

THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

**AUSTRALIAN  
SECURITIES MARKETS  
AND THEIR REGULATION**

PART I

Report from the Senate Select Committee on Securities and  
Exchange

Volume 3

Queensland Mines  
Committee Documents  
Legal Opinions

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## PREFACE

The Committee has continued to meet since it reported to the Senate on 18 July 1974. For reasons outlined in the preface to that Report a chapter on matters relating to certain announcements and geological assessments by Queensland Mines was not included. This chapter is included in this volume. We believe it provides important insights into Stock Exchange and Company practices as well as providing lessons related to the supervision of the securities industry.

The Committee received valuable assistance in the preparation of this chapter from Mr M.G. Lincoln, of the Graduate School of Business Administration in the University of Melbourne, and wishes to record its appreciation to him.

The Committee sought and obtained opinions from four leading constitutional lawyers in relation to the constitutional implications involved in the Committee's terms of reference.

After these valuable opinions were received, the High Court gave its decision in the case commonly called 'The Concrete Pipes Case'.<sup>1</sup> This decision was relevant to the nature and extent of corporations power, and the Committee sought supplementary opinions in the light of that judgment.

The Committee found each of these opinions most valuable and accordingly publishes them so that others may also have the advantage of the spectrum of opinions on constitutional law which they provide.

1. (1971) 45 A.L.J.R. 485

We take this opportunity to express our gratitude to the authors for their valuable contributions to the consideration of the Committee's terms of reference.

The Committee has also been grateful for the opportunity to examine the following opinions, which are relevant to various aspects of its terms of reference.

1. Ex parte St. George County Council; re Trade Practices Tribunal (1974) 48 A.L.J.R. 26;
2. A. I. Tonking, 'Federal Competence to Legislate for the Control of the Securities Market' (1973) 47 A.L.J. 231;
3. J.L. Taylor, 'The Corporations Power: Theory and Practice' (1972) 46 A.L.J. 5;
4. P.H. Lane, 'Can there be a Commonwealth Companies Act?' (1972) 46 A.L.J. 407;
5. O.I. Frankeland J. L. Taylor, 'A 1973 National Companies Act? - The Challenge to Parochialism' (1973) 47 A.L.J. 119;
6. P.H. Lane, 'Federal Control of Trading Corporations' (1974) 48 A.L.J. 233.

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CHAPTER 13  
MISLEADING REPORTS FROM QUEENSLAND MINES

Introduction

The Nabarlek uranium deposits in the Northern Territory sprang into international prominence early in September 1970, when official reports from Queensland Mines Limited, the company working the mineral leases in the area, indicated that they were by far the richest uranium deposits in the world. It appeared that the deposits were of such quality and size that they could transform calculations of Australia's uranium resources and, if they were independently developed, alter international market conditions based on previously known sources of supply. The Commonwealth Government accordingly brought down an ordinance protecting the Nabarlek deposits from the possibility of overseas control, and modified its previous policy restricting exports of Australian uranium.

The prices of shares associated with the Nabarlek deposits rose fourfold in the month following the September 1970 announcements, and the question of control over the deposits became a lively issue among domestic financial groups who engaged in heavy buying of the shares. This ferment was, however, based on grossly inaccurate information.

In August 1971, nearly a year after issuing its initial quantitative reports, Queensland Mines made an announcement drastically downgrading its ore and assay estimates. In effect, estimates of the average richness and the overall

uranium content of the deposits were reduced to about one-sixth of previously published figures. Rumour had long preceded this official announcement with the result that there had been share trading between persons possessing vastly varying knowledge and expectations of the market.

Concern over the above circumstances has led the Committee:

(i) to inquire into the circumstances surrounding the continuing misleading reports from Queensland Mines and into the attendant question of the effectiveness of stock exchange and other statutory supervision of the company's reports;

(ii) to examine the share trading activities of persons who were in a position to possess information regarding the Nabarlek deposits which was either withheld from or not yet available to the general public;

(iii) to analyse the heavy share buying by which other parties attempted to gain control of the Nabarlek deposits, and the conflicts of interest which manifested themselves; and

(iv) to commission an independent, internationally experienced firm of geologists to assess and report on the geological basis of the public statements issued by Queensland Mines.

Queensland Mines Limited was listed on the Australian stock exchanges in October 1967. From its inception eight years previously it had been closely associated with the listed

company, Kathleen Investments (Australia) Limited, and it became a wholly owned subsidiary of Kathleen Investments in 1964. Kathleen Investments floated off this subsidiary in 1967 by offering its shareholders a new issue of 2,451,400 fifty cents shares in Queensland Mines at par. This gave Queensland Mines approximately \$1.2 million to undertake exploration for and development of uranium deposits, roles it had always sought to pursue, notwithstanding a long period of suspended operations dating from 1961. In effect, Kathleen Investments retained control of Queensland Mines after the latter was listed, holding about half the shares. The association between the two companies was firmly cemented by cross-directorships, and at the time of the uranium discoveries at Nabarlek the membership of the two boards of directors was in fact identical. Mr Ernest Roy Hudson held the dual positions of Chairman and Managing Director of both Queensland Mines and Kathleen Investments. The other members of both boards, all non-executive directors, were Messrs M.R.L. Dowling, J.E. Roberts, C.P. Tilley and H.B. Ferguson.

The group which floated Queensland Mines could well have been regarded as Australia's most knowledgeable team in relation to the commercial assessment and development of uranium deposits. Kathleen Investments was already a 35 per cent shareholder in the producing mine of Mary Kathleen in Queensland - the only dividend-paying uranium venture in Australia prior to that time and since. Kathleen Investments' interests also included an investment of about \$2.5 million (ordinary and preference shares) in the Savage River iron ore project and a 47 per cent equity in the successful beach sands miner, Rutile and Zircon Mines (Newcastle) Limited.

Mr Hudson had played a prominent role in the early development of the Savage River operation, this being the most widely known instance of his experience in mining prior to the public listing of Queensland Mines. A lawyer by training, he told the Committee that he had given up practising in the late 1950s to devote himself to mining, and that he had an extensive knowledge of the industry.

Mr Hudson: I practised [law] at Broken Hill ... Broken Hill is a mining town. I became interested in mining. I have done a lot of exploration myself right throughout Australia. I have run my own mines. They have always been privately owned by me, and the exploration that I have done has been out of my own pocket. I have done quite a lot of exploration throughout western and northern New South Wales, into the Northern Territory and over on the Solomon Islands. I have been vitally interested in mining for some 30 years.

(Ev. 2112)

Mr Dowling, a partner (later senior partner) in the broking firm of Patrick Partners, had been one of a group of people who early in 1958 formed Kathleen Investments to take over the 35 per cent equity in the Mary Kathleen mine from the previous owner, Australasian Oil Exploration Limited. Mr Hudson had been invited to help in the legal arrangements for effecting that transfer and later to join the board of Kathleen Investments. By the time it floated off Queensland Mines late in 1967, he had become the chief executive and also the chairman of that company. He took up the same positions in the subsidiary at the time of its public flotation.

The prospecting work of Queensland Mines had started with the Anderson's Lode Leases near Mount Isa. Some intensive work had also been done at Westmoreland in the extreme north-west of Queensland. At the end of 1969, the company reported having estimated reserves in the two areas totalling about 16,000 short tons of average grades between 3 lb and 4 lb of uranium oxide per ton. In that year, the company had also begun the active reconnaissance of holdings in the Northern Territory which led to the discovery in 1970 of the anomalies east of the Oenpelli Mission in the area which came to be known as Nabarlek.

Notwithstanding Kathleen Investments' other interests, its half-equity in Queensland Mines became by far its most highly-valued property on the stock exchange after the dramatic announcements relating to the discovery of Nabarlek deposits. From that time, trading in the shares of Kathleen Investments was linked to calculations concerning the prospects of Queensland Mines and to the question of control over the Nabarlek deposits. The key lay in control of Kathleen Investments itself.

The following summary of significant events in a period of about 18 months beginning in April 1970 outlines the developments which will be under review in this chapter.

#### Summary of Significant Events

1970 Mid-April: Airborne surveys by Queensland Mines reveal a number of anomalous areas ... and a very prominent cluster of high radioactivity' in the area subsequently called Nabarlek.

- 10-15 April: Mr E.R. Hudson purchases 5,500 Kathleen Investments shares and 4,500 Queensland Mines shares on behalf of Talbot Investments Pty Limited, his family investment company. Costeaning (trench digging) and sampling is carried out at Nabarlek.
- 22 June: Mr Hudson, in a managing director's report to the board, says that 'a quick perusal of the records (from the aerial surveys) indicated an outstanding anomaly' at Nabarlek. 'The grade was such as to exceed the limit of the instruments ... It would seem the company is very lucky in finding a high grade anomaly.'
- Mr Hudson purchases 1,000 Queensland Mines shares on behalf of Talbot Investments.
- 26 June: Encouraging reports from costeaning samples are received by the company from the Australian Mineral Development Laboratories (AMDEL) in Adelaide.
- 29 June - 2 July: Mr Hudson purchases 2,000 Queensland Mines shares on behalf of Talbot Investments.
- 3 July: The company makes its first public announcement concerning prospects of uranium at the Nabarlek deposit. This encouraging public statement says that a uranium deposit

has been located, 'assays of surface samples show a very high uranium content', and that it could be in the shareholders' interest to wait for further information from the company.

23 July: Mr Hudson tells the board (which includes Mr M.R.L. Dowling and Mr J.E. Roberts) that diamond drilling had commenced, that cost-eaning of the area to a depth of 12 feet had disclosed a 2½ foot reef of pitchblende of approximately 72 per cent uranium, and that the company's geologists 'consider there is every possibility of the mineralisation extending to depth'.

11-13 August: Two companies of which Messrs Dowling and Roberts are directors make purchases of Queensland Mines shares: Patrick Corporation Limited buys 14,400 shares; Castlereagh Securities Limited buys 15,000 shares. Mr T. Antico (a director of Castlereagh Securities) places an order with Patrick Partners for 10,000 Queensland Mines shares on behalf of a Hong Kong company, Bavieca Limited, which had been formed for him.

27 August: A party consisting of Mr Dowling, Mr Roberts, Mr Antico, Mr J.H. Hohnen, Mr J.S. Millnet, Mr H.B. Ferguson and Dr E. Rod visits the Nabarlek site. They are shown samples and



given analysis demonstrations. Messrs Dowling, Roberts and Ferguson are directors of Queensland Mines. Messrs Dowling, Roberts, Antico and Millnet are directors of Castlereagh Securities. (We shall examine the relationship between Castlereagh Securities and Queensland Mines later in this chapter.) Mr Hohnen was not a director of either of these companies. Dr Rod was Queensland Mines' Chief Geologist. Mr Hudson was not in the party.

On returning to his nearby pastoral property after visiting the Nabarlek site, Mr Antico orders by telephone 10,000 options in Queensland Mines on behalf of his family investment company, Tregyod Pty Limited.

28 August: This is a Friday. Turnover in Queensland Mines shares jumps to five times that of the previous day. Mr Antico's order for 10,000 options in Queensland Mines is placed and filled.

31 August: Following a query from the Sydney Stock Exchange regarding the heavy turnover, Mr Hudson announces that the company will make a report concerning the Nabarlek deposits the next day. Mr Hohnen orders through a number of brokers 5,100 Queensland Mines shares and 800 Kathleen Investments

shares on behalf of himself, his family and companies with which he is associated.

1 September: The company announces that 'drilling and costeaning' at one section of the Nabarlek deposit 'gives indicated reserves of 55,000 short tons of U308 (uranium oxide) of an average grade of 540 lbs per ton of ore'. Mr Hudson signs this report as Chairman and Managing Director of Queensland Mines. No assays to support this claim are yet available. Newspaper headlines read 'World's richest uranium strike - Big Darwin discovery astounds experts'.

2 September: On behalf of the company, Mr Hudson releases further details and affirms the previous day's report. Castlereagh Securities, four directors of which had visited Nabarlek six days previously, begins large scale purchases of Kathleen Investments shares and, at the same time, begins to sell Queensland Mines shares as part of a plan to secure a large holding in Kathleen Investments. Messrs Dowling and Roberts, directors of both Castlereagh Securities and Kathleen Investments, do not inform the board of Kathleen Investments of these purchases. Mineral Securities Australia Limited has also begun large purchases of both Queensland Mines and Kathleen

Investments shares. Subsequently discussion takes place between Messrs Dowling and Robertson (Patrick Partners) and Messrs Nestel and McMahon (Mineral Securities) to combine Castlereagh Securities' and Mineral Securities' shareholdings in Kathleen Investments with a view to obtaining control of the uranium deposits. It is planned to float a public company, Power and Resources of Australia Limited (P.R.A.), in December. Both companies are to sell their Kathleen Investments shares to P.R.A. This company will then own at least 20 per cent of the issued shares of Kathleen Investments.

- 2-3 September: Mr Hudson and Talbot Investments sell 4,000 Queensland Mines shares, yielding approximately \$96,000.
- 15 September: Mr Hudson writes to the board: 'The ore body is remarkably consistent in the first lens at 130 feet and it is reasonable to expect it will continue to a greater depth, materially increasing the reserves. An indication will be available in approximately one month'.
- 15-17 September: Patrick Corporation purchases 15,000 Queensland Mines shares, bringing its total to 30,000.

- 17 September: The Prime Minister announces plans to enact legislation to protect the Nabarlek deposit from foreign control by limiting foreign ownership of Kathleen Investments and Queensland Mines shares to a maximum of 15 per cent.
- 22 September: The first assay reports from Nabarlek are received by telephone from AMDEL. Assays indicate that the deposit is highly erratic and that the average grade figure, 540 lb per ton of ore, announced on 1 September, cannot be sustained.
- 24 September: Mr Hudson and Talbot Investments sell 3,000 Queensland Mines shares, and 4,000 Kathleen Investments shares, yielding approximately \$173,000.
- 30 September: A quarterly report due under the Australian Associated Stock Exchanges Official List Requirements is not submitted.
- 8 October: Queensland Mines and Kathleen Investments shares reach their peak prices, near \$46.00 and \$17.00 respectively.
- 1 November: By this time, geological evidence which has been received indicates to senior executives a definite closing off of the mineral zone.

- 18 November: Mr Hudson sells 2,000 Queensland Mines shares, yielding approximately \$78,500.
- 24 November: The first evidence of Mr Hudson advising the board of a downgrading of ore is noted. At a board meeting, Mr Hudson says that, by contrast with the early indications at Nabarlek, 'some of the current drilling has shown that the pitchblende has become disseminated on each side of the massive pitchblende with consequential lowering of grade'. According to the board minutes, he concluded: 'Drilling is not sufficiently advanced to give any real indication of reserves of grade but it does indicate that ore reserves will be of 55,000 tons but the overall grade will probably be +150 - 200 lbs of U308 per ton'.
- 30 December: A second quarterly report by Queensland Mines is due under A.A.S.E. List Requirements, but is not submitted.
- 1971 19 January: Mr Hudson reports to the board: 'Extreme variations take place in grades of ore in various drill holes, but it is impossible to draw any final conclusion at this stage as to the average grade. Indications are, however, that it will be lower than 540 lbs, but there seems little doubt of the tonnage

of 55,000 tons being achieved'.

- 25 January: An informal meeting takes place between Messrs Dowling, Nestel and McMahon. Subsequently it is alleged by Mr Nestel that Mr Dowling informed them that he thought the P.R.A. float would have to be put off, and that if the assay results of all diamond drill holes to date were published the price of Queensland Mines shares would plummet. (This allegation was denied by Mr Dowling in his evidence to this Committee.)
- 3 February: Shares in Mineral Securities are suspended from trading.
- 5 February: Queensland Mines makes its first public announcement since 1 September 1970. The report states that 47 drill holes have been completed and affirms reserves of 'at least 55,000 short tons of U308'. However, no mention is made of assay results or of the falling average grade.
- 17 March: The liquidator for Mineral Securities sells large blocks of Kathleen Investments and Queensland Mines shares to Noranda Australia Limited and the Australian Mutual Provident Society at \$8.10 and \$19.20 respectively.

- 30 March: A third quarterly report by Queensland Mines is due under A.A.S.E. List Requirements, but is not submitted.
- 8 April: Mr T.A. Rodgers of Noranda and Mr E.C. Kennon representing the A.M.P. Society join the Queensland Mines Board of Directors.
- 23 April: Mr McMahon of Mineral Securities tells this Committee about the P.R.A. project. This was the first Mr Hudson and the other directors (except Messrs Dowling and Roberts) knew of the project and was the beginning of a further phase of the bitter intra-board dispute which was to come under public gaze.
- 6 May: Mr Hudson informs the board of a further drop in the average grade of ore to '120 lbs'.
- 26 May: Mr T.A. Nestel, the former Managing Director of Mineral Securities, tells this Committee that rumours have been circulating for some time that drilling at Nabarlek has not confirmed either the reserves or the grades claimed in the report of 1 September 1970.
- 2 June: The Annual General Meeting of Queensland Mines is held. Mr Hudson refuses to provide up-to-date figures for uranium ore reserves. He insists that he will not give any figures

until the deposit is fully proved, except to repeat that the deposit is the richest in the world. Mr Hudson conveys a wrong impression as to the amount of drilling which had been completed. At this meeting, after very considerable press publicity relating to alleged conflicts of interest, Messrs Dowling and Roberts retire from the board (having retired from the board of Kathleen Investments at that company's Annual General Meeting on 28 May 1971).

