁴⁰ *International Bridge Co. v. Canada Southern Railway Co.* (1883) 8 A.C. 723, 727; *Georgousis v. Medical Board of Victoria* (1957) V.R. 671, 674.

⁴¹ Edgar, S. G. G., *Craies on Statute Laws* (7th ed. 1971) 138; Pearce, D.C., *Statutory Interpretation in Australia* (1974) 98.

compliance with all or any of the provisions of Divisions 1, 2, 5 and 6 of Part IV of the Companies Act (the prospectus provisions), regulations made pursuant to those Divisions and section 552 of the Companies Act. At the very least, section 215C raises the inference that sections 57 and 58 of CASA cannot be used to exempt from or modify the provisions to which section 215C applies. Section 59 of CASA is also of relevance. That section suggests that the Commission's powers pursuant to section 57 and 58 are to be exercised in relation to acquisitions of shares. Thus the Commission's interpretation of its ability to use sections 57 and 58 to exempt from or modify the effect of the Companies Act is consistent with the internal evidence of CASA and the Companies Act and hence is likely to be supported by the courts.

The Commission has also indicated circumstances in which it will be reluctant to exercise its powers pursuant to sections 57 and 58. For example, the Commission has stated that it would be unlikely to exempt an acquisition of shares from the operation of section 11 by reason only of an undertaking by the acquirer of the shares that he will subsequently dispose of a sufficient number of shares to take his entitlement below the prescribed threshold.⁴² It will be interesting to see whether the Commission (like the City of London Panel on Take-overs and Mergers⁴³) will, however, provide such an exemption where firm arrangements are made for the placing of sufficient shares.

The Commission is reluctant to facilitate compulsory acquisition of the shares of non-accepting offerees pursuant to section 42 of CASA:

It has considered such requests [to facilitate compulsory acquisition] in the light of the fact that the principal effect is to deprive shareholders of property rights. Those rights take precedence over commercial convenience of corporate control. Having regard to the alternate means available to effect compulsory acquisition, the Commission has taken the view that the provisions of section 42 represent the minimum requirements for implementation of the streamlined procedures provided by the legislation. It considers, therefore, that these minimum requirements should be maintained in all but the most exceptional circumstances.

The Commission is particularly concerned that the requirement in sections 42(2)(b) and 42(3)(b) that the offeror receive acceptances from three quarters of offerees should be met. The Commission will not grant applications for exemption from or modification of these provisions to account for "lost" or uncontactable shareholders unless the circumstances are most exceptional and then only after the offeror has made efforts to find "lost" shareholders.⁴⁴

The Commission's approach to applications for the modification of section 42 has proved to be overly conservative in the eyes of the courts. In *TNT Limited v. National Companies and Securities Commission*,⁴⁵ Gobbo J. ordered the Commission to exercise its power to modify section 42. Gobbo J. placed emphasis in that case on the fact that two successive take-over offers had been made by the offeror for the target company, the lack of shareholder interest in the affairs of the company, the significant burden of and costs of servicing the remaining shareholders, the uncertainty inherent in the situation and inhibitions created on the commercial planning of the offeror and its associates, the expert opinion that the offer for the shares was generous, the fact that there was no suggestion of any detriment to the remaining shareholders, the impracticability of the amendment of the target company's Articles of Association to permit compulsory acquisition

⁴² NCSC Release No. 105, para. 34.

⁴³ The City Code on Take-overs and Mergers Note 6 on Rule 9.1.

⁴⁴ *Sixth NCSC Annual Report* 28-9.

⁴⁵ (1986) 4 A.C.L.C. 624.

and the fact that there were only nine actively dissenting shareholders with a total of about 2,652 shares out of the target company's total 77,000,000 issued shares. His Honour stated: '[t]he circumstances of the present case are exceptional and do not, in my view, erode the existence of any principle as to the preservation of property rights, given the very recognition of compulsory acquisition in sec. 42.'⁴⁶

The Commission will not use its discretionary powers to pardon a breach of CASA which has already occurred. Release 111 notes that section 48 of CASA expressly provides a court procedure for relief from the consequences of a failure to comply with CASA's provisions. Accordingly the Commission takes the view that it would be usurping the power of the court if it were to exercise its powers ex post an act or omission.⁴⁷

Commentators have been divided as to whether the Commission's policy in relation to ex post exemption is correct. One writer, who agrees with the inference which the Commission has drawn from section 48, has noted that the Commission has a discretion as to whether proceedings will be instituted once a prima facie breach is established and in this sense may effectively excuse breaches of the Act.⁴⁸ Another writer has argued:

