

COMPANY LAW ADVISORY COMMITTEE

MEMORANDUM FOR THE STANDING COMMITTEE OF ATTORNEYS-GENERAL

Future Work of the Company Law Advisory Committee

When the Company Law Advisory Committee was set up, the primary reason for bringing it into existence was the problem that faced the Standing Committee in dealing with the large mass of material that had accumulated in relation to the draft Bills dealing with Accounts and Audit and Investigations. When its terms of reference were formulated, it was thought desirable to frame them in wide terms, in order that the Committee should not be inhibited in dealing with any matters that seemed to it to require attention.

The Advisory Committee did not take a narrow view of the scope of its functions, and in its first Interim Report it sketched out the remaining topics with which it hoped to deal. These were as follows:-

1. Investigations (with special reference to the Investigations Draft).
2. The Control of Fund Raising (New Capital and Borrowings).
3. Take-over Bids.
4. Disclosure of Substantial Shareholdings.
5. Enforcement of the Act.
6. The Protection of Minorities.
7. The Protection of Shareholders against abuses of power by Directors.
8. The Misuse of Confidential Information.
9. The Duties and Responsibilities of Directors (so far as not already dealt with).

The course so indicated has not been followed in the sequence given in the first interim report, since the Standing Committee has from time to time expressed its interest in particular topics that were regarded at the time as urgent. However, reports have now been furnished in Accounts and Audit, Disclosure of Substantial Shareholdings and Takeovers, Investigations, Misuse of Confidential Information, The

Control of Fund Raising, Share Capital and Debentures, and Share Hawking.

Some time ago, the Standing Committee indicated that it would like the Advisory Committee to consider the topic of Unit Trusts and Mutual Funds. Although Unit Trusts are not companies in the ordinary sense, they are dealt with in the Acts, and so are within the literal terms of reference of the Committee. Mutual Funds are usually companies with unlimited liability, a fact which is at the present time occasioning some concern amongst the investors in some of those funds. Whether or not it was originally intended that all these forms of investment should be considered by the Advisory Committee, this Committee agreed to consider them, subject to the qualification that it could not undertake to treat the subject as one of urgency, and that the Standing Committee might have to wait some time for a report on this subject. This qualification proved to be a wise precaution on the part of the Advisory Committee. The complexities of the subjects already reported on, together with the "feedback" from earlier reports, has made it impossible for it to give any consideration to Unit Trusts and Mutual Funds up to the present time. The Chairman has done some preliminary reading, but this has only served to bring home to him the massive task that lies ahead, if the subject is to be dealt with on a comprehensive basis.

Until recently, the Advisory Committee functioned fairly effectively, on the basis that the Chairman was in effect a full-time research worker in the field of company law, and that when he had assembled sufficient material to enable further progress to be made, meetings of the full committee were held at frequent intervals until a report could be completed. This situation has now changed.

The present Trade Practices case has been running for five weeks, and has not yet finished, and another is scheduled to start in September. Experience with the first case will have to be reviewed with the object of determining whether the procedures adopted need to be modified, and the Chairman will have little time in the foreseeable future for the sort of research which enabled the Advisory Committee to function as it has in the past.

While it may be said that the current legislative programmes generated by the reports of the Committee will keep the

standing Committee busy for some time, there are some aspects of the Unit Trust-Mutual Fund situation that give rise to concern. An example may be found in the question of unlimited liability (referred to above) which might perhaps be dealt with in part by requiring that the prospectus display a warning in appropriate terms in a prominent position. Other questions on which attention has been focussed recently are the concentration of investments in a few companies, often associated with the directors of the mutual fund, and the use of the resources of the mutual fund to assist in the financing of takeovers by other companies. It is not intended to suggest that this list is exhaustive; indeed, the material prepared by the N.S.W. Companies Office, which as supplied to the Advisory Committee when it agreed to look at this topic, shows that there are many unsatisfactory features of the present law. The problem may be rendered less urgent if the proposals in relation to sharehawking are adopted. In the light of present conditions in the share market, new funds are not likely to be promoted unless they can be sold with vigour. Nevertheless, it would seem desirable that some action should be taken to determine what immediate safeguards are necessary, leaving a comprehensive revision of the law relating to unit trusts, mutual funds and investment companies to be dealt with later. If such a review is to be undertaken, it might well be thought that some investigation into the economic effects of investment in such vehicles, and their suitability as a form of investment for people with low incomes, should be undertaken, perhaps in some form of public enquiry. Some form of discretionary control, comparable with that exercised by the Insurance Commissioner, might also be found to be desirable.

It is clear that the Advisory Committee will not be able to undertake any work on the urgent aspects referred to above, and it is quite likely that the present conditions will continue for some time, so as to make it virtually impossible for it to contemplate any large scale activity in the field of unit trusts and mutual funds. With regard to the other topics still on the list of matters outstanding, the Committee feels that there are a number of them in respect of which it might be able to contribute to the development of the law. In particular, at the present time, there is much public debate on questions of conflicts of interest and kindred topics. Matters being investigated by the Senate Committee and others may throw light on the desirable remedies for evils known or

suspected to exist. In this field, however, too much haste may be a disadvantage, as the long term implications of any restrictive legislation need to be carefully considered.

The Advisory Committee is willing to continue to work on such matters as the Standing Committee is prepared to leave in its charge. It has felt, however, that it should point out to the Standing Committee the serious limitations on its time that have arisen. If it were relieved of responsibility for action in relation to Unit Trusts and Mutual Funds, it could probably deal with the remainder of its programme in due course, although some urgent matters might arise which would have to be dealt with without staying to ascertain the views of the Advisory Committee.

In the light of the foregoing, the Advisory Committee would appreciate an indication by the Standing Committee of its views.

Chairman.

5th July 1971.