- 3 June: Patrick Corporation, having been a seller of Queensland Mines shares for several months, sells its remaining 12,440 shares to a company owned by Patrick Partners.
- 10-17 June: Mr Rodgers visits Nabarlek and begins to have his first doubts about grade levels and reserves.
- 21 July: Mr Rodgers writes to Mr Hudson, again pressing for an immediate announcement in view of the fact that the report of 1 September may well have 'led to the creation of a false market' in the company's shares.
- 26 July: Mr Hudson replies to Mr Rodgers' letter. He reaffirms the board's decision that no



public announcement be made pending further clarification.

- 3 August: A special board meeting is convened at Mr Rodgers' insistence, but his motion for an immediate public announcement is again defeated.
- 4-5 August: Bavieca (the Hong Kong company associated with Mr Antico) sells 10,000 Kathleen Investments shares.
- 11 August: Bavieca sells 2,040 shares in Queensland Mines.
- 12 August: The staff technical committee of Queensland Mines reports to the board that reserves are not expected to exceed 9,000 tons of uranium oxide, and adds that 'on the facts known in February ... the original assessment [of 55,000 tons] could not be ascertained by an experienced geologist'. After a lengthy and heated debate, Mr Hudson collapses and retires under medical attention from the meeting. Mr Rodgers resigns from the board and notwithstanding the strong objections of the Secretary, Mr L. Madden, is replaced by Mr J.S. Millnet, Chairman of Castlereagh Securities. Mr H.B. Ferguson assumes the Chairmanship.

- 12 August: This is a Friday. At the end of trading the company makes an announcement down-grading the reserves and the grades to approximately one-sixth of those claimed in the report of 1 September 1970.
- 16 August: The shares of Kathleen Investments and Queensland Mines are suspended from trading.
- 19 August: The suspension of trading is lifted and Queensland Mines shares fall from \$12.50 to \$5.40 on this day.
- 24 August: At a meeting of the board, Mr Hudson is removed as Chairman of Directors and replaced by Mr Millner.
- 6-7 September: Mr Hudson resigns as Managing Director of Kathleen Investments and Queensland Mines.

#### A Year of Misleading Reporting

#### The September Announcements

From the above calendar, it can be seen that the first date on which grievous misrepresentation occurred was 1 September 1970. The text of the relevant passage in the public announcement which was made after a meeting of the board and signed on behalf of the board by Mr Hudson, as Chairman and Managing Director, and issued to the stock exchanges on that day, reads as follows:

A 2 foot thick core of the pitchblende lode, surrounded by a thick crust of bright yellow uranium ochres, was exposed by costeaning at a depth of 4 feet below the surface, and has been drilled to a vertical depth of 130 feet.

Intersections by diamond drilling were made of massive pitchblende with a maximum true thickness of 12 feet and of a grade of 1,300 lb. to the ton of ore. On each side of the pitchblende core the metamorphics contain patchy pitchblende giving a high grade mineral-ised zone of a combined average width of 28 feet.

Of 10 diamond drill holes, 7 intersected the first lens with a minimum length of 400 feet, one was between the first and second lenses and was barren, and two drill holes intersected a second lens of patchy and disseminated pitchblende of an average grade of 120 lb. U308 per ton of ore.

The northern end of the first lens is still open. Drilling is continuing to the north and at depth.

Drilling and costeaning of the first lens gives indicated reserves of 55,000 short tons of U308 of an average grade of 540 lb. per ton of ore.

It will be noted that the word 'drill', or the variants 'drilling' and 'drilled', appears six times in this passage, and that the concluding sentence directly implies that assays obtained from drilling operations as well as from costeaning (relatively shallow trench cutting) formed a basis for estimates of 'indicated reserves' of the unprecedented richness specified in the final paragraph of the announcement. At the time of the announcement no assay reports of drill cores had been received by the company.

In addition, the statement is open to the interpretation that the 55,000 short tons of ore averaging 540 lbs of

or not less than 27 per cent of uranium oxide per ton did not necessarily represent the full extent of the Nabarlek reserves. When Mr Hudson had occasion on the next day, 2 September, to answer a stock exchange request for additional details, he repeated more strongly the hint that these figures did not exhaust the potential of the first lens (mineral occurrence) or take account of possibilities in a second lens on which some drilling had been done. He also took the opportunity in this confirmatory statement to emphasise the insignificance of the costs to be expected in mining the Nabarlek deposits. The text of his letter of 2 September to the secretary of the Sydney Stock Exchange is as follows:

Dear Sir,

I refer to your request for further information on our recent uranium discovery in Arnhem Land 18 miles east of Oenpelli Mission.

The Authority to Prospect and the present application for leases over the area are under option from Mrs G.D. Stevens of Adelaide.

The consideration payable to her on exercise of the option is not materially significant.

The ore body was discovered by aerial spectrometer reconnaissance on 31st May last, since when ground radiometric reconnaissance, costeaning and diamond drilling in the area has been carried out.

The ore body is mineable by open cut methods, is mineralised at the surface by high grade disseminated pitchblende mineralisation commencing from 4-16 feet below the surface. Mining costs would be small per ton of ore and are of no significance per lb. of uranium.

The area is accessible by road to Darwin during the dry season, but would not be accessible without further road construction during the wet season, and is well supplied with water. Having regard to the grade of ore, only a small treatment plant would be required and costs and infrastructure should not exceed \$3 million.

In estimating the reserves, the result from drilling of a second lens has not been taken into consideration, as only two drill intersections have been made to date. The 7 drill holes which intersected the first lens were over a distance of 400 feet and to a depth of 130 feet. The lens is still open at the northern end and drilling is continuing.

The Company could commence mining operations after the middle of next year, provided contracts are available for sale of uranium oxide.

The present market for spot sales of uranium is approximately \$US6.50 per lb., although this price is variable according to date of delivery.

Yours faithfully,  
QUEENSLAND MINES LIMITED

E.R. Hudson  
Chairman & Managing Director

The statements of 1 and 2 September had been issued by the senior representative of the most experienced and successful uranium mining group in the country. Between them, the two statements seemed to supply all the necessary ingredients for anyone to do the small amount of homework that was needed to make an evaluation of Queensland Mines: 55,000 short tons at average 540 lbs uranium oxide per ton; costs, negligible; selling price, \$6.00 per lb. It multiplied out to a gross value of \$660 million for the ore in the ground at Nabarlek, subject to present-value discounting, but subject also to further

extensions of the ore reserves.

Queensland Mines had fewer than 5,000,000 shares on issue at the time, while its half-owner, Kathleen Investments, had issued 4.4 million shares. The stock market, after its initial astonishment, gradually became persuaded that Mr Hudson was actually playing down the worth of Nabarlek. Typical of many comments was a report by a Sydney broking firm, Jackson, Graham, Moore and Partners, dated 2 September and headed, Fundamental Evaluation of Queensland Mines' Uranium Discovery. In part, it referred to:

the probability of very significant additions to high grade ore reserves in the Northern Territory areas held by Queensland Mines which have not been written into this calculation.

... reported reserves are 55,000 short tons.

... very much greater ore reserves potential can be attributed to the area of interest ... we would expect a final statement of ore reserves perhaps four times the size of the amount stated so far.

Similarly, in the Cowan Investment Survey: Daily Market, dated 8 September 1970, the following statement appeared:

the Company's ore reserves are almost certainly greater - probably much greater - than 55,000 short tons already stated.

On 2 September 1970, the market price of Queensland Mines shares on the London market rose from \$11.00 to \$27.00 in what a newspaper described as the 'wildest buying spree since the Tasminex flurry' (Age, 2 September 1970). Kathleen

Investments shares rose from \$4.70 to \$10.16 on the same day. By 8 October Queensland Mines shares had risen to a high of \$46.00, putting a value of more than \$220 million on the company, and Kathleen Investments shares had risen to \$17.00.

From this point, the price of the shares slowly declined. On 30 December 1970 Queensland Mines shares were selling for \$30.00 and Kathleen Investments for \$12.00. By the time of the Annual General Meeting of Queensland Mines on 2 June 1971, the shares were priced at \$18.50 and \$7.70 respectively. On 13 August 1971, just before the announcement of the downgrading, the shares were \$12.50 and \$6.70. Finally, after the suspension of trading was lifted on 19 August 1971, Queensland Mines sold for \$5.40 and Kathleen Investments for \$3.90.

The share market was by no means alone in its confident interpretation of the announcements made by Queensland Mines in early September. Mr Hudson made a journey to Canberra which was publicized in the Press. While there he persuaded the Commonwealth Government to introduce a special ordinance limiting overseas ownership in the Nabarlek deposits to a maximum of 15 per cent. He also induced the Government to relax its restrictions on the export of uranium oxide. This official action was clearly taken on a firm assumption, based on details in the company's announcements, of a great multiplication of the nation's uranium reserves.

That calculations of ore tonnage and richness issued by Mr Hudson on 1 September were understood to be based on assay results is clear from several of the reports published by

investment advisers and commentators at the time.

For example, the brokers William Tilley, Hudson, Evans and Co., in their Special Report on Queensland Mines Limited of 14 September 1970 said:

on indicated and proven ore reserves ... without taking into account the fact that the main Nabarlek ore body is open at depth and at one end which provides definite potential for significantly increased reserves...

Similarly, the Mining Investment Digest of 30 September 1970 told its readers that 'the "known" and declared portion of the Nabarlek deposit comprises 55,000 short tons of uranium oxide'. So, too, the Daily Market Digest of 10 February 1971 referred to Queensland Mines' 'known and defined reserves'.

These inferences from the Queensland Mines reports do not seem to have been strongly questioned by other commentators. They evidently reflected the common interpretation of the reports at the time, an interpretation that was presumably known to Mr Hudson.

#### The Lack of Assay Results to Substantiate the Report

The Committee has established that the ore grade and reserve figures published on 1 September 1970 were not substantiated by any assay results from the drilling of the first ten holes at Nabarlek, notwithstanding the obvious impression given by the frequent use of the word 'drilling' and the phrase 'drilling and costeaning' to substantiate the 'indicated' reserve calculations quoted at the end of the announcement.



Furthermore, the use of the word 'indicated' would in itself give support to this mistaken impression.

Drilling results would naturally form the single most essential element in any accurate calculation of the reserves and grade levels. There is no question that both Mr Hudson and the Chief Geologist of Queensland Mines, Dr Emile Rod, were aware that their company had not received assay reports from the Adelaide laboratories of the Australian Mineral Development Laboratories (AMDEL) at the time of the September announcements. The Committee examined both these witnesses at some length:

Senator Rae: Would you agree that anybody reading this statement of 1 September would get the impression that you were saying that drilling - you used the word first - and costeaning had shown an average grade of 540 lbs per ton? In fact, I am suggesting to you that drilling had not shown any grade because there had not been any assay of the drilling.

Dr Rod: That is correct.

(Ev. 2168)

In respect to a passage in the announcement of 1 September which referred to drilling and specific grade figures, the following evidence was given:

Senator Rae: ... I want to take these words fairly carefully:

'Intersections by diamond drilling were made of massive pitchblende with a maximum true thickness of 12 ft and a grade of 1,300 lb a ton of ore.'

... So in stating its grade at 1,300 lb you are referring to the grade from diamond drilling, are you

not? That is the only way in which that sentence can be interpreted by anybody reading it?

Dr Rod: That is correct.

Senator Rae: But in fact there had not been any assay to enable you to set the grade at 1,300 lb?

Dr Rod: Not with the drills. That is correct.

(Ev. 2168)

Upon further examination, it appeared that the grade figure of 1,300 lbs to the ton of ore came from a special sample from only one hole (Na 5):

Senator Rae: Was there any other assay information to enable you to use the grade of 1,300 lb to the ton of ore other than that which came from the special sample out of NA 5 or costean No. 5.

Dr Rod: No, not at this date.

(Ev. 2171)

Referring again to the passage which spoke of 'intersections by diamond drilling ... of massive pitchblende with a maximum true thickness of 12 feet', Dr Rod admitted that there had been only one such intersection despite the use of the plural in the company's report:

Senator Rae: I simply go back to point out that you have used the plural in relation to intersections. You have said 'intersections by diamond drilling ...' That is the plural, indicating that there was more than one. Was there more than one?

Dr Rod: Certainly not with 12 ft.

(Ev. 2169)

## A 'Geological Doodle'

The Committee appointed the firm of Watts, Griffis & McOuat (Australia) Pty Limited as its geological consultants in the investigation of the Nabarlek announcements. The firm was commissioned to report on the technical background and the accuracy of the announcements. Their report, which we shall henceforth refer to as the McOuat Report, was prepared by Mr J.F. McOuat and Mr T.V. Willstead, and was tabled before the Committee on 20 October 1971 (Ev. 2343-82).

In relation to the Queensland Mines announcement of 1 September 1970, the McOuat Report says that none of the stated drill intersections of mineralisation were based on assay data - costean data only were available. The calculation of reserves or grades could not have been based on fact or even reasonable geological assumptions.

Given that there were no assay results to support the 1 September claim, the Committee turned to the question of what substantiation did exist at the time. We were informed that the documents on which the calculations for the 1 September announcement were based had been kept in a safe by the company. The documents were subpoenaed. They proved to be brief handwritten notes from Dr Rod to Mr Hudson containing a few figures referring to sampling data, and giving some extremely sketchy suggestions regarding tonnage and grades of ore at Nabarlek. The principal document concerned is reproduced on page 2356 of the transcript of evidence.

With reference to these documents and the information supporting them, the McOuat Report says:

Material supplied to us showing the apparent basis of calculation for the 1 September statement can only be thought of as geological doodling and in no manner can be thought of as a technical calculation.

(Ev. 2344)

The McOuat Report says that, although no drill hole assays were available to Queensland Mines on 1 September, the geological logs or descriptions of the first ten holes were available. These should have been useful in determining the uniformity, nature and width of intersections. After listing the relevant extracts from the logs of the ten holes, the McOuat Report says:

Even a brief non-technical inspection of the foregoing excerpts show that in only one hole Na 1 is there any mention of 'massive pitchblende', all other references are essentially to scattered patches, veins or grains of pitchblende ...

The references are, in terms of normal exploration, quite encouraging and high (that is, greater than 1 per cent  $U_3O_8$ ) assays could have been expected from a number of the samples ...

In summary, as of 1 September the company had made a significant and high grade surface discovery of uranium. An analysis of surface assays and other information showed possible dimensions of the deposit of 700 ft in length by 60 ft average width on the surface, which averaged 1.2 per cent  $U_3O_8$ . They also clearly showed the mineralisation was erratic in grade and width ...

Except as geological 'doodling' there could not have been a tonnage and grade estimate made, and even the estimate that was made and published appeared to ignore the technical data that was available at the time.

(Ev. 2346-47)

The McOuat conclusions on the propriety of the company's announcements are summarised in this statement:

The 1 and 2 September 1970 statements were not supportable by technical evidence and were merely geological guesstimates' at best. They should not have been made available to the public.

(Ev. 2344)

When the Committee invited Dr Rod to comment on this assessment of the September estimates of ore reserves, he defended it by claiming that he had been pressed to make a subjective judgement in conditions of great urgency:

Dr Rod: I thought the way I presented it was correct - it was my conviction. True, you can say many things now. Some might call what I did a doodle on a scrap of paper. Anyway, then I was convinced, I believed in it ...

Senator Georges: Would you not, as a scientist, in spite of your high expectations, carefully check out your first assessment before making it public or passing it on to your Managing Director?

Dr Rod: It is quite right, what you said, and I would do it if they said to me: 'Have an assessment ready in a couple of weeks or in a couple of months'. But they said to me: 'Have something ready by tomorrow'. I tried to do my best, and I thought I could do something.

Senator Georges: So to be scientific, you required time, but if you did not have time, you had to speculate?

Dr Rod: In a case like this you have to make different working hypothesis, evaluate all your facts, and say: 'All right, what is in favour of this, what kind of factors can you use'. The estimate I gave then was a very rapid estimate, and under the circumstances, on the information we had then, I was convinced that I did the correct thing. I gave an idea, an estimate, of the potential in uranium of the Nabarlek deposit.