It cannot be assumed that the unfettered language in s. 57 was not intended to convey a wide discretion irrespective of some degree of overlap between the powers of the NCSC and the powers of the court. As indicated above, the role of s. 57 is to enable a party, and society in general, to avoid the cost of compliance with the Code where the spirit of the Code is satisfied, albeit that the letter of the law may be contravened. The possibility of a commercially unrealistic application of the Code is an important problem regardless of whether the law has already been contravened or has yet to be contravened.⁴⁹

In my view the Commission's policy in relation to ex post relief is unduly restrictive in view of the broad wording used in sections 57 and 58.⁵⁰ I consider that section 48 does not raise a necessary inference that the Commission is debarred from providing ex post relief. In view of the legislation's objectives of reducing business costs and promoting market efficiency, the Commission should consider applications for ex post relief. Of course, if the applicant is dissatisfied with the Commission's decision, the applicant may then take the matter to the courts and seek section 48 relief.

Commentators have also been divided as to whether section 58 permits the Commission to increase the rigours or expand the operation of CASA or whether it merely permits the Commission to provide dispensations from the requirements of the legislation. One writer has assumed that the Commission is technically capable of increasing the rigours of the legislation but that the Commission is unlikely to exercise its discretion in this way.⁵¹ Another writer has taken

⁴⁶ *Ibid.* 628.

⁴⁷ *Fourth NCSC Annual Report* 24.

⁴⁸ O'Connell, A., 'The Power of the National Companies and Securities Commission to Deal with Non-Compliance with the Companies (Acquisition of Shares) Act' (1984) 2 *Companies and Securities Law Journal* 164, 165.

⁴⁹ Digby, *op. cit.* 221.

⁵⁰ See *Re Kornblums Furnishing Limited; Blair v. Wade* [1982] V.R. 123, 134-5 in which Beach J. held that the Commissioner of Corporate Affairs was empowered by s. 69J of Companies Act 1961 to extend the time in which a substantial shareholdings notice must be lodged after the expiry of the statutory period.

⁵¹ Maxwell, *op. cit.* 99.

the view that section 60, not section 58, is designed to enable the Commission to regulate take-over activity which falls outside the black-letter provisions of CASA. Given that section 60 compels the Commission to take into account the Eggleston principles, and expressly provides for judicial review, take-over participants are provided with some protection. 'Consequently, to give s. 58 its widest reading would be to ignore the obvious intent of the legislature that s. 60 was to be the primary source of the Commission's power to extend the effect of the Code.'⁵² The writer has argued therefore that section 58 should only be used to expand the legislation in minor or technical ways. 'Under such an approach the Commission could extend the Code's application in a situation where the spirit of the law is not being met but the undesirability of the conduct does not warrant the "grave step" of declaring the conduct to be unacceptable under s. 60.'⁵³ This approach to section 58 is, I contend, sound. It prevents section 58 from becoming a mere duplication of section 57 and yet recognises that section 58 should not intrude upon section 60.⁵⁴

The Commission has not directly entered into the discussion as to the extent of its power pursuant to section 58. To my knowledge it has not exercised its power pursuant to that section so as to impose additional requirements or to extend the operation of CASA. The Commission has, however, implied that it may be prepared to use its powers pursuant to section 58 where an offeror, who prior to making a bid for shares in the target company was entitled to more than 10% of the shares in the target company but in fact held less than 10% of such shares, seeks to acquire the outstanding shares compulsorily pursuant to section 42 following the successful completion of its take-over offers although the offeror obtained acceptances from less than 75% of the offerees. The Commission has suggested that notwithstanding sections 42(2)(b) and 42(3)(b) this would be contrary to the spirit of CASA and hence that such offerors should apply to have themselves brought within the requirement that 75% of offerees accept the take-over offers.⁵⁵ Clearly this would constitute a modification of CASA which would impose an additional burden upon offerors. If the Commission exercised its powers in such circumstances, it is likely that the Commission would soon be subjected to court challenge.

The Commission has been urged by some commentators to take a bold approach to the exercise of its discretionary powers in order to achieve the objects of CASA⁵⁶ and by other commentators to take a cautious approach to avoid the instability and uncertainty which would be inevitable were its decisions to be the subject of constant court challenge.⁵⁷ In exercising its powers pursuant to sections 12(o), 57 and 58, the Commission has, however, won general acceptance by reason of its recognised commercial expertise and its availability to the

⁵² Digby, *op. cit.* 223.

⁵³ *Ibid.* 223.

⁵⁴ Deutsch, R. L., 'Takeovers and the scope of the Companies (Acquisition of Shares) (N.S.W.) Code' (1983) *Australian Business Law Review* 205.