(Ev. 2210)

When Mr Hudson in his turn was asked why, as Chairman of the company, he issued public statements couched in such terms, he told the Committee that the stock exchange had asked the company if it knew of any reason why the shares had risen on the previous day, and that furthermore he suspected his co-directors were buying shares on the basis of inside information they may have gained on a trip to Nabarlek on 27 August. Mr Hudson also appealed to his dependence on the Chief Geologist whom he had instructed to prepare information. He said:

Under normal circumstances I would have not made a statement at this stage until a lot more drilling had been done; that I was forced into the position of making a statement; and that I would have preferred not to have made a statement for at least another month or two until further drilling had been done. But the circumstances arose where I had to make a statement to the stock exchange, and the question is: What kind of a statement was I to make? The only statement I could make was to ask my chief geologist to give me a statement and to issue what the chief geologist gave me. But it was not my own decision; it was a board decision.

(Ev. 2147)

These explanations are totally unsatisfactory. The stock exchange had not, as should have been obvious to Mr Hudson, asked Queensland Mines to pronounce on the size of its estimated ore reserves, let alone to issue a wildly speculative 'guesstimate'. The company had already on 3 July publicly announced the discovery of the deposits at Nabarlek, had said that the surface samples showed 'a very high uranium content', and had advised shareholders to wait for further information. It was natural to assume that subsequent statements from Queensland Mines would be based on solid technical information resulting from proving the reserves. The phrasing of the announcements of 1 and 2 September, with their heavy use of words such as 'drilling', exactly fitted such expectations. No outsider was setting a time limit on the company converting the preliminary encouraging announcement of 3 July into definitive terms. If specific information was not available on 1 September, the company was entitled, and was required, to say so. It could well have said that it was awaiting drill assay results from the laboratories.

We shall have occasion later to consider which of the directors of Queensland Mines and Kathleen Investments appears to have profited most from trading on the basis of inside information. At this stage it is enough to note that, whether or not the other directors were trading on inside information, such trading would have provided no excuse for the publication of irresponsible statements to the investing public. In addition, rather than deterring powerful financial groups from buying shares, the company's announcements in September provoked an enormous wave of buying by Mineral Securities and Castlereagh Securities, as we note in the chapter of this Report dealing with Mineral Securities.

## Misuse of the Term 'Indicated Reserves'

In the Committee's opinion, the use of the term 'indicated reserves' in the September announcement was, in the circumstances, misleading and unreasonable. This term has a specific geological meaning, and its use could only have led members of the public to believe that the figures given for the reserve and grade levels were backed by a substantial series of assay results, and as such were reasonably reliable. When examined, both Mr Hudson and Dr Rod admitted being aware of the standard usage of the term, but Mr Hudson claimed that in Australia the phrase did not have to be applied in this sense in the reports of exploration companies, as distinct from producing mining companies. Mr Hudson did not produce any evidence for this contention, nor was he able when invited to quote an instance when he himself had publicly stated that he, or the companies which he directed, used the words with a connotation different from that usual in the mining industry.

In standard usage, 'indicated reserves' or 'probable reserves' are clearly distinguished from 'inferred' or 'possible' ore on the one hand and from 'proven' or 'measured' on the other. The widely known and accepted American and Canadian definitions are closely similar in wording. Both definitions were quoted to Mr Hudson in the course of our examination (Ev. 2156; see also McOuat Report, Ev. 2364-65). Mr Hudson said he was aware of them. He did not dispute that the term 'indicated reserves', according to these definitions, could not truthfully be applied to the conditions at Nabarlek on 1 September 1970. He said he believed there was a slight difference in some Australian standard usage. He regarded that



usage as applying only to producing mines and not to companies in the exploration stage. He said that he personally had introduced this phrase into the public announcement of 1 September, in which the last sentence read: 'Drilling and costeaning of the first lens gives indicated reserves of 55,000 short tons of U308 of an average grade of 540 lb per ton of ore' (see p.13).

In the Committee's view, this sentence was constructed so as to convey a definite technical meaning to the word 'indicated'. Mr Hudson put the suggestion to us that most members of the public would be unaware of the technical meaning attached to the word, while on the other hand experienced mining people who did know its technical meaning would recognise that the word was not being used in a technical sense by Queensland Mines in September 1970 because the reference to ten drilling holes would show that insufficient work had been done to justify the use of 'indicated reserves' in the formal sense (Ev. 2157). We do not think that such an argument, based on ambiguity of meaning of words, deserves to be taken seriously. The reaction of some experienced and qualified mining investors to the September 1970 announcements is sufficient to refute it, and Mr Hudson must have observed this response at the time. It is equally impossible to accept the proposed distinction whereby the untried and speculative class of mining companies, often possessing less experienced managements, are permitted and expected to use words more loosely and irresponsibly than established, producing companies. Under such a convention, the scope for double-talk would be unlimited. For instance, one of the companies of which Mr Hudson was a director, Queensland Mines, would be permitted to employ the phrase 'indicated reserves' in a context in which another company with which he

was closely involved, Mary Kathleen Uranium, would be prohibited from using it. It was precisely because Mr Hudson held the highest position of responsibility in a company, Kathleen Investments, which had a major holding in the producing Mary Kathleen uranium mine, that the public was entitled to assume he was using the words with respect to the Nabarlek uranium discovery in a professional manner.

There was no suggestion in the evidence given to the Committee to indicate that any other directors of Queensland Mines ever sought to have the misuse of the term corrected until Mr Rodgers joined the Board the following year.

#### The First Assay Reports - 22 September 1970

The first assay results (for twelve holes) from the Nabarlek deposits were telephoned to the company from the AMDEL laboratories in Adelaide on 22 September and confirmed in writing on 2 October. The McOuat Report tabulates the assay returns for the first ten holes in order to relate them to the company's announcement of 1 September. McOuat has calculated the intersections (lengths along the axes of the drill holes) obtained in these first ten holes, using three different cut-off grades, namely 0.1 per cent, 1.0 per cent and 10 per cent. By cut-off is meant that all assays included within the calculations for a zone must be of a value equal to or higher than the stated cut-off grade (Ev. 2345-48).

McOuat concludes that, if similar calculations and plottings had been done by Queensland Mines on receipt of the AMDEL assays, 'it would have been immediately obvious that the

zone was not uniform in grade or width'. After quoting a number of detailed conclusions drawn from the assay figures, McOuat says that even an 'inferred tonnage' estimate of the reserves could not have been made at this stage, the expression 'inferred' ore being at a lower level of technical confidence or precision than 'indicated'. However, the McOuat Report ventures an attempt at an 'order of magnitude' estimate of the ore based on these assay data. The results of this exercise gave average grades between about one-sixth and one-third (according to whether a cut-off grade of 0.1 per cent or of 1.0 per cent was adopted) of the figures announced by Queensland Mines. The McOuat Report says of the assay returns:

Because of the very erratic nature of the mineralisation and because of the very limited data available no valid 'inferred tonnage' estimate could be made.

The best calculation which could have been produced would only have been an order of magnitude or potential dimensions type which, while potentially carrying some technical significance, is one that would not be normally signed by a professional engineer or geologist and certainly not one for public consumption or publication.

Normally in the case of an erratic and relatively small but high grade mineralised body, such as this, between 30 to 40 significant pieces of sampling data are required to give an inferred estimate of tonnage and grade.

Grade, particularly under such circumstances, is difficult to predict and quite common practice is to reduce very high grade samples to the calculated average of the deposit or by some other arbitrarily chosen reduction.

However, in an attempt to test the validity of the company's calculation we have calculated this 'order of magnitude' tonnage and grade.

We did not, for the purpose of this exercise, reduce high values. We have not shown any dilution factor -i.e. the amount of waste or lower grade rock on either side of the mineralised zone which breaks into and becomes mixed with the 'ore', and has the effect of reducing grade and increasing tonnage ...

These tonnage and grades for each section were then weight averaged to obtain an average grade. The results were as follows:

Cut-off	..	..	0.1%	1.0%
Tons	..	..	240,000	76,000
Grade U <sub>3</sub> O <sub>8</sub>	..	..	4.3%	8.5%

We believe that if a potential for the 'northern lens' had to be given it would have to be of the order of magnitude shown above.

We have seen no data which suggests the company did carry out such a calculation.

(Ev. 2348)

The grades of 4.3% and 8.5% in the above table can be compared with the grade of 27.0% in the Queensland Mines announcements. The estimates of tonnage of U<sub>3</sub>O<sub>8</sub> in the McOuat Report ranged from approximately 6,460 to 10,320 tons. This compares with the 55,000 short tons given in the Queensland Mines announcement.

The evidence given by Mr Hudson and Dr Rod leaves no doubt that they immediately recognised that the first assay results received from AMDEL contradicted the claims made in the company's public announcement of 1 September 1970. Some passages in Dr Rod's testimony may be quoted:

Senator Rae: In early October, presumably within a few days of 2 October, you received in writing the assays from AMDEL of the drill holes 1 to 10 or 1 to 12. You had, as I understand it, received by telephone the information on about 22 September. Is that right?

Dr Rod: That is correct.

Senator Rae: Either at the time when you received the information by telephone, or certainly at the time when you received the report from AMDEL in writing, it was apparent, was it not, that the grades were much lower than anticipated?

Dr Rod: That is correct.

Senator Rae: Did you at that time, that is at the time of receipt either of the telephone report or the written report, consider that a recalculation of the indicated reserves was desirable either in the interests of the company management or in the interests of the public including the shareholders.

Dr Rod: I did not consider it was necessary for the moment.

Senator Rae: The question, I think, was desirable not necessary, but you can answer it in whichever way you like.

Dr Rod: I would say it was not desirable at that moment; we should drill much more; actually I was disappointed to see the results; the assay results were actually much lower than I thought. Before we do any revision, we should drill many more holes to have a much better picture and do some statistical research to find out what is actually the true average grade. We watched things carefully.

(Ev. 2206)

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Senator Rae: Do you agree that from the time, either in late September or in early October, when the assay

results were received from AMDEL all the assay results which you received tended to take away from the original estimate of the reserve which you had calculated for the purpose of i September?

Dr Rod: That is correct. What actually appeared was the grade. As long as you can compensate with more tonnage of ore you are safe. I was watching this closely, and I think it was in May that I made an estimate, I said: 'Well, we certainly do not have a lot more than 25,000 or 30,000 tons proved'. Based on the drilling results, I was quite aware of this in May. I knew, though, that unless further drilling proved more tonnage and better grades, and unless we could find more ore to the north or along the southern extension we could not make it. But I was very confident. I had actually no doubts that eventually we would make it. I was still full of hope that the 55,000 tons would be here.

Senator Rae: Dr Rod, you have used an expression which I would like to just explore with for a moment. I do not want you to take this offensively to your profession. I ask it in genuine elaboration, and for the purposes of information. You used the expression being 'full of hope'.

Dr Rod: Well, that is the very thing in any prospecting.

Senator Rae: I would like to know the significance of the expression 'hope' in relation to the carrying out of your professional work as a geologist.

Dr Rod: 'Hope' in this sense, for the geologist, is a strong desire, a strong expectation to find something.

(Ev. 2208)

Mr Hudson likewise admitted that from early October 1970 he knew that the actual grade of ore would be lower than the one he had announced as being 'indicated'.

Senator Rae: What happened so far as you were concerned and the confidence which you had in the statement made on 1 September when the information came to you as to the assays from the first group of drill holes?

Mr Hudson: I went to Nabarlek on 7 and 8 October.

Senator Rae: As a result of considering those drill assays.

Mr Hudson: Yes.

Senator Rae: Did you make inquiries then while you were there?

Mr Hudson: Yes. I stayed 2 days and with the geologist in charge I went over the area very carefully. I also had a person with me who was a geologist. After 2 days of looking at the situation the general view was that there would be no problem in reaching 55,000 tons, but that the grade would not be of the order as stated in the report.

(Ev. 2181)

In the Committee's opinion, it could reasonably have been expected that the company would have sought to qualify its previous announcement, if only to modify the average grade figures and to clarify its use of 'indicated reserves' as being merely equivalent, in Mr Hudson's mind, to 'estimated'. But no such qualification was forthcoming even though a quarterly report, as required by the Australian Associated Stock Exchanges Official List Requirements, was due to the Sydney Stock Exchange for the period ending 30 September 1970. However, there did not appear to be a demand from the Exchange for this report. In fact, no qualification of the 1 September 1970 announcement was forthcoming until 13 August 1971.

According to the A.A.S.E. List Requirements, Section 3.F.(2), the quarterly report due to be delivered to the Sydney Stock Exchange on 30 September should have made 'full disclosure of production development and exploratory activities'. If a quarterly report had been filed it could have been expected to contain the information received from AMDEL concerning the assay results, and thus to have alerted the public to the misleading nature of the 1 September announcement, or at least to have raised doubts about the claims which had been made.

We are also led to the conclusion that the failure to release the assay information, or to qualify the original announcement, contravened at least the spirit of another stock exchange requirement, one aimed at the prevention of 'false markets' in company securities. The A.A.S.E. List Requirements, Section 3.A.(1), states that a company is required to notify the stock exchange of:

Any information concerning the company or any subsidiary which, consistent with the interests of the company, should be communicated to the Exchange for public announcement, including (inter alia) any information necessary to avoid the establishment of a false market in the company's securities.

The McOuat Report comments in this respect that: 'Certainly, after the original statement, the receipt of the assays of the first few holes would have been a material fact' which would have been required to be made public (referring to Canadian law) as soon as it became known (Ev. 2345).

It can be seen that these two explicitly phrased exchange requirements were ineffectual in protecting the public,



for in the period between 22 September and the first week in October the shares in both Queensland Mines and Kathleen Investments were soaring. On 30 September, Queensland Mines shares sold for \$42.00 and Kathleen Investments for \$15.50. By 8 October they reached their peak at \$46.00 and \$17.00 respectively, and they remained at very high levels for months thereafter.

#### The Public Announcement of 5 February 1971

Another quarterly report from Queensland Mines in respect of the period ending 30 December 1970 became due on 31 January 1971 but was not submitted. The company did, however, issue a public statement on 5 February 1971 (Committee Document 13-1). The section of the statement dealing with Nabarlek said that 47 drill holes had been completed between 1 July 1970 and 31 January 1971, but gave no information on the assay results. The statement forecast that the main drilling programme would be completed by July 1971, and added:

No calculation of proved reserves and grade is possible at this stage, but drilling indicates a strike length of the northern lode of 850 feet and reserves of at least 55,000 short tons of  $U_3O_8$ . Drilling has confirmed the existence of an outstanding high-grade uranium deposit.

A reader would infer from this that, while the company was exercising due care in moving towards a declaration of final or 'proved' reserves, everything on site had borne out the 'indicated reserves' announced five months previously. Further, it was implied that the final figures would in fact be higher rather than lower; drilling had 'confirmed the existence of a

high-grade deposit' and the tonnage was now 'at least 55,000'.

By this time, the directors knew that the ore grades were much lower than the public and the share market had been led to believe. According to the minutes of a board meeting held on 24 November 1970, Mr Hudson told the directors that in the light of the latest drilling, which showed that the pitchblende had 'become disseminated on each side of the massive pitchblende with consequential lowering of grade', it was not possible to 'give any real indication of reserves of grade'. He said the drilling 'does indicate that ore reserves will be of 55,000 tons but the overall grade will probably be +150 - 200 lbs. of U308 per ton'. This represented a reduction by more than three-fifths from the grade quoted in the September announcement. In his Managing Director's report circulated to the directors on 19 January 1971, Mr Hudson referred to the downgrading and to 'extreme variations' in grades while again reiterating that the tonnage of uranium oxide obtainable from the area should exceed 55,000.

Furthermore the McOuat Report suggests that there may have been another misleading element in the February statement. McOuat considers the company was at that stage, having drilled 47 holes, in a position to offer 'an indicated ore reserve' for 'the full length of the lode from the surface to the drill indicated depth of the ore on each cross section' (Ev. 2349). Because of the erratic nature of the high-grade samples, such an estimate would have required the use of a large number of check assays. McOuat did not carry out a reserve estimate on this basis, but expressed the view that the results 'might have improved somewhat' on those derived from the exercise based on

the first ten drill assays mentioned above.

From the evidence of brokers and others, we understand that from January 1971 rumours of a downgrading of the Nabarlek deposits had begun to circulate in sections of the share market. The long silence from the company had perhaps given countenance to these rumours. On 5 February, the day of the public announcement, the price of Queensland Mines shares rose by \$1.50 to \$20.50 while Kathleen Investments shares remained unchanged at \$7.50. The share prices were now down to about half the peaks reached in October. It is impossible to say how much these movements reflected conscious revision in the market of the initial expectations of the capitalised value of the uranium deposits at Nabarlek, for the share market in general was experiencing a down turn at this time.