⁵⁵ *Sixth NCSC Annual Report* 27.

⁵⁶ Ffrench, H. L., 'Fundamental Aims of the New Australian Take-over Code' 2 *The Company Lawyer* 256, 263; Digby, *op. cit.* 235; Lanzer, H. 'Regulation and the Vesting of Discretions in the NCSC' in Bartlett, *op. cit.* 132.

⁵⁷ Deutsch, *op. cit.* 216.

business community, both to provide advice about the legislation and the manner in which such legislation will be administered and to receive the views of the business community.⁵⁸

C. Review of the Commission's Discretions

A number of avenues are open to a person who is dissatisfied with the exercise or failure to exercise by the Commission of its discretionary powers pursuant to sections 12(o), 57 or 58 of CASA. Of course the Commission, in exercising these powers, is acting pursuant to a State enactment⁵⁹ and hence will be subject to the administrative law of that State.⁶⁰ This analysis will consider the exercise by the Commission of its powers pursuant to the Victorian Code.

(i) Section 537 of the Companies Act

Section 537 gives a person aggrieved by an act, omission or decision of the Commission a right to appeal to the Supreme Court which may confirm, reverse or modify the act or decision or remedy the omission and make such orders or give such directions as it thinks fit. It is now accepted that an application may be brought under section 537 in respect of an act, omission or decision made by the Commission or its delegates pursuant to CASA given that the Companies Act and CASA are required by the Companies (Acquisition of Shares) (Application of Laws) Act 1981 and corresponding State Codes to be read as one.⁶¹ Accordingly, if a person were aggrieved with a decision by the Commission or its delegate to exercise or refuse to exercise any of its discretionary powers pursuant to CASA, the person could appeal to the Supreme Court.

It is also now established that an appeal to the Supreme Court pursuant to section 537 constitutes an appeal de novo. In *TNT Limited v. National Companies & Securities Commission*, the Commission submitted that although an appeal to the court pursuant to section 537 constitutes an appeal de novo, the court should abide by the Commission's decision unless convinced that the Commission had fallen into serious error. Gobbo J. disagreed:

I am of the view that this is altogether too wide a proposition and would require the Court to abdicate its obligation to conduct a de novo hearing. Rather, it may be more moderately put that the Court should include due consideration of the Commission's decision in its deliberations on the matter of discretion. What weight is to be given to the Commission's decision will depend, amongst other things, on whether the decision is accompanied by reasons and, where relevant,

⁵⁸ Digby, *op. cit.* 235.

⁵⁹ In *Allan v. National Companies and Securities Commission and Others* (1986) 4 A.C.L.C. 319, Toohey J. held that a decision, whether by the Commission or its delegate, pursuant to s. 417(6)(b) of the Companies (Western Australia) Code constitutes a decision under a State Act and hence the Federal Court is not competent to consider an application for review under the Administrative Decisions (Judicial Review) Act 1977 (Cth). The same reasoning would apply to a decision whether by the Commission or its delegate pursuant to ss 12(o), 57 or 58 of CASA.

⁶⁰ Administrative Remedies Agreement dated 21st April, 1982 clause 9.

⁶¹ *T.N.T. Limited v. National Companies and Securities Commission* (1986) 4 A.C.L.C. 624; *Humes Limited v. Unity APA Limited and Another* (1986) 11 A.C.L.R. 641, 665; *The Broken Hill Proprietary Company Ltd v. National Companies and Securities Commission and Others* (1986) 4 A.C.L.C. 265. Sub-s. 24(2) of the Companies and Securities (Interpretation Provisions) Act 1980 and corresponding State Codes provides that any reference to the Commission in the Companies Act shall be construed as including a reference to the delegates.

material in support of such reasons and whether the subject matter is an area where the Commission's expertise might be thought to have particular relevance. Less weight is likely to be given to the Commission's views where it is essentially offering a view on the interpretation of a statute.⁶²

The implications of a hearing *de novo* were discussed in *Humes Limited v. Unity APA Limited and Another*.⁶³ In that case, Beach J. distinguished between an appeal where the court considers whether the initial judgment was right when given, an appeal by way of re-hearing where the court re-hears evidence (but not witnesses's submissions) and where there is a special power to receive further evidence, and a full re-hearing where witnesses are heard again. Beach J. considered that an appeal pursuant to section 537 of the Companies Act required the court to 'consider the matter for itself, based upon the material which was before the Commission at the time it made its declaration, the Commission's statement of reasons for its declaration, and any further evidence the parties wished to place before the court'.⁶⁴ Beach J. rejected the notion that the court should re-hear witnesses's submissions.

The cases also establish that where an appeal under section 537 of the Companies Act relates to the exercise or failure to exercise by the Commission of its discretionary powers, the court's discretionary power 'is circumscribed by that which the Commission or its delegate has under the Code'.⁶⁵ When reviewing or exercising the Commission's discretionary powers, the courts are not bound by the Commission's policy statements.⁶⁶

Unlike Australian courts, English courts do not have the ability to review the merits of a decision by the City of London Panel on Take-overs and Mergers. In a recent case, the Court of Appeal held that given the public nature of the duties performed by the Panel, judicial review was however available on the grounds of *ultra vires* or breach of the rules of natural justice.⁶⁷ The judges showed great respect for the Panel. Sir John Donaldson MR stated:

I wish to make it clear beyond a peradventure that in the light of the special nature of the panel, its functions, the market in which it is operating, the time scales which are inherent in that market and the need to safeguard the position of third parties, who may be numbered in thousands, all of whom are entitled to continue to trade on an assumption of the validity of the panel's rules and decisions, unless and until they are quashed by the court, I should expect the relationship between the panel and the court to be historic rather than contemporaneous. I should expect the court to allow contemporary decisions to take their course, considering the complaint and intervening, if at all, later and in retrospect by declaratory orders which would enable the panel not to repeat any error and would relieve individuals of the disciplinary consequences of any erroneous finding of breach of the rules. This would provide a workable and valuable partnership between the courts and the panel in the public interest and would avoid all of the perils to which counsel for the panel alluded.⁶⁸

Australian courts show no such inclination to limit their intervention in the take-over arena.

⁶² (1986) 4 A.C.L.C. 624, 627. *Elders IXL Limited and Others v. National Companies and Securities Commission and Others* (No. 4) (1986) 10 A.C.L.R. 719; *The Broken Hill Proprietary Company Ltd v. National Companies and Securities Commission and Others* (1986) 4 A.C.L.C. 265.

⁶³ 11 A.C.L.R. 641, 668-73.

⁶⁴ *Ibid.* 672.

⁶⁵ *The Broken Hill Proprietary Company Ltd v. National Companies and Securities Commission and Others* (1986) 4 A.C.L.C. 265, 268.

⁶⁶ *Bond Corporation Holdings Limited and Another v. Grace Bros Holdings Limited and Others* (1983) 8 A.C.L.R. 61, 83; *Elders IXL Limited and Others v. National Companies and Securities Commission and Others* (No. 4) (1986) 10 A.C.L.R. 719, 736.

⁶⁷ *R. v. Panel on Take-overs and Mergers; ex parte Dakafin plc and Another (Norton Opax and Another intervening)* [1987] 1 All E.R. 564.

⁶⁸ *Ibid.* 579-80.

(iii) *Administrative Law Act 1978 (Vic.)*

The Administrative Law Act gives any person affected by a decision of a tribunal the right to apply to the Supreme Court for an order for the review of the tribunal's decision (section 3) and the right to request the tribunal to furnish a statement of the reasons for its decision (section 8). 'Tribunal' is defined in section 2 to be a person or body of persons (other than a court or a tribunal which includes a Supreme Court Judge) who, in arriving at the decision in question, is or are required by law whether expressly or otherwise to observe one or more of the rules of natural justice. A 'decision' includes a decision to grant or deny a privilege (section 2). A person is affected by a decision for the purposes of the legislation if the person has a greater interest than other members of the public and is or may be affected to a substantial degree by the tribunal's decision (section 2). Where the requirements of section 3 are satisfied, the Court may only refuse an application for review if no matter of substantial importance is involved and no substantial injustice will be imposed upon the applicant.⁶⁹

CASA does not expressly require the Commission to observe the rules of natural justice when considering an application for the exercise of its discretionary powers pursuant to section 12(o) in section 57 or 58. The silence of the legislation regarding the relevance of the rules of natural justice is not, however, conclusive. Case law has established that a court when deciding whether the rules of natural justice should apply must consider the status of the complainant, the statutory criteria for the intervention, the sanction which the authority can impose⁷⁰ and whether the authority normally functions in a judicial capacity.⁷¹ In *Salemi v. Mackellar*, the High Court stated that where a claimant has a legitimate or reasonable expectation that an administrative authority will exercise its powers in a particular way, that expectation may be treated as an interest for the purpose of applying the rules of natural justice.⁷² Where, however, a right to a re-hearing de novo on appeal exists, it has been held that adequate protection exists and the rules of natural justice do not apply.⁷³

The Commission's powers pursuant to section 12(o), 57 and 58 have the ability to prejudice property rights. In so far as sections 57 and 58 are concerned, the legislation provides some guidelines as the manner of exercise of the discretions. Further the Commission's policy releases regarding the manner in which it will exercise its discretionary powers may create a reasonable expectation in an applicant that its application will be successful. These factors all suggest that the rules of natural justice are applicable. On the other hand, it is clear that sections 12(o), 57 and 58 confer very broad ranging powers on the Commission and an appeal de novo is available to a person aggrieved with the Commission's decision to exercise or refuse to exercise its discretionary powers.⁷⁴ Whilst it is clear

⁶⁹ Section 4.