Several directors of Queensland Mines suggested in evidence that the decline in grade need not have been considered material to the rate of profits to be expected from the mine when it came into production. Indeed, Mr T.A. Rodgers, who was to become a director in April 1971, and who strongly opposed Mr Hudson's policy of refusing to correct the September mis-told the Committee that: 'When the grade [per ton] statements, rises above a certain level, profitability reaches a plateau. Even at a level of 150 lb the profit is about the same as double that - 300 lb per ton' (Ev. 1936-37). In this context, however, it may well be argued that an important distinction must be made between the rate of profit per lb of uranium oxide extracted during a mine's life, on one hand, and the total quantity of uranium oxide to be obtained, and hence the prospective value of a mine, on the other. On a daily operating basis a halving of

the grade richness need not make a fully-proportionate difference to the margin of revenue over cost per lb of oxide being extracted. However, it still reduces the previously assumed quantity of extractable uranium by half, unless in the meantime there has been a doubling of the tonnage of the 'indicated' ore reserves which contain this lower average grade.

In the case of Nabarlek, the down grading was to be much more drastic - a reduction by about five-sixths. In the absence of greatly expanded known ore reserves, calculated by the simplified but not unreasonable conventions then current in the share market, provision would have to be made for a corresponding difference in the capitalized value of Nabarlek. As there had been no such extension of the indicated ore reserves, and as any of the directors might have ascertained the significance of the greatly changed prospective situation by questioning the Managing Director, we believe that the statement of 5 February 1971 extended the process of grave misinformation of the market and of the public.

Evasive Answers to Shareholders' Questions at the Annual General Meeting on 2 June 1971

By the end of 1970 Mineral Securities had become a large shareholder in Queensland Mines (425,000 shares) and Kathleen Investments (700,000 shares); the collapse and impending liquidation of Mineral Securities had just become known when Queensland Mines issued the statement of 5 February 1971 which we have just been discussing. The liquidator of Mineral Securities, Mr J.H. Jamison, took early action to sell these holdings. By 17 March he had sold by tender most of Mineral Securities' interests in Queensland Mines and Kathleen

Investments. The principal buyers were Noranda Australia Limited (a wholly owned subsidiary of Noranda Mines of Toronto, Canada) and the Australian Mutual Provident Society. They paid prices of \$19.20 per share for Queensland Mines and \$8.10 for Kathleen Investments. Three weeks later, on 8 April 1971, the chief executive of Noranda Australia, Mr T.A. Rodgers, and a representative of the A.M.P. Society, Mr E.C. Kennon, became directors of Queensland Mines.

As we have noted, unfavourable rumours regarding the Nabarlek deposit and unease in the share market had been growing. The statement of Queensland Mines on 5 February did not appear to settle the rumours. At a board meeting on 6 May, a director, Mr J.E. Roberts, called attention to an overseas article which claimed that the deposit would prove to contain from one-half to one-fifth of the reserves reported in the previous September. Mr Hudson informed the board that the average grade had fallen to 'about 120 lb' (Ev. 2189).

On 26 May, Mr T.A. Nestel, the former Managing Director of Mineral Securities, in his public evidence to this Committee, said that there had been rumours for about five months that drilling on the Nabarlek deposit was not confirming either the reserves or the grade claimed in the September 1970 report. Reading mostly from a prepared statement, Mr Nestel said:

Towards the end of December and during January there were rumours that Nabarlek was not nearly as rich as the original announcement indicated. Queensland Mines Limited took no action of any kind to dispel the rumours and when its report for the period of 31st December 1970 was eventually issued on 5th February 1971, the all important 540 lbs of uranium oxide per

short ton of ore was conspicuous by its absence. This gave credence to the rumours.

In my opinion, if the market had been assured by appropriate announcements by Queensland Mines Ltd, the shares would have been worth \$50. The uncertainty which exists to this day as to whether in truth Nabarlek has 55,000 short tons of  $U_3O_8$  of a richness of 540 lbs per short ton of ore in the first lens plus the additional reserves which could be anticipated has placed the shares under a cloud and reduced their value and price.

(Ev. 1321)

On the day before he gave his public evidence this Committee had been informed by Mr Nestel, through his legal advisers, of some aspects of his prepared statement. Consequently on that day, 25 May, the Committee by telephone and telegram informed the Sydney Stock Exchange and the Australian Associated Stock Exchanges that Mr Nestel would on the following day be giving evidence which could be of particular concern to those bodies. Our message concluded by saying:

... you are notified so that you may be present personally or by representative stop a copy of portion of the total evidence which portion is specifically related to Nabarlek deposit will be made available in writing to persons present at the hearing.

(Ev. 1932)

Our subsequent inquiries showed that neither of the stock exchange bodies took up the question of the deposit values with Queensland Mines as a result of this evidence and our messages.

The Annual General Meetings of Kathleen Investments and Queensland Mines were anticipated with much interest by the market, for it was hoped that at them the situation would be clarified. Because of the prospect of large attendances, the board decided to change the venue of the Annual General Meetings to a larger hall and to postpone the meeting of Queensland Mines from 28 May until 2 June, immediately after the Kathleen Investments meeting.

Before considering the statements made at the Annual General Meeting of Queensland Mines on 2 June, we may note the McOuat Report's assessment of the geological situation and of the data available to the company at that time:

At this time completion of the closing up of the plane of original discovery holes, was well advanced, with drilling at 50 ft centres ... Assay results up to hole Na 80 were available.

(Ev. 2350)

A calculation of 'indicated reserves' could have been prepared if desired for the 1971 Annual General Meeting.

Notwithstanding the availability of this information, Mr Hudson refused to disclose the results of the drilling and to qualify in any way the announcement he had made nine months previously, on 1 September 1970. He would not be drawn on more up to date figures which shareholders were entitled to have. Mr Hudson even conveyed a wrong impression of the amount of drilling which had been completed - giving a figure of 40 drill holes when in fact assay results had been received from more

than 80 holes - and subsequently refrained from correcting the wrong impression that resulted. It appears that he also misled at least one of his fellow-directors, Mr T.A. Rodgers, in this respect (Ev. 1932).

The following passages are extracted from the transcript of proceedings of the Annual General Meeting of Queensland Mines on 2 June 1971 (Committee Document 13-2). The first questioner gave his name as Perl, without further identification. His first two questions were:

1. Will you re-affirm the statement you made on behalf of the Company on 1st September 1970, that drilling and costeaning of the first lens gave indicated reserves of 55,000 short tons of Uranium Oxide with an average grade of 540 lbs. per short ton of ore?
2. Will you give full details, including complete assays, of each of the 40 diamond drill holes completed by December 31st, 1970 as referred to in the Annual Report?

After an exchange regarding the questioner's identification, the transcript records Mr Hudson's answer and a subsequent exchange between Mr Perl and Mr Hudson:

A: The first question - do I re-affirm that on the drilling and costeaning at the 1st September last year the indicated reserves as disclosed by our geologists were 55,000 tons of 540 lbs. grade - the answer is 'yes'.

[The second question]- I do not intend to give you full details of the 40 drill holes. They are not a matter for the shareholders, and the Board and its technical people will assess the results of these



holes in due course when the deposit has been fully drilled  
...

PERL: Could I have clarification of the first question. You have reaffirmed that at the present time the indicated reserves are 55,000 short tons ...

HUDSON: I did not; you asked me whether on 1st September as a result of the then known diamond drill holes and the then costeans it was stated that the indicated reserves were 55,000 tons of 540 lbs. grade.

PERL: But my question is will you reaffirm now whether this is still the position?

HUDSON: I will neither confirm nor deny it ...

The next questioner gave his name as Mr T.C. Hastings of Neutral Bay, New South Wales. He asked:

Why have we been kept up to now completely in the dark as to progress or lack of it, at Nabarlek, since your first announcement that our company has the richest uranium deposits in the world. Now since you announced it, and your subsequent hurried visit to the Prime Minister which made world headlines, you have for reasons perhaps known only to yourself, maintained a complete and utter silence. Now what has been going on at Nabarlek all these months? What has been revealed.

The pertinent section of Mr Hudson's answer, and Mr Hastings final comment, were recorded as follows:

The original assessment or indication of reserves at Nabarlek was made on the information then available. They were shown as indicated and not as proved reserves. Now it was very important that a quick assessment of this deposit be made for advice to the Stock Market ... I obtained a detailed report from the technical people who advise the Board and the

report was as indicated to the market and shareholders ...

Following an indication of reserves, which is our usual custom ... we then seek to go about and establish what are the reserves at Nabarlek and what is the average grade. And this is going to require about 100 drill holes to establish. We have done 40 at this time. The results of those 40 holes do not give a conclusive answer nor a full answer and in my view whatever the position might be, it would be most inadvisable to give a further assessment on one half of the necessary drill holes. We will not finish the total drill holes until December, and until they are finished you cannot get an accurate assessment ... But I can say this, that from the indication of drilling to date, this deposit is still the best deposit in the world ...

HASTINGS: Well thank you very much sir, and my reply to your address is that I think it was a most comprehensive answer, it was very long delayed and I do not think that the public relations branch of your company does you justice. I mean that sincerely.

In evidence to this Committee, Mr Hudson admitted that when he spoke at the Annual General Meeting there had been '90 drill holes at that time', though he told the meeting: 'We have done 40 at this time'. In explanation of the apparent discrepancy Mr Hudson said in evidence:

Mr Hudson: ... what I was referring to at that stage was the 40 intersecting drill holes in the ore body and I said that you need about 100 to determine the reserves. How anyone could have believed, after I said in my annual report on 31 December that there were 40 drill holes and I have been drilling for 6 months, that I would have said 6 months after there were still only 40 drill holes I would not know.

Senator Rae: If I can clarify this, when you used the expression of 40 drill holes you did not say 40

intersecting drill holes. So you did not qualify it in the way you are telling us you meant to qualify it.

Mr Hudson: Perhaps I should have said 40 intersecting drill holes, but it was not an easy meeting.

(Ev. 2192)

Mr T.A. Rodgers, the only member of the board of Queensland Mines with mining qualifications, was among those who gained the impression that Mr Hudson had meant 40 drill holes of any kind. Mr Rodgers told the Committee that when he visited the Nabarlek area a week after the Annual General Meeting, he 'was surprised to learn in the course of this visit of a seeming inaccuracy in the Chairman's statement at the Annual Meeting when he referred to 40 or so holes as the number of diamond drill holes completed, when during the field visit I noticed that hole No. 101 had been drilled' (Ev. 1932).

For the next two months, Mr Rodgers applied himself to the tasks of discovering the real position of the Nabarlek reserves and ore grades and urging the board of Queensland Mines to make a realistic public statement. In the meantime, Mr Dowling and Mr Roberts had resigned as directors of Kathleen Investments and of Queensland Mines as from the date of each company's Annual General Meeting. Mr Hudson, in evidence to the Committee, implied that he had forced them to resign, having 'the voting strength to do so' (Ev. 2134). In the same section of his evidence Mr Hudson indicated that he had serious differences with Mr Rodgers and Mr Kennon, the A.M.P. Society's representative on the board of Queensland Mines. It is clear that a contest had developed for control of the Nabarlek deposits. Messrs Dowling and Roberts were directors of Patrick Corporation

and its associated company, Castlereagh Securities; and Castlereagh Securities had joined forces with Mineral Securities in the latter months of 1970 with the object of buying a joint holding of about 20 per cent in Kathleen Investments, evidently expecting that this would provide them with effective control of Kathleen Investments, and hence of Queensland Mines. Mr Hudson had not been informed of the joint buying operation until it was well advanced, even though Mr Dowling and Mr Roberts were fellow-directors on the boards of Queensland Mines and Kathleen Investments. When Mineral Securities collapsed, its joint buying with Castlereagh Securities as part of what was then known as the Power and Resources of Australia Limited project, amounted to about 17 per cent of the shares in Kathleen Investments. According to Mr Hudson's evidence, the A.M.P. Society and Noranda advised him that they were prepared to buy the Mineral Securities' holdings in Queensland Mines and Kathleen Investments, and asked whether they could have two representatives on the board of Queensland Mines. Mr Hudson's evidence continued:

I said no, they could not have 2 representatives on the board, but if AMP and Noranda purchased the Minsec shares I was prepared to agree to a representative from Noranda going on the board provided there was an independent representative of AMP. I also took an undertaking from both of them that on no account would they purchase shares or join up with Castlereagh or Patrick Corporation in regard to their holdings and that they would hold the shares against them. That explains the situation which led to my statement at the meeting [the Annual General Meeting of Queensland Mines] that I believed this would help to counteract the high holding that Castlereagh had. AMP and Noranda did not keep the undertaking given to me. I found just before the shareholders' meeting that both Noranda and AMP were voting to maintain Mr Dowling and

Mr Roberts on the board, and I told both representatives that if they continued with that I would put them off the board as well as Mr Dowling and Mr Roberts because I had the voting strength to do so. They then withdrew their support for Mr Dowling and Mr Roberts.

(Ev. 2134)

Mr Hudson proceeded, in evidence, to express extreme criticism of Mr Rodgers, Noranda and the A.M.P. Society in relation to this matter.

A Rebellious Director Forces Public Disclosure - 2 June to 13 August 1971

We have noted that Mr T.A. Rodgers, a week after the Annual General Meeting of Queensland Mines on 2 June 1971, became aware of inconsistencies between the impression that Mr Hudson had given the company's shareholders and the state of the drilling programme as Mr Rodgers found it on a visit to Nabarlek. By the time he made this visit, Noranda (of which Mr Rodgers was the chief executive) had paid the liquidator of Mineral Securities about \$9 million for shares in Queensland Mines and Kathleen Investments, and had influenced the decision of the A.M.P. Society to invest several million dollars also. Mr Rodgers' initial confidence regarding the Nabarlek deposits was based on verbal discussions with Mr Hudson supplemented by a report of a field visit he had commissioned, suggesting that 'the surface configuration and the placing of the drill holes could suggest 200-odd or 300-odd thousand tons of ore'. Noranda had thus made its investment without being in a position to make any independent check on the claims of ore grade issued by Queensland Mines in September 1970. Giving evidence to the Committee in August 1971 Mr Rodgers said, in relation to

Noranda's investigations prior to committing itself to purchase shares that:

... there was no way I could expect to have access to the company's confidential record of a drill hole and other analyses. And these are the only things that fix the average grade and when the average grade is fixed than and only then can an outsider determine the 55,000 tons, or whatever content.

(Ev. 1944)

After returning to Sydney from his first visit to Nabarlek as a director of Queensland Mines, Mr Rodgers on 17 June 1971 told Mr Hudson that he wanted to speak to Dr Rod. The meeting was arranged, and Mr Rodgers asked Dr Rod for assay data, cross sections and longitudinal sections at Nabarlek. He was told that only a limited amount of such information was available in Sydney. After looking at some of the material which was available, Mr Rodgers wrote to Mr Hudson on 30 June, saying he had 'reached the conclusion that we should endeavour to develop at board level a programme for the assessment of tonnages and grades' at Nabarlek, and suggesting that this could best be done if Mr Rodgers himself be appointed a committee of the Board under the Articles of Association for this purpose' (Ev. 1933).

On 2 July, before receiving a reply to his letter Mr Rodgers received a copy of a 'Managing Director's Report' from Mr Hudson. It contained the following statement:

Current drilling at Nabarlek does not indicate that we can prove reserves of the tonnage and grade of the original forecast by the end of this year and

there will be material reduction in high grade tonnage necessitating the use of all low grade material and a reduction in mill feed to 60 lb to 80 lb per ton. Actual reserves at Nabarlek will probably not be determined for a number of years and will require considerable developmental drilling. While additional drilling between now and Christmas could alter assessment of proven reserves to-date I thought it desirable to drill 4 other anomalies immediately so that whatever deficit there might be in the tonnage of Nabarlek will be overcome by tonnage from the 4 anomalies to be drilled. Arrangements have been completed and drilling commences next week. The dolomite sill at Nabarlek has created problems which will not have an early answer. Two of the anomalies to be drilled are of high grade.

(Ev. 1934)

By its nature this report was not available to the public. Mr Rodgers told the Committee that he had interpreted the Managing Director's Report as an acknowledgement of a substantial downgrading of the Nabarlek deposit and as an indication that Mr Hudson considered it would be necessary to find further deposits if there was to be any prospect of reaching the previously stated reserves.

On 7 July, Mr Hudson replied to Mr Rodgers' letter of 30 June. He began by writing:

Your suggestion arises because of your recent appointment and unfamiliarity with the company's operations. For some time we have had a special man assigned to Nabarlek responsible for sampling and progressive preparation of sections and plans relating to reserves. Unfortunately there is a material delay between drilling and final receipt of analysis and currently 17 drill holes are outstanding ...

Whatever shortcomings there may be between the statement of indicated reserves and actual reserves at Nabarlek will possibly be overcome by the end of the year by reserves from the other 4-5 deposits ... As Managing Director I am responsible for keeping the Board advised of the position, and while I am, personally, not technical, I am satisfied that the highly technical staff that this company has available can properly inform me of the reserves position to enable me to carry out my function.