⁷⁰ *Alfred Thangarajah of Chundikuly Durayappah, Mayor of Jaffna v. Fernando and Others* [1967] 2 A.C. 337; *Ridge v. Baldwin and Others* [1964] A.C. 40.

⁷¹ *Cooper v. Wandsworth Board of Works* (1863) 14 C.B. (NS) 180, 190; *Salemi v. Mackellar* (No. 2) (1977) 137 C.L.R. 396, 420.

⁷² *Salemi v. Mackellar* (No. 2) (1977) 137 C.L.R. 396.

⁷³ *Twist v. Randwick Municipal Council* (1976) 12 A.L.R. 379.

⁷⁴ Companies Act s. 537.

that the Commission is required to conform to the rules of natural justice when holding a hearing for the purposes of section 36 of the NCSC Act,⁷⁵ it is also clear that many of the Commission's minor powers pursuant to CASA, for example, the power to approve the manner of dispatch of offers pursuant to section 16(2)(c), is not subject to the rules of natural justice.⁷⁶ Notwithstanding this, I think it likely that a court would find that the Commission, when considering an application pursuant to sections 12(o), 57 or 58, is required to conform at least to some extent to the rules of natural justice and hence the Commission would be regarded as a 'tribunal' for the purposes of the Administrative Law Act. Accordingly, an order for review of any exercise or non-exercise by the Commission of its discretionary powers could be sought by an acquirer of shares, a target company or target company shareholder.

The Administrative Law Act does not specify the grounds for review of a decision of a tribunal. Accordingly, the common law rules regarding review are applicable.⁷⁷ These have established that review may be possible on the grounds of breach of natural justice or on the grounds of ultra vires.

There are two rules of natural justice, the hearing rule and the bias rule. The hearing rule imposes a minimum requirement that a tribunal act in good faith and listen to both sides.⁷⁸ The rule does not necessarily entitle a person to an oral hearing provided that he is given an adequate opportunity to present his case. The bias rule outlaws not only situations where the tribunal has an interest in the outcome or demonstrates a partiality towards one of the parties, but also in some cases a demonstrated pre-determination of the issues.

It seems most unlikely that the Commission's obligation to observe the rules of natural justice would extend to an obligation to provide an oral hearing before determining an application pursuant to sections 12(o), 57 or 58. After all, an applicant to the Commission can adequately communicate his position to the Commission by written submission. Where, however, the Commission makes a decision which seriously affects a person other than the applicant, the hearing rule may oblige the Commission to give that other person an opportunity to make its viewpoint understood. At present, the Commission does not invite submissions from interested parties before exercising its discretionary powers. This has been the source of some complaint.⁷⁹

The bias rule was discussed in *R. v. Commonwealth Conciliation and Arbitration Commission and Others; ex parte the Angliss Group*,⁸⁰ in which it was alleged that the Arbitration Commission should be disqualified from hearing a case concerning equal pay for men and women because the Commission had previously inferred that it favoured an equal pay policy once the economic situation so permitted. The High Court found that the Arbitration Commission was required to develop policy and that it had not demonstrated bias. The National Companies and Securities Commission likewise is required to develop

⁷⁵ NCSC Act s. 38(1)(d).

⁷⁶ O'Connell, *op. cit.* 183.

⁷⁷ *Ibid.* 191.

⁷⁸ *Board of Education v. Rice and Others* [1911] A.C. 179, 182.

⁷⁹ Samuel, G., 'Regulation and the Vesting of Discretions in the NCSC' in Bartlett, *op. cit.* 122.

⁸⁰ (1969) 122 C.L.R. 546.

policy. Whilst this is not incompatible with the exercise of its discretionary powers, the Commission must be wary. If the Commission were to apply the rules, as developed in their policy statements, in such a way that it failed to consider the merits of a particular decision, then this would amount to a breach of the bias rule.⁸¹

Although the Commission has very broad discretionary powers, its powers are still subject to the doctrine of ultra vires in so far as 'it is incumbent upon the public authority to decide [applications for exercise of its discretion] bona fide and not with a view to achieving ends or objects outside the purpose for which the discretion is conferred.'⁸² Accordingly the Commission's discretionary powers must not be exercised for an improper purpose, all relevant considerations must be taken into account and no irrelevant matters taken into account, an inflexible rule of policy cannot be adopted, the Commission cannot act under improper direction, its decisions cannot be unreasonable and any conditions imposed by the Commission must not be vague or uncertain.⁸³ If then the Commission, when exercising its discretionary powers, took into account objectives which are outside the purposes of CASA, the Commission's exercise of its powers could be challenged on a number of grounds.

As yet, no person has sought an order for review under the Administrative Law Act of a decision by the Commission to exercise or refuse to exercise its powers under sections 12(o), 57 or 58. I am not aware whether the Commission has been requested in accordance with section 8 of the Act to provide reasons for such a decision by it. Actions have been brought pursuant to the Administrative Decisions (Judicial Review) Act 1977 (Cth) against the Commission for breach of natural justice in conducting an inquiry. In one such case, the Federal Court concluded by saying 'the Court should be slow to intervene in a purely procedural decision made by an administrative tribunal in the course of a long and complex inquiry. This is particularly so in cases where the tribunal has been given, by statute, a wide discretion as to how it should conduct its inquiries, subject only to a requirement to observe principles of natural justice.'⁸⁴ It may be that the courts will take a similar approach when reviewing pursuant to the Administrative Law Act decisions by the Commission in relation to applications under sections 12(o), 57 and 58 of CASA.

Clearly the Administrative Law Act permits only a limited review of the Commission's exercise or failure to exercise of its discretionary powers. It may be, however, that an order for review will be sought pursuant to the Act where the Commission has erred in reaching a decision as to how to exercise its discretionary powers but the merits of the case are weak and hence substantive review pursuant to section 537 of the Companies Act is not desirable.

⁸¹ O'Connell, *op. cit.* 188.

⁸² *The President, Councillors And Ratepayers of the Shire of Swan Hill v. Bradbury* (1937) 56 C.L.R. 746, 757 per Dixon J.

⁸³ O'Connell, *op. cit.* 189-90; Sykes, E. I., Lanham, D. J., Tracey, R. R. S., *General Principles of Administrative Law* (2nd ed. 1984) Part Three.

⁸⁴ *The Broken Hill Proprietary Company Ltd v. National Companies and Securities Commission and Others* (1987) 5 A.C.L.C. 698, 702 per Woodward J.

(iv) *Part VI of CASA*

It is possible that the Commission's exercise of its discretionary powers under sections 12(o), 57 and 58 of CASA may be reviewed by the Supreme Court in the course of an application for an order pursuant to section 45 or 47 of CASA. Section 45 provides that where a person has acquired shares in contravention of section 11 the Court may, on the application of, inter alia, the target company or a shareholder of the target company, make such orders as it thinks fit. Section 47 provides that where a Part A statement has been served on a target company or a take-over announcement has been made, the Court may, on the application of, inter alia, the target company or a shareholder of the target company, if the Court is satisfied that a provision of CASA has been contravened, make such orders as it thinks necessary to protect the interests of the persons affected by the take-over scheme or take-over announcement. If then the Commission exercised its discretionary powers to exempt an acquisition from the operation of section 11 or to exempt an offeror from compliance with a requirement of CASA, the target company or a shareholder of the target company could bring an application before the court on the grounds that the Commission's exercise of discretion was invalid and hence the offeror breached its obligations pursuant to CASA.

In the *O.P.S.M.* case,⁸⁵ the Supreme Court considered the validity of a section 58 declaration pursuant to an application for interlocutory relief. The Court appeared to treat the application as within section 49 of CASA which permits the Court on any application for orders under section 45 or 47, inter alia, to make interim orders in the nature of injunctions or declarations. Argument in the case focused on the question of whether the declaration was void as being ultra vires. No allegation of breach of the rules of natural justice was made. The Court did not consider the merits of the decision of the Commission to exercise its powers pursuant to section 58. This would seem proper given that sections 45 and 47 do not contemplate review by the Court of the exercise or non-exercise by the Commission of its discretionary powers.

An application pursuant to section 45 or 47 of CASA, which is founded upon an allegation that the Commission invalidly exercised its discretionary powers, is limited to the common law grounds of challenge as is an application for review pursuant to the Administrative Law Act. In the event, however, that the Court upholds the challenge to the Commission's exercise of its discretionary powers, sections 45 and 47 of CASA give the Court wide-ranging powers. These sections specifically empower the Court to make, inter alia, an order restraining the acquirer from disposing of or voting the acquired shares, an order directing the acquirer to dispose of the acquired shares or vesting such shares in the Commission and an order directing the target company not to register the transfer of the acquired shares. In addition, the Court is empowered to make such other orders as it thinks fit. Where applicable, sections 45 and 47 would probably provide a more satisfactory remedy for a person dissatisfied with the Commission's exercise of its discretionary powers than review pursuant to the Administrative Law Act.