(Ev. 1935)

On 13 July 1971 Mr Rodgers asked for further information about the deposits. In discussion with Dr Rod, he was told reserves totalled 460,000 tons of ore at a grade of 5 per cent. This amounted to 23,000 tons of contained U308. Mr Rodgers then late in the afternoon rapidly went over the plans and sections and arrived at a rough calculation of 450,000 tons of ore. He decided to return the next morning to attempt to find out the grade in a crude fashion before the scheduled board meeting that day:

On my own very hurried and inadequate calculations, based really on a crude sampling of the mass of data that was in front of me, it seemed that the grade could not be more than 3 per cent or 60 lb to the short ton, compared with the original announcement of 540 lb to the ton.

(Ev. 1937)

This meant in effect that Mr Rodgers' calculation amounted to 13,500 tons of contained U<sub>3</sub>O<sub>8</sub> (compared with Dr Rod's 23,000 tons of the previous afternoon and the announcement of 55,000 tons on 1 September 1970). Mr Rodgers continued:



At this point I was emotionally upset. I was horrified and I determined to press for a public release of this new situation at the meeting of 14 July, the same day. I wished to do this in the interests of protecting the credibility of the company in the longer term, particularly in its relationship to the international market for uranium and in relation to the world financial community from which the company might ultimately be borrowing massive sums.

(Ev. 1937)

Consequently, at the board meeting on 14 July, Mr Rodgers pressed for an immediate public statement which would disclose the 'current status of the Nabarlek deposit and trace the history of the geological assessment made in September 1970 and since' (Ev. 1937-38). At this meeting there was lengthy discussion of the use of the term 'indicated reserves' in the announcement of 1 September 1970, the falling of the average grade and reserve levels of the deposit, and the desirability of making a public announcement in the terms advocated by Mr Rodgers. During the course of the debate, Dr Rod was asked to, and did, sign the following statement, which was incorporated in the minutes of the board meeting:

There is 55,000 tons of indicated reserves of  $U_3O_8$  at a minable grade in the northern area of the Nabarlek anomaly between 3 per cent and 6 per cent.

(Ev. 1938)

Mr Hudson reiterated at the meeting that new drilling in other areas would by the end of 1971 'meet any deficiency' there may have been in the original estimate.

As a result of Mr Rodgers' efforts, a company staff group consisting of Dr Rod, Dr R.D. Hutchinson and Mr P.R. Stork was appointed to determine the available reserves and to report back to a board meeting scheduled to be held on 11 August. In addition, it was decided to appoint an independent geologist to determine whether Dr Rod's statement was soundly based. The board, however, rejected Mr Rodgers' proposal for a public announcement 'to indicate the situation in general, pending completion of formal ore reserve calculations' (Ev. 1938).

On 21 July, after consultation with his lawyer and some directors, Mr Rodgers sent a letter to all members of the board in which he expressed the belief that 'it is inconceivable that the deposit under consideration could contain 55,000 short tons of  $U_3O_8$  of average grade 540 lb per ton of ore'. He pointed out that Dr Rod's signed statement referred to a grade of between 3 per cent and 6 per cent, 'in contrast to the previously announced average grade of 540 lb, (27 per cent)'. In pressing for an immediate announcement, he expressed the belief that the September report may well have 'led to the creation of a false market' in the company's shares. His letter called for a special meeting of the board, and contained a draft of a statement to be issued to the public (Ev. 1939-40).

Mr Hudson replied by letter on 26 July. From this point, the correspondence took a more formal tone. Mr Hudson ceased to address Mr Rodgers by Christian name and signed himself E.R. Hudson, Chairman and Managing Director. Mr Hudson said he was unable to accede to Mr Rodgers' request:

At the Board meeting on 14 July I allowed you to disrupt the normal business of the meeting and to address the Board from 3.30 p.m. until after midnight, during which time you had a full opportunity to express your views. The Board, after lengthy discussion, decided against your request for an immediate public statement pending further clarification, and there is no good purpose in calling another meeting to traverse the same ground.

(Ev. 1941)

Mr Hudson reminded Mr Rodgers that Dr Rod had expressed confidence that 55,000 tons of uranium reserves would be obtained from Nabarlek, and said that Mr Rodgers did not deny that 'there could be 55,000 tons in the Nabarlek leases'. He said that the main basis on which Mr Rodgers was recommending a public statement was 'on technical interpretation of the word "indicated" and the reference to a single lens in Dr Rod's original report' He said that at the Annual General Meeting on 2 June the shareholders 'were informed the company does not intend to make a statement until next December and there was no objection or criticism thereof' (Ev. 1941).

Mr Rodgers wrote back on 28 July. He said the question at issue was whether 'in the light of our present knowledge and our obligation as directors of a public company to act honestly and conscientiously, a statement should be made to the Sydney Stock Exchange Ltd'. He said that the shareholders could hardly be expected to criticise the board for absence of information when they lacked knowledge 'of the facts which make such a statement a critical necessity at this stage'. He reiterated that the company's statements on 'the contained uranium oxide at Nabarlek' upon which the public was basing its estimate of share

values were now known to be wrong (Ev. 1941-42).

At a special board meeting of 3 August called by Mr Rodgers under the Articles of Association of Queensland Mines, he again moved that a public statement be made along the lines of the draft announcement circulated with his letter of 21 July. The motion was defeated.

At the 12 August meeting of the board, Mr Rodgers' fears were confirmed when the technical committee which had been appointed early in July reported that the reserves were expected to be about 9,000 tons of  $U_3O_8$ , and that there was no justification for Dr Rod's statement that there were 55,000 short tons of indicated reserves. The group stated that it considered Dr Rod's original estimate to be optimistic but not unreasonable. However, on the facts known in February, it did not believe that the original assessment could have been sustained by an experienced geologist (Committee Document 13-3).

After a heated debate lasting into the evening, and after Mr Rodgers had criticised Mr Hudson's performance of his role as the company's Managing Director and questioned his capacity to continue, Mr Hudson collapsed and, on medical advice, withdrew from the meeting. On his departure, Mr H.B. Ferguson assumed the chair. Mr Rodgers tendered his resignation from the board; and it was 'accepted with regret'. Mr J.S. Millner, the Chairman of Castlereagh Securities, was elected to fill the casual vacancy created by Mr Rodgers' resignation. Mr Madden, the secretary of Queensland Mines, immediately protested against Mr Millner's appointment to the board, on the ground that it was contrary to an agreement made that evening with Mr Hudson after

his collapse, and was therefore 'unethical' in view of the Chairman's enforced absence.

On Friday, 13 August, the company made a public announcement giving an accurate assessment of the reserve and grade levels at the Nabarlek deposit. The announcement indicated that the reserves were approximately one-sixth of the reserves stated in the original report. This re-assessment was received by a stunned market whereupon the shares of Queensland Mines and Kathleen Investments were suspended from trading. When they were re-listed on 19 August, the price of Queensland Mines shares fell from the 13 August level of \$12.50 to \$5.40, and Kathleen Investments shares fell from \$6.70 to \$3.90.

On 17 August it was announced that the N.S.W. Corporate Affairs Commission had been making preliminary investigation into trading in Queensland Mines and Kathleen Investments shares during the preceding months.

In a news release the N.S.W. Attorney General said:

(i) the Commission had commenced inquiries into share trading in Queensland Mines and Kathleen Investments;

(ii) the inquiries were, among other things, to ascertain if there had been any informed selling or insider trading in securities or either company;

(iii) the inquiries would be directed towards determining whether there was evidence of any breach of the provisions of the Securities Industry Act of the State, and, if so, the

prosecution of the offenders.

In response to a recent inquiry this Committee was informed by the Commissioner that inquiries for the purpose stated under (ii) above were completed prior to 19 October 1971, and failed to disclose any evidence of a breach of the insider trading provisions of the Securities Industry Act.

As regards the matter referred to under (iii) above inquiries were concentrated on announcements to the stock exchange made by Queensland Mines on and after 1 September 1970. The purpose was to ascertain whether any announcement, and in particular that of 5 February 1971, contravened S.73 of the Securities Industry Act. A report on this aspect of the inquiries was referred to the Crown Solicitor who advised that no offence had been committed (Committee Document 13-4).

Unfortunately, no public report was made on the Commission's investigation. Therefore, it was difficult for this Committee to make an analysis of the effectiveness or otherwise of the inquiry by the Commission.

On 24 August Mr Hudson was present at a meeting of the board at which a motion was carried that he should be replaced as Chairman by Mr Millnet. The minutes of that meeting record:

Mr Tilley, speaking against the motion, informed members that as the Senate Select Committee enquiries were continuing, the status quo should be maintained and no changes should be considered, at least until Mr Hudson had appeared before the Senate Committee.

Replying, Mr Ferguson said he firmly believed the general standing of the Company had been damaged, to the extent that it may take years to recover and the Board should not appear to have acquiesced.

On 6 September, Mr Hudson resigned as Managing Director of Kathleen Investments; on the next day, he resigned as Managing Director of Queensland Mines. Mr Madden resigned as Secretary, Dr Rod remained Chief Geologist to the company, and Mr Stork was appointed to the position of Manager.

This concludes our summary account of the two years of misleading geological reporting from Queensland Mines. Before making our concluding comment on these events, we propose to refer to some share trading activities during the period and to some complications which appeared to arise from a number of cross-directorships and multiple personal responsibilities.

Some Share Trading Activities - April 1970 to August 1971

#### Early Transactions

It was in mid-April 1970, according to the tenth Annual Report of Queensland Mines, that the company began an airborne spectrometer and magnetometer survey of its prospecting authorities in the Nabarlek region. Between 10 April and 15 April Mr Hudson's private investment company, Talbot Investments, bought 4,500 shares in Queensland Mines at prices between \$4.84 and \$5.88 and also bought 5,500 shares in Kathleen Investments at prices between \$3.13 and \$3.60 (Ev. 2199).

The aerial surveys soon indicated interesting anomalies at Nabarlek. Samples from costeaning were sent to the AMDEL laboratories in Adelaide. AMDEL telephoned encouraging results on 26 June and, on receipt of written confirmation, Queensland Mines made a first public announcement on 3 July regarding prospects at Nabarlek. This was an accurate statement to the effect that surface assays gave indications of high uranium content.

In the ten days preceding this public announcement, Talbot Investments purchased another 3,000 Queensland Mines shares ranging in price between \$3.40 and \$6.44. In evidence, Mr Hudson explained that these purchases like those he had made in April, had been motivated by the fact that he 'was then building up an investment in Talbot Investments of 7,000 shares in Queensland Mines (Ev. 2115).

After the costeaning and surface sampling was completed earlier in the month diamond drilling commenced on 23 July. On that day, Mr Hudson circulated to the board a Managing Director's Report giving more details of the extent of the deposit and mentioning the possibility of contracts with the Atomic Energy Commission and with Japanese interests for the sale of uranium (Committee Document 13-5). The Board of Directors of Queensland Mines at this time comprised Mr E.R. Hudson (Chairman and Managing Director), Messrs M.R.L. Dowling, H.B. Ferguson, J.E. Roberts and C.P. Tilley.

In the period 11-13 August, six weeks after the initial public announcement concerning Nabarlek, Patrick Corporation purchased 14,400 Queensland Mines shares and



Castlereagh Securities purchased 15,000. Castlereagh Securities sold 5,000 of these shares two weeks later, between 28 and 31 August (Ev. 1990); this was a few days before Mr Hudson made the dramatic announcement of 1 September of the very large uranium reserves of unparalleled richness. Each of these share transactions had been made primarily through the broking firm of Patrick Partners. Neither Mr Dowling nor Mr Roberts, who were directors of Patrick Corporation and Castlereagh Securities, disclosed the transactions of these companies to the boards of Queensland Mines and Kathleen Investments, of which they were also directors.

Also on 13 August, another director of Castlereagh Securities, Mr T.V. Antico, placed an order through Patrick Partners to purchase 10,000 Queensland Mines shares on behalf of Bavieca, a company which had been incorporated on the instructions of Mr Antico that month in Hong Kong (Ev. 2035). Further investigation by the Committee revealed that Bavieca was organised to benefit Mr Antico's children through a trust arrangement planned to avoid certain Australian taxation levies. Bavieca's active trading in the Australian securities market, including Queensland Mines and Kathleen Investments shares, continued until 11 August 1971, two days before Queensland Mines shares were suspended from trading. The order for 10,000 shares was not disclosed by Mr Antico to the board of Castlereagh Investments. He explained: 'I do not think that at the time I bought shares in these companies that Castlereagh Securities was buying shares' (Ev. 2052).

## Transactions During and After a Visit to Nabarlek

On 27 August 1970 a party of seven persons who were on an aerial tour of mining areas in northern Australia visited the site of the Nabarlek deposit and were shown some of the costeaning and samples. The party comprised two directors of Castlereagh Securities, Mr Antico and Mr Millnet; two directors of both Castlereagh Securities and Queensland Mines, Mr Dowling and Mr Roberts; another director of Queensland Mines, Mr Ferguson; that company's senior geologist, Dr Rod; and Mr J.H. Hohnen, of Perth, an investor and mining engineer, and director of mining companies who was not, however, on the board of or an employee of any of the companies just mentioned. The party spent that evening at Mudginberri, a nearby pastoral property belonging to Mr Antico. The visit had been cleared with Mr Hudson, as Chairman of Queensland Mines, and at one stage there had evidently been an expectation that Mr Hudson might also be a member of the party (Ev. 2328). However, the invitation extended by Mr Roberts to Mr Hudson was declined. Mr Hudson told us that he did not like the idea of people other than directors visiting Nabarlek, but since the other persons were being taken by directors he felt he did not have the right to stop the visit:

Senator Rae: Going back to this question of a visit by the directors, I would like you to explain a little further your attitude to the persons, other than the directors of Queensland Mines, visiting the Nabarlek deposit.

Mr Hudson: I did not like it.

Senator Rae: Why did you not like it? Did you attempt to stop it? Did you believe that you had any right to

attempt to stop it?

Mr Hudson: I did not believe I had any right to stop it at all.

Senator Rae: Because they were being taken by other directors; was that the reason?

Mr Hudson: Yes.

Senator Rae: In the normal circumstances you would have had the right to stop it if they were complete outsiders?

Mr Hudson: They would not have been allowed in.

Senator Rae: It was because they were being taken by other directors of Queensland Mines that you thought you had no right to stop it?

Mr Hudson: I did not think I had any right to stop it.

(Ev. 2129)

On the next day, 28 August, the stock exchange turnover in Queensland Mines shares rose to approximately five times the level of the previous day. It was at this point that the Sydney Stock Exchange, after asking the company if it knew of any reason for the increased trading activity, received Mr Hudson's dramatic answer.

We now draw attention to the market transactions of two of the party which visited Nabarlek on 27 August.

First, on 27 August, Mr Antico, telephoning to Sydney from his Mudginberri property, ordered the purchase of 10,000 options in Queensland Mines for his family investment company, Tregyod. Mr Antico explained this action to the Committee as follows:

Some time on the afternoon of Thursday, 27 August 1970, after my arrival at Mudginberri ... I had a telephone conversation with my secretary on various matters ... Amongst other things I asked her whether she had heard whether the order I placed for the purchase of 10,000 shares in Queensland Mines had been filled. She said that she had not received any contract notes. I instructed her to telephone Mr Corner [a partner in Patrick Partners] to ascertain the position and told her that if the order had not been filled, then in order to cover the shares she should place an order with Put and Call Traders Pty Limited for 10,000 options in Queensland Mines. It turned out that the order to purchase the 10,000 shares had not been filled and accordingly the order to purchase the 10,000 options through Put and Call Traders Pty Limited was placed and filled on 28 August 1970 ... Some shares had been purchased towards completion of the order on 19 August but the order was by no means completed by the 27th.

(Ev. 2035-36)

Secondly, a substantial number of securities in Queensland Mines and Kathleen Investments was ordered between 31 August and 3 September on behalf of Mr J.H. Hohnen and companies with which he was associated. These purchases comprised 5,100 shares in Queensland Mines, 800 shares in Kathleen Investments, 1,000 options in Queensland Mines and 2,000 options in Kathleen Investments.

There were two aspects of these purchases which interested the Committee:

(i) the purchases by Mr Hohnen were made immediately following the receipt of information not available to the public and obtained by him with the assistance of certain of the directors of the company.

(ii) the purchases were made in various names through several stockbrokers on a number of stock markets. This disguised trading enabled a quick purchase with minimum impact on prices.

Mr Hohnen was invited to appear before the Committee to give evidence. After taking legal and medical advice he declined the invitation and tendered a statutory declaration through his solicitor, referring to his purchases and the circumstances surrounding them (Committee Document 13-6). He said that on 31 August he was told by his broker that there had been a preliminary announcement by Mr Hudson and that the shares had moved upwards:

I instructed these two brokers and also a Perth merchant banker to make a purchase of shares in Queensland Mines and Kathleen Investments for me, my family and for certain companies with which I am associated. To buy shares under such circumstances is normal procedure for visitors to mines particularly from overseas after they are shown the potential of mining operations ... I have for many years as a mining engineer been associated with major mining companies and projects ... Since my retirement I have retained my interest in mining as a director and consultant to various companies. I regarded the purchase of the shares in Queensland Mines and Kathleen Investments as a normal business transaction.

Mr Hohnen also said in his declaration:

At no time was it suggested by Mr Dowling or any other member of the party that there was anything confidential in what we learned during the visit to Nabarlek ... In fact, with the knowledge of Mr Dowling, I brought away with me a number of

specimens from Nabarlek which I showed to various persons, feeling perfectly free to do so.

Mr Dowling was questioned regarding Mr Hohnen's share purchases:

Senator Rae: I wondered whether you could let us have any comments on whether you would have expected those sort of transactions to have arisen from the arrangements of which you were a party to the visit to Nabarlek on 27 August.

Mr Dowling: No, I would not have.

Senator Rae: From what you said earlier, I take it that if those facts are correct you would not approve?

Mr Dowling: That is correct.

(Ev. 2278)

The Committee certainly does not approve of the circumstances surrounding Mr Hohnen's share purchases. However, we recognise that there is substance in Mr Hohnen's reference to some present conventions. Any visitor to a public company's scene of operations, and not least in the case of a mining company, may hope to pick up information that is not generally available.

However objectionable the existing convention may have been Mr Hohnen was not an 'inside trader' under the existing legislation, in the sense of being an employee or director of the company.

Like other members of the party which visited Nabarlek in August 1970, he had obtained due authorisation, and he

happened to come on the scene at a moment of exciting, though uncertain, developments and unfolding possibilities. Some of the companies which permit visits to their operations may be unwilling to endorse such a direct expression of the code relating to share trading as offered by Mr Hohnen. But it is a realistic statement of attitudes which exist and, when described so bluntly, the convention is seen to be a matter deserving more consideration than it receives. Visits to such remote sites as Nabarlek are for privileged persons who can afford them, and some at least of the visitors are bound to regard the trips as business operations from which they propose to obtain a financial return based on their ability, aided by knowledge or impressions derived from visits, to 'beat the market' in share dealings in the companies concerned.

The question of the extent to which companies should, by giving permission, encourage visits of inspection to their operations is not, however, a simple one. Visits can be justified on the grounds that shareholders, who are after all the real owners, are entitled to see something of a company's operations, and that the element of inter-communication promoted by visits has sociological and educational value. Be that as it may, any company which allows privileged persons to visit working sites should be concerned to maintain high standards in issuing public information and should be prompt in announcing changes in the company's circumstances so that visitors do not gain advantage over the general body of shareholders, who are no less 'owners of the business' than the few who make the visits. As we have noted, some members of the board of Queensland Mines did not maintain such standards.

The Committee received a copy of a report (Committee Document 13-7) prepared by a group consisting of a partner of Patrick Partners, investment advisers of Patrick Partners, and investment advisers, officers and analysts for several companies including Castlereagh Securities. The group made a nine day trip through Queensland and the Northern Territory; the places visited included Nabarlek. The report gave general impressions of the trip and included the following statement:

But more importantly - as far as the share market is concerned - was the significant amount of valuable information we were able to obtain from the company personnel, which has helped provide a much fuller picture of the mining operations than a mere reading of the directors' intermittent public statements on their progress.

This was a report from a group of people who, in their various roles, handle vast sums of money.

Quite clearly there is a need for regulatory authorities to examine the question of the circumstances in which such visits should be permitted. There can be no justification for people being able to profit out of a position of privilege as occurred, for example, from the Nabarlek visit by Mr Hohnen and Mr Antico. The Committee considers that the actions of these two people in placing orders, while not illegal, constituted an undesirable, even if a common, practice.

#### Disguised Trading: Two Methods

An additional aspect of the transactions of Mr Hohnen and Mr Antico which deserves attention is the evidence these



transactions provide of ways in which share traders, acting on professional advice, may substantially disguise the course of their trading activities from the stock exchange and from government authorities. The procedures used in each case will be described for their general interest.

(i) Between 31 August and 3 September 1970, Mr Hohnen used the services of at least five brokers and one merchant banker in trading on the Perth, Melbourne and Brisbane Stock Exchanges. The transactions were carried out in the names of Mr Hohnen himself, his family, and four separate companies with which Mr Hohnen was associated either as a director or substantial shareholder.

This being the case, it would be almost impossible for any one of the stock exchanges or State regulatory bodies of itself to have been fully informed of the nature of the total transactions. It would be difficult for any individual Stock Exchange or State regulatory authority to adequately regulate the total market in such circumstances. It was only as a result of the exercise of this Committee's powers to obtain the relevant records from all the exchanges that the full nature of the transactions was identified.

The following is a summary of transactions carried out on one day, 31 August 1970, which, after a good deal of investigation, the Committee was able to trace:

(a) Through Melbourne broker No. 1 500 shares in the name of J.H. Hohnen.

(b) Through Melbourne broker No.2 1,100 shares in the name of J.H. Hohnen or members of his family.

(c) Through Melbourne broker No.3 800 shares in the name of Sherlock River Station Pty Limited (Mr Hohnen is a director of Sherlock, a major shareholder of which is Mr Hohnen's family company, Saint Just Investments Pty Limited).

(d) Through Melbourne broker No.4, who was acting for a Brisbane broker, 5,580 shares in the name of a nominee company in Perth; 2,000 of these shares were purchased by this nominee company for another company, C.H. Trading Pty Limited, of which Mr Hohnen is a director. C.H. Trading is a wholly owned subsidiary of Church Hills Securities (Aust.) Pty Limited, one-third of whose shares are owned by Mr Hohnen's family company, Saint Just Investments.

Altogether, this trading on 31 August was the equivalent of nearly 30 per cent of the total turnover in Queensland Mines shares reported by the Melbourne and Sydney exchanges for that day. The technique of dispersed orders used by Mr Hohnen would be suitable for making a quick maximum purchase with minimal impact on market prices.

In addition, Mr Hohnen bought 1,000 options in Queensland Mines and 2,000 options in Kathleen Investments on 3 September 1970. These purchases were made through a Perth merchant banker and at least one of the Melbourne brokers already mentioned.

(ii) In the case of transactions associated with Mr Antico, our interest was directed to the use made of the Hong Kong company, Bavieca Limited. Here we have an illustration of the way foreign companies may disguise the beneficial ownership of shareholdings as well as, in some instances, providing a means of tax avoidance. Once again, after painstaking inquiry the Committee was able to gather some facts about Bavieca which were later confirmed by Mr Antico.

Bavieca was incorporated in Hong Kong in August 1970, and it was on behalf of Bavieca that Mr Antico ordered 10,000 shares in Queensland Mines on 13 August. The directors of Bavieca were two other companies called Cygnet Limited and Lomas Limited, both incorporated in Hong Kong. The only shareholder was Cygnet Limited. It appears that Cygnet holds shares on behalf of Mr Antico's children. It would be almost impossible, without making extensive overseas investigations, for an Australian stock exchange or regulatory authority to discover the association of Australian residents with such a company.

The following passages from Mr Antico's evidence to the Committee begins with references to two of his locally registered family companies, Tregyod and Air Bulk, and proceed to matters concerning the ownership and nature of the Hong Kong-based Bavieca:

Mr Antico: When I place an order for shares in the investment portfolio, the day I place the order I do not necessarily say that I will buy it for this company or that company. I lay it aside for investment purposes. When I say that I placed the order, actually the order was never filled by Tregyod or booked to Tregyod or Air Bulk Pty Ltd. They were

taken up - offered at a later stage and taken up by an overseas company.

Senator Rae: Would you write down the name of the purchasing company?

Mr Antico: Yes.

Senator Georges: Is the purchase by this overseas company a matter of public record?

Mr Antico: It is not.

Senator Georges: Why not?

Mr Antico: Before coming here I discussed this question with my legal advisers and they advised me it is not. I do not control the company. I do not own the company. My legal advisers tell me that one day my children may receive benefits from that company. Under those circumstances it can be gathered, from what my lawyers told me, that it comes under your terms of reference which state 'any area'.

Senator Georges: In answer to a question earlier I thought you said that it was an overseas company.

Mr Antico: It is an overseas company. If you would like to deal with this matter in private I would be only too happy to give you all the complete details relative to this matter ... I think, in view of the circumstances that I do not control the company and it is not my company, I should not disclose the business of other people.

(Ev. 2037)

Later, after an adjournment, the Committee returned to this question and Mr Antico gave further evidence about Bavieca:

Senator Rae: Who are the directors?

Mr Antico: I do not know the directors of the company.

Senator Rae: Who are the shareholders?

Mr Antico: The directors of the company are Cygnet Ltd and Lomas Ltd.

Senator Rae: Are you familiar with those companies?

Mr Antico: No, but I believe they may be the accountant-solicitors acting for this company in Hong Kong ...

Senator Rae: Were you consulted on any occasions prior to that company buying or selling any shares in Queensland Mines or Kathleen Investments?

Mr Antico: Yes, at times I was consulted in terms of - I acted in an advisory capacity.

(Ev. 2061)

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Senator Rae: At the time of the incorporation of the company, with whom did you discuss the matter?

Mr Antico: It was discussed with my accountants and legal advisers.

(Ev. 2063)

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Senator Lawrie: I want to refer to the statement you made this morning in which you said:

I personally have neither bought nor sold any KI or QM shares since April 1965.

How would you reconcile that statement with all the evidence you have given about how you bought this and how you bought that? I realise they were probably bought for family companies or others but you have had a lot to do with buying KI and QM shares.

Mr Antico: I think when I use the personal pronoun I mean that I have not bought shares as T.V. Antico.

All my trading transactions for KI, apart from what is stated there, have been done through Tregyod and Air Bulk ...

Senator Georges: I am a little puzzled about this company Bavieca. Is this not in effect a nominee company?

Mr Antico: No, it is not a nominee company as I understand it ...

Senator Georges: Does this company not disguise the beneficial owner of shares and trading in shares?

Mr Antico: I do not think so. I do not own or control Bavieca, as I said this morning. I repeat that statement.

Senator Georges: I am not saying you are disguising or not disclosing share ownership or share trading. I am just asking you: Is this not a means of disguising the beneficial ownership of shares?

Mr Antico: As I understand the situation, that is not the purpose of Bavieca.

Senator Georges: Since the affairs of Bavieca are not in the public record, as you said this morning, is that not, as far as the ordinary Australian citizen is concerned, the end result, that there is a clouding of the beneficial ownership of shares in Queensland Mines, Kathleen Investments and Pan Continental?

Mr Antico: No, I do not think it is a clouding. I have told the Committee at this stage who the owners are. I indicated earlier this morning that I am prepared to disclose to the Committee in camera the complete details about this and that is as far as I can go at this stage.

(Ev. 2064)

The Committee considers, however, that the character of Bavieca, like the question of the beneficial ownership

relating to its operations, is a matter of such considerable subtlety as to remain clouded indeed. Pursuing some inquiries subsequent to Mr Antico's appearance at the hearings, we obtained evidence that the formal shareholders of both Cygnet Limited and Lomas Limited are residents of Hong Kong who are evidently connected with the accountants and solicitors acting for Bavieca. Cygnet and Lomas are the trustees of a settlement which provides that at some future date benefits from Bavieca's assets and income can go to members of Mr Antico's family. The refinements of the arrangement are such as to cause Mr Antico himself to remark at one stage of his evidence: 'I do not know a lot about it, frankly' (Ev. 2063).

The existence of Bavieca tended to disguise share trading operations conducted on behalf of Mr Antico's family interest. In a prepared statement read by Mr Antico at the opening of his evidence to the Committee in September 1971, he said that he and his wife had not bought or sold shares in Queensland Mines or Kathleen Investments since 1965, and that the other members of his family had never bought or sold such shares. He also said that the family company Tregyod had not bought or sold such shares since 1969, but he mentioned that it had bought the 10,000 options on 28 August 1970, to which reference has been made, and exercised those options in February 1971. He further stated that the other family company, Air Bulk, had ceased to trade in such shares in July 1970, except for a small sale of 600 Queensland Mines shares made in the mistaken belief that it still held that number. This sale had to be covered by a later purchase of 600 shares (Ev. 2036).

This section of Mr Antico's prepared statement, as submitted to the Committee in written form, appeared under the heading 'Trading or Investing in Kathleen Investments and Queensland Mines'. But it cannot be said to have been a frank account of the transactions in Nabarlek stocks carried out on behalf of Mr Antico's family interests, since it made no reference to Bavioca with which Mr Antico's association was later established (Ev. 2037-61). Bavioca was trading substantially in shares of Queensland Mines and Kathleen Investments during the period when Mr Antico's statement indicated that he and his family, and their family companies, had scarcely traded in them. For example, in addition to the buying order for 10,000 Queensland Mines shares that Bavioca placed in August 1970, Bavioca bought 10,000 shares in Kathleen Investments between 7 and 14 July 1971. Shortly afterwards on 4 and 5 August 1971, Bavioca sold the 10,000 Kathleen Investments shares. Again, on 11 August 1971, two days before the public announcement of the downgrading of the Nabarlek uranium deposits, Bavioca sold 2,040 Queensland Mines shares. These sales grossed approximately \$99,000. In regard to these transactions, Mr Antico explained that the sales made in August 1971 were 'to finance the purchase of Pan Continental shares and to pay off a \$100,000 debt to Patrick Partners'.

He said that he considered it was completely coincidental that the sale of Queensland Mines shares had been made shortly before the down-grading announcement (Ev. 2062).

Mr Antico said that after those sales 'Bavioca still holds a large holding in Queensland Mines and KI', and that the main investments of Bavioca had been placed in those two shares



(Ev. 2062). Since Bavieca had been formed only in August 1970, these latter statements indicate that it had made large purchases during the twelve-months period when, as Mr Antico's prepared paper said, other family companies and persons did not trade in these shares. The existence and use of the overseas-registered company, Bavieca, had effectively concealed the identities or beneficial interests of those for whom it traded from any normal inquiries which could be conducted in Australia.

Mr Hudson's Sales, and the Castlereagh-Minsec Purchases in a Misinformed Market

On 1 September 1970, Mr E.R. Hudson made the public announcement of phenomenally rich 'indicated reserves' of uranium at Nabarlek, and the market price of Queensland Mines shares more than doubled in the next 24 hours. Promptly after the announcement, on 2 and 3 September, Mr Hudson and Talbot Investments sold 4,000 Queensland Mines shares at between \$23 and \$27 yielding approximately \$96,000.

At this point, Castlereagh Securities undertook its programme of large purchases of shares in Kathleen Investments. The purchases were principally made through the broking firm of Patrick Partners, and were held in the name of Patrick Nominees (Ev. 2012). This process continued for the remainder of 1970. By the beginning of 1971, Castlereagh Securities held 829,389 shares in Kathleen Investments, representing somewhat less than 10 per cent of that company's issued capital. In order to concentrate its resources on the purchase of these shares during the latter months of 1970, Castlereagh had gradually sold its 10,000 shares in Queensland Mines. In this period of heavy buying, Mr Dowling and Mr Roberts, who were directors of

Castlereagh, again did not inform their fellow directors of Kathleen Investments of the purchases by Castlereagh Securities.

In these months, Mineral Securities made very large purchases of both Queensland Mines and Kathleen Investments shares. These purchases also tended in the main to be made through Patrick Partners and to be held largely by Patrick Nominees. We have already described how Castlereagh Securities and Mineral Securities joined forces in this period for the acquisition of a substantial holding in Kathleen Investments. Mineral Securities, unlike Castlereagh Securities, was an active net buyer of the two Nabarlek stocks outside the terms of the joint buying arrangement. Patrick Corporation, a company closely associated with Castlereagh Securities, had bought an additional 15,600 shares in Queensland Mines about mid-September, bringing its total holding to 30,000 shares, and had sold 17,560 of them by December (Ev. 2011).

In describing these large scale transactions it is pertinent to note how the use of a nominee company to hold the shares for the purchasers effectively precluded other directors, other shareholders, and the public from learning of the aggregation of shareholding by Castlereagh Securities and Mineral Securities.

The complications of the conflicts of interest arising from the multiple responsibilities of Mr Dowling will be discussed later in this chapter.

We now proceed to record Mr Hudson's share transactions subsequent to the sale of 4,000 Queensland Mines shares

after the announcement of 1 September.