⁸⁵ (1982) 1 A.C.L.C. 479, 482-3.

D. Policy Considerations

Since the inception of CASA, there has been extensive debate about the Commission's discretionary powers under the legislation. Until recently, almost all participants in the debate have, however, concurred in assuming that company take-overs contribute to economic efficiency and hence should be regulated but not discouraged.⁸⁶ The Commission's recent study of the economic effects of take-overs has questioned the validity of that assumption.⁸⁷

Commentators have generally accepted that, given the complexity and procedural nature of CASA, the legislation requires a mechanism for flexibility. In particular, it is necessary that a procedure exists to alleviate from CASA's requirements where detailed legislative restrictions are unnecessary.⁸⁸ Canadian take-over legislation introduces such flexibility by providing a court with discretionary powers.⁸⁹ It is, however, preferable that an administrative body rather than a court exercise discretionary powers given that an administrative body will be able to operate more quickly, efficiently and less expensively than a court. In addition, it seems undesirable to permit a court to enter into the political and economic arena of take-overs in this way.

It is also widely accepted that take-over legislation must be given a purposive interpretation. Otherwise loop-holes will be found in the legislation and exploited by some take-over participants.⁹⁰ Mr L. Masel, the former Chairman of the Commission, has noted the difficulty of combining in CASA on the one hand detailed black-letter law and on the other hand the requirement that the legislation be given a purposive interpretation and the existence of the Commission's discretionary powers. Black-letter law, of course, encourages a literal interpretation.⁹¹ Mr A. B. Greenwood, a former member of the Commission, has explained that 'the legislation was designed to cope with some quite complex business manoeuvres, and 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 the Australian legislatures to attempt detailed prescription of a highly technical kind'.⁹² It seems, however, that the courts have sought to give the provisions of CASA a purposive interpretation.⁹³ In my view, the combination in CASA of black-letter law and the Commission's discretionary powers provides a good balance.⁹⁴

Debate regarding CASA and the Commission's role has also centred upon the wisdom of the Commission exercising both a policy development role and an administrative role. It has been suggested that these roles conflict. For example, one commentator believes that the Commission's recent study of the economic impact of take-overs prejudices the Commission's exercise of its discretionary

⁸⁶ Masel, L., 'Regulatory Commissions and Courts — An Uneasy Relationship' Address to Committee for Economic Development of Australia, 4 May, 1982, p. 5.

⁸⁷ Bosch, H., 'NCSC Viewpoint on Regulation of Takeover Bids' in Bartlett, *op. cit.* 1-14.

⁸⁸ Bosch, H., 'The Role of the NCSC in Shaping the Takeover Situation' 8.

⁸⁹ Ffrench, *op. cit.* 263.

⁹⁰ Bosch, H., 'The Role of the NCSC in Shaping the Takeover Situation' 13.

⁹¹ Masel, L., *op. cit.* 16. Cf. Lanzer, *op. cit.* 130.

⁹² Greenwood, *op. cit.* 1.

⁹³ Cameron, *op. cit.* 46-62. Cf. Samuel, *op. cit.* 98.

⁹⁴ See Ffrench, *op. cit.* 263.

powers under the existing legislation.⁹⁵ Whilst there is some basis to this argument, I think that the Commission's experience in administering CASA clearly provides it with invaluable insights into the legislation, its strengths and weaknesses, and hence the Commission should take a primary role in policy development.

It seems to me that the most worrying development in relation to CASA and the Commission's discretionary powers is the evident increasing willingness of take-over participants to seek court review of the take-over process including the Commission's exercise of its powers.⁹⁶ In 1983, one commentator predicted that any use of the Commission's discretionary powers runs the risk of appeal.⁹⁷ Notwithstanding the caution of the Commission, there has been an 'exponential growth in the use of litigation in take-overs'.⁹⁸

Clearly take-over litigation has been given impetus by the increasing dollar value of the stakes involved in take-over battles and the increasing sophistication of the main take-over participants. In take-over battles, even unsuccessful litigation can result in a win to the perpetrator of the litigation given that the litigation may result in a fatal loss of a momentum for the other participant in the litigation.