On 22 September, the AMDEL laboratories telephoned to Queensland Mines the first assay reports from the drilling operations at Nabarlek. This was the most substantial geological information to come from Nabarlek to that date. The AMDEL report indicated that the zone was highly erratic in grade and width, and could not sustain the figures announced by the company three weeks previously. On 24 September, two days after the receipt of these assay results, Mr Hudson and Talbot Investments sold 3,000 Queensland Mines shares at \$40.00 and 4,000 Kathleen Investments shares at approximately \$15.10. The proceeds amounted to approximately \$173,000 on that day. In explanation of this sale, and also of the sale he had made on 2 September just after the major announcement, Mr Hudson told the Committee:

The reason for selling those shares was that I had asked my accountant in September what my commitments were to the end of June, and he told me they were round \$650,000. I had then been to Brazil and entered into an exploration company in Brazil. I was up for a very substantial amount of taxation, I think between \$230,000 and \$240,000. I had other commitments that I had entered into in relation to exploration in the Savage River which would involve me in from \$150,000 to \$200,000. I asked my accountant in September what my cash position would be as at June, and it appeared that I would be short of liquid funds. I told him to sell sufficient shares to keep me liquid as at June. The only shares I could sell without paying taxation were the shares I had in these companies because I had held them for 13 years, and those sales were made, but proportionate to my holding they were very small sales.

(Ev. 2115)

On 18 November, Mr Hudson sold an additional 2,000 shares in Queensland Mines at \$39.25, yielding \$78,500. On the next day, 19 November, Mr Hudson circulated a Managing Director's Report (Committee Document 13-8) preparatory to a meeting of the directors of Queensland Mines that was scheduled to be held on 24 November. At that meeting, Mr Hudson reported that the grade of the deposit was falling (Ev. 2185).

On each of these selling occasions, therefore, Mr Hudson was privately aware of developments which widened the glaring discrepancy between the ascertained geological facts and the state of confident belief in the market to which he sold the shares. Each of the selling transactions coincided with an advance in his personal understanding of the discrepancy. Mr Hudson's explanation of the sales does not alter the grave impropriety of the share dealings. This is a case of 'insider trading' with a peculiarly objectionable twist. The person who made profits from his possession of information that made a mockery of the market's belief in his company's shares was also one of the persons responsible for misleading that market for a period of nearly a year. A director was profiting from a misinformed market of his own company's creation. Even if it had been established that Mr Hudson was compelled by personal circumstances to realise on the relevant securities at the relevant times, one would expect that any director in his position should have recognised his responsibility to give the market, on each of the selling occasions, as much up-to-date information as he, the intending seller, possessed.

It is impossible for a committee of inquiry into the securities markets to present even a brief narrative of share

transactions such as these (the only official report that has been made on them) and to forebear from stating expressly that the principles adopted in the transactions were objectionable. As was the case with some others, Mr Hudson, by the tenor of his evidence, sought to imply that the practical significance of the profits he made from the share dealings was minor. The figures can be left to speak for themselves. In mid-April 1970, when the first aerial surveys of the Nabarlek area were under way, Mr Hudson's family company Talbot Investments had bought 4,500 additional shares in Queensland Mines and 5,500 in Kathleen Investments at a total apparent cost of less than \$45,000. In the two-and-half months following his public announcement of 1 September 1970 Mr Hudson and his family company sold 9,000 shares in Queensland Mines and 3,000 in Kathleen Investments. The proceeds from those sales amounted to \$347,000.

#### Mr Dowling's Conflicts of Interest

The Committee's inquiry into matters relating to Queensland Mines brought to our notice a significant example of potential conflicts of interest. This principally involved Mr M.R.L. Dowling, a senior partner of Patrick Partners, stock and sharebrokers. The Committee cites Mr Dowling's case as an illustration of the fact that the wide-ranging growth of the role of some stockbrokers in Australia has caused major difficulties in resolving many deep conflicts of interest which are potentially present.

The following details show the many roles performed by Patrick Partners and Mr Dowling:

(i) Patrick Partners at the relevant time was the biggest share brokerage firm in Australia. During the mining boom it usually had the largest daily turnover of mining shares of all broking firms on the Sydney Stock Exchange. The partnership was very active in the fields of underwriting, floating and sponsoring new companies and, through private companies owned by the partnership, in large scale share trading.

(ii) Patrick Partners had substantial interests in several public companies. One of these was Patrick Corporation which was approximately 45 per cent owned by the partners and was engaged in various fields, including merchant banking, share trading, and dealing in mineral leases. Patrick Corporation was regarded as an extension of the operations of Patrick Partners:

Senator Rae: So, another way of putting it, with which I presume you would agree, is that to you personally Patrick Corporation is, in effect, an extension of the operations of Patrick Partners.

Mr Dowling: An extension and, if I could add to that, I think parallel to. They work in sympathy with each other. For instance, Patrick Corporation owns the short term money market operation. So Patrick Partners is contracted out of the short term money operation business.

(Ev. 1460)

Patrick Corporation was very active in the Australian capital market through Bill Acceptance Corporation Limited, Patrick Acceptances Pty Limited, and Patrick-Intermarine (Australia) Limited - all companies in which it had a substantial interest. Among its other interests was a 50.5 per cent interest in a mining service company, Mining Advisers Pty Limited

(Ev. 1451). This Company acquired leases and titles, both by pegging and buying interests. In turn Mining Advisers sold titles, claims and leases to companies which were floated by Patrick Partners or with which they were associated.

The operations of Patrick Corporation were managed by the office of Patrick Partners. When shares were purchased or sold, either on a discretionary account or following advice from the Board of Patrick Corporation, they were mainly purchased through Patrick Partners and the shares transacted in the name of Patrick Nominees (a company wholly owned by Patrick Partners).

The broking firm also had a substantial interest in Castlereagh Securities. This public listed company was sponsored and heavily promoted by Patrick Partners:

Senator Rae: It appears that it was obviously intended that at the time of the floating of Castlereagh Securities it should be a company with close links with other members of the Patricks group ...

Mr Dowling: Correct.

Senator Rae: What role does Castlereagh Securities play or provide which was not played or provided by Patrick Corporation?

Mr Dowling: It is an investment company and Patrick Corporation is not.

Senator Rae: Is that the basic distinction?

Mr Dowling: I should think that is the basic one. Perhaps the words 'investment company' would be better used as 'investor'.

(Ev. 1984)

Not only did Patrick Partners have substantial interests in Patrick Corporation and Castlereagh Securities, but these companies in turn often had substantial positions in other companies.

(iii) It is significant to recall that Mr Dowling was:

(a) A member of the committee of the Sydney Stock Exchange.

(b) A director of several companies. He was a director of Kathleen Investments until 28 May 1971 and Queensland Mines until 2 June 1971. At the time of his first appearance before the Committee on 3 June 1971, he was a director of the following listed companies:

Patrick Corporation Limited  
Castlereagh Securities Limited  
Metals Exploration N.L.  
Norseman Gold Mines N.L.  
Western Titanium N.L.  
Conwest Exploration N.L.  
Longreach Oil Ltd.  
Longreach Metals N.L.

He was also a director of various subsidiary companies of some of the above companies.

(c) A senior partner of Patrick Partners. He was regarded as the man responsible for making Patrick Partners the biggest brokerage firm in Australia.



In summary, Patrick Partners directly and indirectly performed a wide variety of roles. The firm was:

- \* a sharebroker with offices in Sydney, Melbourne, Brisbane, Canberra, Wollongong and a European office in Brussels, acting as agent for investors, advising them and carrying out their instructions.

- \* an underwriter, sub-underwriter and sponsor of companies and their public share issues.

- \* a merchant banker with activities in the Australian capital market and overseas.

- \* a mining explorer and adviser, pegging or purchasing and selling leases or claims, and providing general geological services.

- \* a substantial investor and a major share trader in several public companies. Those companies in turn had positions in other companies, sometimes substantial ones.

- \* in a position of having significant influence and access to information through directorships held by its partners in public and private companies.

The Committee concluded that Mr Dowling's many interests inevitably created deep conflicts which in practice were incapable of being satisfactorily resolved. The P.R.A. affair

(which is further discussed in Chapter 14 of this Report) is an example of such a conflict.

Conflicting Evidence of an Attempt to Gain Control of Nabarlek

Following the announcement of the Nabarlek discovery on 1 September 1970, the board of Castlereagh Securities decided to purchase 500,000 shares in Kathleen Investments. Castlereagh Securities had been floated some four months earlier with an issue of 60,000,000 ordinary shares of 25c each at par. In the prospectus (Committee Document 13-9) the directors, of which Mr Dowling was one, stated:

In matters of financial and investment control, it is intended that the Company should draw upon the advice and initiative of Patrick & Company (Members of The Sydney Stock Exchange Limited), a sponsor of the Company ...

It is recognized that implementation of Castlereagh's policies, to be successful, must be based upon detailed knowledge and understanding of current developments within the mineral industry. For this reason, Castlereagh has been provided with the considerable degree of support from specialist mining and financial advisory groups referred to above. In addition, Castlereagh has as one of its sponsors Mining Traders Limited, a company which may best be described as progressing along the course of investment banking. Under appropriate conditions, Castlereagh will seek to participate with the Mining Traders Group in particular mining projects and investments.

Of this particular purchase of Kathleen Investments shares by Castlereagh Securities, Mr Dowling said:

This purchase was made purely as a long term investment: it was in no way intended as a step towards obtaining control of K.I.

(Ev. 1452)

Another very big buyer in the market after the Nabarlek announcement was Mineral Securities. Towards the end of September Castlereagh Securities and Mineral Securities became aware that they were each buying large parcels of Kathleen Investments shares in the market. In order to prevent such big buyers competing against one another Mineral Securities decided that its future purchases of Kathleen Investments shares would also be made through Patrick Partners. Both buying companies were in constant consultation to ensure an equitable allocation of shares.

At this stage Castlereagh Securities and Mineral Securities discussed the possibility of combining their share-holdings in order to acquire 51 per cent of the issued share capital of Kathleen Investments.

From the evidence given to the Committee it seemed that Mineral Securities understood from these discussions that it was agreed that the two should join to obtain a controlling interest. Mr McMahon, of Mineral Securities, said:

The proposal was that Mineral Securities and Castlereagh Securities should jointly seek a controlling interest in Kathleen Investments. On this basis Patricks were authorized to buy.

(Ev. 1191)

However, Mr Dowling, referring to Mr McMahon's statement, told the Committee:

This is incorrect insofar as it means in its context that it was agreed that Castlereagh would join Minsec in seeking a controlling interest of K.I. I have said the proposal was that a 51 per cent interest be acquired and this proposal was rejected both by myself and by the board of Castlereagh.

(Ev. 1452)

Whatever the intention as to the ultimate size of holdings, both companies still intended to merge their Kathleen Investments holdings by floating a new company, Power and Resources of Australia (P.R.A.). In fact, a draft prospectus was prepared and many details, including the composition of the proposed board, were settled.

The following facts relating to the possible conflicts of interest of Mr Dowling attracted the Committee's attention:

- 1) He was a director of Kathleen Investments, a company subject to heavy share buying which could influence the share price, the balance of power and the future of the company.
- 2) The buying was being carried out through his stock-broking firm, Patrick Partners.
- 3) One buyer, Castlereagh Securities, was a company of which he was a director.
- 4) Another buyer, Mineral Securities, was being

assisted in its funding of the purchases by Patrick Corporation, a company closely associated with his sharebroking firm and of which he also was a director.

5) Patrick Partners was to act as broker to the issue in the public flotation of P.R.A., and also to act as underwriters.

6) Short term funds for P.R.A. were to be marshalled by the Patrick group.

7) Patrick Partners was to arrange for the shareholders of Castlereagh Securities and Patrick Corporation to have priority rights of application for shares in P.R.A.

8) Patrick Corporation was to be the investment banker to P.R.A.

9) The Patrick group and Mineral Securities were considering either nominating in perpetuity the board of P.R.A. or being the sponsors of a majority of the board of P.R.A.

(See Committee Document 13-10 for a proposal for a prospectus of P.R.A.; further information can be found in Ev. 1190-92, and Ev. 1450-59).

This illustrates just how powerful and how expansive the role of Patrick Partners had become in Australia. Arising out of Patrick Partners' many roles - as an agent, promoter, banker, director, underwriter, financier and share trader - came serious potential conflicts of interest.

### Three Examples Illustrating Conflicts of Interest

We now give three examples which we believe illustrate these conflicts.

#### Share Buying by Castlereagh Securities

The Committee noted that Mr Dowling did not inform the board of Kathleen Investments of the share buying by Castlereagh Securities and Mineral Securities.

The directors of Kathleen Investments included Mr John Roberts, who was also a director of Castlereagh Securities. So two of the directors, Mr Dowling and Mr Roberts, of Kathleen Investments knew of the huge purchases and plans for ultimate control whereas the others did not. On this matter Mr Dowling said:

So, what would the Board [Kathleen Investments] do with the information? Would it circulate it to shareholders? I do not know what they want it for.

(Ev. 1466)

The Committee did not regard Mr Dowling's answer as adequate. This was a case where two directors of Kathleen Investments had been discussing the formation of a company - Power and Resources of Australia - to obtain a controlling, or at least significant, interest in Kathleen Investments, a company which had the prize of what was believed to be the world's richest uranium deposits. We believe that Messrs Dowling and Roberts should have informed the board of Kathleen Investments of their involvement. The consequences of their actions could

have been far-reaching. For example, Castlereagh Securities and Mineral Securities were primarily investment companies. They could have offered very little by way of expertise to develop the Nabarlek deposits, but they could have sold the shares to a mining group which could have gained control of the development of the deposits. In fact, there was some elusive suggestion of indirect overseas involvement intended to avoid the foreign-control limitations of the ordinance of September 1970.

Mr Hudson: The company [Queensland Mines] was safeguarded under the ordinance from being taken over by a foreign corporation, but there had been strong discussions and appointments by overseas companies to try and get control of management and sales. Sales become the important part. This is another thing that I would think is important because again you have effective control of a company if you can take over its management and sales organization.

(Ev. 2135)

Quite clearly, with all the possibilities of the large shareholdings of Castlereagh Securities and Mineral Securities being used in an attempt to effectively control the uranium deposits, the directors of Kathleen Investments should have been made fully aware of the share purchases.

#### The Intra-Board Dispute

The Committee was concerned about the dispute within the board which subsequently came into the open when the P.R.A. proposal became known. It became apparent from the evidence that an important factor contributing to this dispute was the widespread power of Patrick Partners. Mr Hudson told the Committee:

For some years, as I have indicated to you, there was an imbalance in our Board in that three directors were associated with Patrick and Co. After the Minsec collapse, I became aware of the Power Resources Scheme. I then saw the position that Patricks could control the Board and could also have a big pressure from a very large shareholding. I regarded this as a dangerous position. Whether it would or would not have been, I am not making any comment. All I say is I did regard the position as vitally dangerous.

(Ev. 2134)

After the P.R.A. scheme became known to the remainder of the board, there was much bitterness. There was strong reaction to a situation where two directors knew of and were concerned with the purchase of a 20 per cent interest in their own company, and knew also that the shares were purchased through the nominee company of one director's own brokerage firm. It was felt by Mr Hudson in particular that a director should not encourage anyone to buy a large shareholding in his company secretly. This came out into the open when Messrs Dowling and Roberts came up for re-election to the boards of Kathleen Investments and Queensland Mines. The Annual General Meeting of Kathleen Investments was scheduled for Friday, 28 May 1971. Messrs Dowling and Roberts sent a circular to shareholders dated 20 May 1971 (Committee Document 13-11) answering allegations made against them in certain press reports. The allegations included the failure to inform the directors of Kathleen Investments of the P.R.A. affair and of 'wearing many "hats"'. The two directors denied that their actions were taken against the interests of Kathleen Investments shareholders and enclosed proxies asking that shareholders vote for their re-election.



The Australian Shareholders' Association also sent a circular to Kathleen Investments shareholders (Committee Document 13-12). The Australian Shareholders' Association prepared this circular because it felt certain unusual features had arisen and that shareholders of the company should give them particular consideration. The statement said:

Before shareholders exercise their right to vote at the forthcoming meeting the Association recommends that they should seriously consider whether, as a matter of principle, public company boards should include members who have interests which could conflict with those of the companies themselves.

In an earlier section the statement said:

The position of a company director is one of great responsibility, a responsibility which he must exercise in the interests only of the company itself and its members as a whole, and not in the interests of individual members or of others.

At the Annual General Meeting, both Mr Dowling and Mr Roberts resigned before the election in which seven candidates sought election to the four vacant positions on the board.

The Committee was concerned that a board of directors could be controlled by brokers and their associates with a broad range of conflicting interests. The foregoing dispute is evidence of the problems which may arise when this happens. This bitter fight left the interests of shareholders disregarded and virtually irrelevant, and accordingly the shareholders suffered the consequences of the power play of the members of the two boards.

## The Nabarlek Visit

The visit to Nabarlek on 27 August 1970 has already been described. Messrs Dowling, Roberts and Ferguson, directors of Queensland Mines and Kathleen Investments, invited and accompanied Messrs Millner, Antico and Hohnen to inspect the deposit site. Mr Dowling and Mr Roberts were directors of Castlereagh Securities as well as Queensland Mines and Kathleen Investments. Mr Millner and Mr Antico were also directors of Castlereagh Securities. It has been described elsewhere how Messrs Antico and Hohnen used the information so obtained in making substantial purchases of shares prior to the public announcement which caused a spectacular share price rise.