In view of the increasing volume of take-over litigation, much thought has been given as to the appropriateness of the courts as adjudicators of take-over disputes. Many commentators have argued that the courts are not appropriate given their inability to act quickly in many States, their lack of commercial expertise and their frequent unfamiliarity with the complex take-over legislation.⁹⁹ Mr L. Masel has argued that CASA is as much concerned with economic matters as with legal matters. Whereas the common law is primarily concerned with personal relationships, CASA is concerned with the interaction between free market forces and the power of government to impose society's values.¹ Australian courts are notoriously reluctant to be law makers and hence are uncertain where new legislation is involved, particularly legislation which requires them to provide a purposive interpretation.² It could also be argued that the courts' refusal to be bound by the Commission's policy statements and their willingness to substitute their discretions for those of the Commission create uncertainty in the business community and undermine CASA.

Concern about take-over litigation has prompted the Victorian Attorney-General's Department to propose the establishment of a specialist tribunal.³ The tribunal would assume the Commission's role in making substantive decisions pursuant to sections 60 and 60A of CASA and it would review administrative decisions made by the Commission pursuant to its other powers to ensure that minimum standards of procedural justice were provided by the Commission. Court review of decisions by the tribunal pursuant to sections 60 and 60A would

⁹⁵ Samuel, *op. cit.* 116.

⁹⁶ *Ibid.* 105-6.

⁹⁷ Deutsch, *op. cit.* 216.

⁹⁸ Lanzer, *op. cit.* 126.

⁹⁹ Samuel, *op. cit.* 102; Maxwell, *op. cit.* 108.

¹ Masel, *op. cit.* 3.

² *Ibid.* 16; Hitchens, L., 'The Regulation of Takeovers: The American and the Australian Experience' (1982) 5 *University of New South Wales Law Journal* 153, 169.

³ Victoria, *Takeovers: The Role of the Courts and the Discretions of the NCSC* (1986).

only be possible on the grounds that the tribunal had failed to provide procedural justice. No court review would be possible of the Commission's administrative decisions or the tribunal's review thereof. The tribunal would be staffed by a judge or a person with judicial experience and two non-judicial members from the business community. It would be separate from the Commission and bound by the Commission's policy statements about administrative decisions. When exercising its powers pursuant to sections 60 and 60A, the tribunal would be assisted by the Commission which would act as investigator.

The Attorney-General's Department has recognised that the establishment of an additional tribunal may be unpopular in view of the present budgetary environment. Of course this expense should be assessed bearing in mind that court review of the Commission's discretionary powers is expensive and is adding to the present court delays. The Department also recognises that the establishment of a tribunal will only be successful if the tribunal is able to gain the acceptance and confidence of the business community. It seems to me, however, that with the passage of time a tribunal, like the Commission, will gain such acceptance and confidence. In my view, the establishment of such a tribunal would help to streamline take-over regulation, ensure uniformity of legislative interpretation throughout Australia, avoid many of the current problems associated with court review, discourage the use of litigation as a tactic in take-over battles and reduce the cost to the community of take-over litigation. I do not agree with Marks J. that: 'Moves from the executive side in Victoria to reduce, if not withdraw, supervisory powers of the courts over the operation of the law in the area of take-overs threaten impartial application of the law, greater and more expensive obstacles to commercial freedom and propose the spectre of government interference according to the dictates of executive partisanship that control or influence through appointment and status of semi-government agencies'.⁴

Throughout the life of the Commission, the Commission has been understaffed and short of funds. This has forced the Commission to be selective when deciding on which matters it should focus. Despite its financial difficulties, the Commission has, I think, been a successful component in take-over regulation and in particular has exercised its discretionary powers responsibly.

⁴ 'Takeover Litigation in the Supreme Court of Victoria' 1987 *Commercial Law Quarterly* 20.

SCHEDULE

	81/82	82/83	83/84	84/85	85/86†	86/87
No. of Take-overs Notified to the Commission and Delegates						
	164	89	182	153	179	258
s. 12(o) applications — accepted	8	5	9	5	7	17
— rejected	18	3	5	9	6	8
— other*	4	3	1	4	—	—
s. 57 applications — accepted	24	11	4	24	24	7
— rejected	9	11	7	4	4	5
— other*	1	4	4	6	—	—
s. 58 applications — accepted	58	46	72	106	175	160
— rejected	8	15	22	30	32	29
— other*	5	10	19	10	—	—

* Includes applications not proceeded with or found to be unnecessary.

† These figures are not directly comparable to those of previous years in view of the change in method of recording decisions of the Commission. Also, about 85 applications were considered by staff of the Commission but were withdrawn prior to a decision by the Commission.

— These figures do not include applications considered by the Delegates:

- s. 12(o) :2
- s. 57 :4
- s. 58 :124

Source: NCSC Annual Reports

1986/87 figures provided by the Commission.