After having performed sluggishly for several months the increased turnover from this buying caused the company's share price to show a marked rise. Because of this increased activity the Sydney Stock Exchange (of which Mr Dowling was a committee member) called upon the company for an explanation. The statement made in response to this request involved earlier disclosure than had been anticipated by the board. The Committee believes that this early announcement was a direct result of the heavy share buying following the visit of the privileged party to Nabarlek and, as we have noted earlier, was unfounded and irresponsible in its form. The details of this announcement have been discussed elsewhere in this Chapter. The Committee believes a member of a stock exchange should not be involved in the conflicting roles we have just outlined if he is to adequately perform his duty as a sharebroker. We believe that the scope for conflict is so wide that it is difficult for the broker to perform his role in the interests of the public in

general and his clients in particular.

For example, because of the visit to Nabarlek and the information available to the board members Mr Dowling was placed in the position of having information not immediately available to shareholders. Therefore, he must have been in an embarrassing position when advising clients whether to purchase shares in Queensland Mines and Kathleen Investments.

As a director he had a responsibility to look after the interests of all shareholders in Queensland Mines. As a stockbroker he had a duty to advise, to the best of his knowledge and ability, his clients.

When clients sought advice in relation to the buying or selling of Queensland Mines shares Mr Dowling would either have to use and disclose his knowledge gained as a director, and so fail in his duty to shareholders who were not his clients and thereby did not obtain this privileged information, or withhold it and thereby give to his clients something less than the advice to which they were entitled from their broker.

It would have been very difficult to forget about private information when talking to clients or managing their discretionary accounts. Bearing in mind his responsibility (as a director of Queensland Mines) to refrain from taking advantage of inside information, Mr Dowling's position was untenable without clear conflicts of interest.

## Summary

We have referred to the potential conflicts of Mr Dowling and Patrick Partners. The three examples we have given show these conflicts were not always reconcilable. The duties of director, broker and partner were different:

- \* as a director there was a fiduciary duty to the companies being served;
- \* as a partner there was a legal duty to fellow partners to disclose information which affected the welfare of the firm; and
- \* as a broker there was a duty to advise clients on all facts relevant to an investment decision.

The Committee is aware that in the United States and other nations the problem has been regarded as serious. We are convinced that there is a need in Australia for a body which can exercise a regulatory function in relation to these conflicts and other consequential matters.

In a statement presented to the Committee on 3 June 1971, Mr Dowling said:

Obviously, an adviser cannot act for 2 clients whose interests are opposed, because in such a case he cannot fulfil his duty to either of them.

(Ev. 1458)

The Committee entirely agrees with this view, and regrets that

Mr Dowling allowed himself to be placed in a position where he was unable to fulfil his duty. Mr Dowling added: 'But such a conflict of duty is easily identified - and easily resolved'. Apparently Mr Dowling found it more difficult to identify and resolve such a conflict than he had anticipated.

#### Failure of the Directors to Submit Quarterly Reports

##### A.A.S.E. List Requirement, Section 3.F.(2)

This section provides as follows:

Notwithstanding Official List Requirement 3.F.(1) above, all Mining and Oil Companies which are prospecting and/or exploring and/or engaged in search for minerals including oil shall provide on a quarterly basis, and more frequently when circumstances warrant full disclosure of production, development and exploratory activities and expenditure incurred therein. Six copies of such Report shall be lodged with the Stock Exchange not later than the end of the month following the termination of the quarterly period. When there has not been any production, prospecting and/or exploring activities the Company shall lodge a report to that effect.

It is particularly disturbing to the Committee that in the case of Queensland Mines there was a failure to comply with this section. In addition, the Sydney Stock Exchange of which one of the directors of Queensland Mines was a committee member did not take the necessary steps to ensure the company complied with this section. There is no doubt that both the board of Queensland Mines and the committee of the Sydney Stock Exchange can be strongly criticised for their apparent lack of interest

in ensuring the protection of the investing public by complying with this requirement.

#### Stock Exchange Confusion as to Meaning

Mr Lincoln Madden, the Secretary of Queensland Mines, was asked about the quarterly reporting requirement.

Senator Rae: Mr Madden, if I could ask you a question now, in the course of your duties at the time did you specifically check with the Sydney Stock Exchange as to whether the September statement would be accepted in lieu of a quarterly report?

Mr Madden: At that particular time I do not really believe that the Stock Exchange knew what was specifically required. I first went into the Exchange on 11 May and endeavoured to ascertain from Mr Foldes what was specifically required in this respect. You will appreciate that I was there as secretary of both Kathleen Investments and Queensland Mines. Kathleen Investments was lodging quarterly production reports and Mr Foldes explained to me that the purpose of the new regulation was to encompass the new exploration companies that were not making any reports. I asked him for details of precisely what was required and what was meant by the new section, and also I asked what companies were in fact complying with this requirement. After quite some difficulty he managed to bring to light one particular report from, I think, All State Exploration. But basically, the position remained as then that they were not over-specific in what was required; they could not be specific in the generalisation of this requirement. I referred this back to Mr Hudson. The discussions ensued as was disclosed there. I did not at any time question them as to whether the 1st and 2 September statement was accepted in lieu of a quarterly report because at the particular time we were still in discussion as to whether we were really required to submit a quarterly report. It was only as the year developed out and the major companies were, let us say, brought into line on it that this was agreed. But we had no demand

from the exchange for this report in compliance with the new section of the Stock Exchange requirements.

(Ev. 2180)

Here was the situation of a regulatory body giving the appearance of being unsure as to what was required in relation to its own rules which required quarterly reporting. In our view the company did not issue quarterly reports as required by the regulations for the quarters ending 30 September, 30 December and 31 March. The result of not issuing these quarterly reports has been discussed elsewhere in this chapter. However, we consider that both the board of Queensland Mines and the committee of the Sydney Stock Exchange must be criticised for the failure to present regular reports to the investing public.

The Committee recently invited the Sydney Stock Exchange to express its views of the evidence given by Mr Madden. However, personnel changes in the Exchange's staff meant that the relevant officers were no longer available to comment. (Committee Document 13-13).

#### Deficiency of Reports in Intervening Periods

The Company made special reports on the Nabarlek deposit on 1 September 1970 and 5 February 1971. Because of the narrowness of their context and the general framing of their content they could hardly be categorised as quarterly reports even if they had been published when required by the rules.

As an illustration we note that the Westmoreland area was regarded as having high potential as a uranium deposit. Yet,

between July 1970 and 5 February 1971, the shareholders were not given any report of the progress of drilling in the Westmoreland area. But this highlights only one deficiency in the reporting by the board of Queensland Mines.

We believe that, although there could be a situation where there is nothing new to report, this does not justify the omission of quarterly reports by a listed company. This fact alone is of significance and worth reporting. An investor is entitled to this information and any other relevant information. It should not be retained as the property of the Board of Directors.

Although the directors of Queensland Mines can be criticised for failing to issue quarterly reports the confusion created by the Sydney Stock Exchange on this matter is to be deplored.

#### The Regulation of Geological Reporting

The detailed account which has been given of the repeated process of geological misreporting by Queensland Mines will have made it evident that we can find no justification or tenable excuse for the sustained sequence of misleading statements and failures to report. The geological report which we commissioned from Watts, Griffis and McOuat reinforces this conclusion. In the arguments presented by Mr Hudson, from his explanation that the 1 September 1970 announcement resulted from a stock exchange request for comment on share price movements, and its inaccuracies thereby justified, though his attempted justification of the term 'indicated reserves' to his account of



the misleading impression conveyed by his address to the Annual General Meeting of shareholders in June 1971 and his grounds for rejecting Mr Rodgers' subsequent demands for correction of that wrong impression, there is a continuing vein of speciousness. Yet the misrepresentation was successfully maintained, in the glare of intense worldwide public interest, for almost a year. It was maintained in spite of the prescribed safeguards of stock exchange and State regulatory authorities. It is necessary to inquire how responsible parties failed to provide effective checks, and so discover how a recurrence may be prevented.

The Committee questioned Mr Dowling, who was evidently the most influential of Mr Hudson's fellow directors. Mr Dowling's interests straddled the two worlds from which it might have been hoped that restraints on misreporting proclivities would come: in addition to being a director of Queensland Mines and Kathleen Investments, he was a member of the committee of the Sydney Stock Exchange and a stockbroker of recognised capability.

Mr Dowling had not been present at the board meeting of Queensland Mines which sanctioned Mr Hudson's dramatic announcement of 1 September 1970. He was therefore unable to say how closely the other directors had examined Mr Hudson on the justification for his geological claims. At a previous board meeting, however, he had heard Mr Hudson express an opinion that there were 95,000 tons of uranium oxide at Nabarlek and, when the 1 September announcement referred to 55,000 tons of indicated reserves, he took this to be the result of a proving up of part of the ores by drill assays. He said: 'Indicated, I have always believed and still believe has a

context of grade. You cannot have a grade unless you have assay results of the diamond drill hole' (Ev. 2282). Concerning the Queensland Mines board meetings in general, Mr Dowling said: 'The board never received any assay drill results' (Ev.2281). When he was asked whether the other directors ever asked Mr Hudson for the assay details to support the information Mr Hudson presented to them, Mr Dowling said:

At a board meeting, when you receive a report, you discuss the report. You do not say that you believe it is incorrect and that you want to see the chief accountant, if it is figures, or the geologist or something like that. The normal way in which a board receives its report is through its chief executive. In this company it was even more than the chief executive, it was also the Chairman. He is a pretty influential figure. I think you are entitled, as a board member, to expect him to be forthright, honest and accurate because he is your source of information. To my mind, that applies to all boards.

(Ev. 2284)

The question arises as to the competence of the board to deal with matters relating to mining, and whether they may be regarded as laymen and so absolved of responsibility for the publication of technical but inaccurate information.

Mr Hudson claimed, in evidence, a wide knowledge of the mining industry arising from 30 years experience. Other directors had broad experience as directors of mining companies. For instance, Mr Dowling was a director of Kathleen Investments (Aust.) Limited, Metals Exploration N.L., Norseman Gold Mines N.L., Western Titanium N.L., Conwest Exploration N.L., Longreach Oil Limited, and Longreach Metals N.L. Presumably this

experience would ensure a general understanding of the mining industry and the management of mining exploration companies. Mr Roberts was a director of Coffs Harbour Rutile N.L., Flinders Petroleum N.L., Kathleen Investments (Aust.) Limited, Pilbara Tin Pty Limited, Queensland Mines Limited and Rutile & Zircon Mines (Newcastle) Limited. Mr Ferguson was a director of Abrolhos Oil N.L., Farmout Drillers N.L., Hawsburn Drillers N.L., Kathleen Investments (Aust.) Limited, Longreach Oil Limited, Longreach Metals N.L., Pilbara Tin Pty Limited and Queensland Mines Limited. Mr Tilley was a director of Kathleen Investments (Aust.) Limited, Mary Kathleen Uranium Limited, Pilbara Tin Pty Limited, and Queensland Mines Limited.

The Committee was concerned about the question of the qualifications and responsibilities of directors. For instance, can Mr Dowling, a director of seven significant mining and exploration companies, plead total reliance upon officers of the company in relation to matters of fundamental significance to a company and its shareholders? Shareholders, knowing of the broad experience of such directors, should be entitled to expect more.

A second issue that the Committee raised with Mr Dowling concerned Queensland Mines' failure to release quarterly reports on the due dates laid down by stock exchanges, these dates being one month after the end of each quarterly operational period. Mr Dowling suggested in reply that the announcements actually made by the company effectively met, or even more than met, the formal requirement. For example, referring to the report issued on 5 February 1971, he said that 'if it had been issued on 1 February, [it] could well have been

a quarterly report to 31 December. However, 4 days later it was a better report than that because it went another month forward, under no rules, just because it was giving more disclosure' (Ev. 2024). And again: 'In summary, the stock exchange insists on quarterly reports for the purpose of disclosure. If disclosure is made in another report on factors which affect value this would overweigh the quarterly report' (Ev. 2025).

A third question raised with Mr Dowling was prompted by his evidence that he considered that the Annual General Meeting on 2 June 1971 effectively provided scope for supplying information which had been due in a quarterly report in respect of the period ending 31 March, but which was not presented. However, he added that in his view Mr Hudson's statement to the meeting conveyed a false impression of the number of holes which had been drilled at Nabarlek. Part of the Committee's discussion with Mr Dowling was as follows:

Senator Durack: What bothers me is why nothing further was done then by the exchange and by you.

Mr Dowling: I have already said that I suggested very strongly that the position should be clarified as soon as possible.

Senator Durack: You did that to the directors of the company?

Mr Dowling: Yes.

Senator Durack: But I am concerned and Senator Little is concerned with your position as a member of the exchange and, indeed, the committee of the exchange.

Mr Dowling: It would be very difficult, would it not, to have been involved in publicity which came by chance bankruptcy of Mineral Securities, which

involved me coming before this Committee to answer some wild allegations that were made, and from that situation to be picked on, making it untenable for me to remain on these boards. I would have sounded pretty much just a sour grapes man if I had gone to the meeting and started attacking the companies. I know that is a personal explanation, but I do not think anyone would have listened to me. Do you think they would?

Senator Durack: But you could have queried why there had not been a quarterly report put in and some line of inquiry could have been pursued.

Mr Dowling: There had been an annual meeting since the quarterly report. The quarterly report falls out of importance after an annual meeting, surely.

(Ev. 2026)

The first comment we wish to make on these passages from Mr Dowling's evidence is that strictly formal quarterly reports from mineral companies should present a complete record in respect of the period covered. Such comprehensiveness may be avoided if topical informal statements are issued at irregular intervals. If the board had furnished an explicit account of each quarter's proceedings, the company might have been less able to avoid specifying detailed drilling results, and less able to avoid relating its public appraisal of the reserves to the realities of the results derived from the drill holes.

It is impossible to say whether Mr Hudson and the board avoided the formalities of issuing quarterly reports for such reasons, but it is noticeable that they refrained from making quarterly reports during the year in which the public was misled. Mr Dowling's justification of a looser, less regular reporting system would only have substance when those responsible

for preparing the reports were always and indubitably, in his words, 'forthright, honest and accurate'. Even so, the looser system could only have been safely condoned by Mr Dowling and his colleagues on the board if they themselves were in regular receipt of full, detailed drilling reports. As it was, these results were being withheld from the board, and were apparently not sought until Mr Rodgers pressed for them in June 1971. But even if the results had been available, and even if Queensland Mines' irregular reports had been scrupulously truthful, the presence of a committee member of the stock exchange on the board of a company that was breaching the exchange rules could have created unfortunate precedents for exploitation by less responsible companies. It is possible that Mr Dowling's presence on the board of this non-complying company inhibited the stock exchange officials from firmly insisting on the submission of quarterly reports, or lulled them into a sense of misplaced confidence in his detailed knowledge of the company's affairs. But in failing to demand compliance from Queensland Mines, the exchange was compromising its power to demand prompt quarterly reports from other mining companies. We believe that there is a lesson to be noted here concerning the implications of the presence of a senior member of a stock exchange on the board of any listed company. Such companies cannot avoid setting a public example, good or bad, in their standards of conformity to stock exchange rules.

Another subject on which we have quoted part of Mr Dowling's evidence is that of each individual director's responsibility for company announcements. We wish to consider the position of all non-executive directors of mining companies. It is probable that Mr Dowling expressed a common and natural

viewpoint when he stated that after directors receive a report from the chief executive they 'discuss the report' and do not spend time challenging its veracity. There is force in his argument, but the experience of 1970 raises the question of how far that viewpoint should be maintained.

In September 1970, Mr Hudson evidently misled his fellow directors as well as the general public into believing that the company's sensational announcement of uranium richness at Nabarlek was based on drill assay results. In the public's eyes, all directors were associated with that announcement, but the other directors seemed to be conscious of this fact only when they subsequently became aware that Mr Hudson was retreating from his original position. His fellow directors were at least in part captives of the grossly misleading announcement of 1 September. To retract meant that they, as well as Mr Hudson, would be admitting a mistake of major proportions. Mr Rodgers, the one director who pressed for a public correction, joined the board in April 1971, and therefore had no association with the earlier mis-statements. Mr Hudson, indeed, argued before this Committee, as he had to Mr Rodgers, that a substantial reduction in grade richness need not be crucial so long as the tonnage originally claimed could be proved in due course. For reasons we have already given we would not expect a Board of Directors who were in an objective frame of mind to accept this as justification for not telling shareholders the truth. To the extent that the unwillingness of other directors to insist on a public correction was due to a sense of personal embarrassment, they were acknowledging that they were implicated in the original error simply by virtue of being on the board.

In general, then, there appears to be a degree of ambivalence in the claim that directors are expected to take the honesty of their executive for granted. The extent to which some or all of the non-executive directors with their various interests in large direct or indirect shareholdings in the company and Kathleen Investments may have preferred to refrain from sadly disabusing the market is a matter for conjecture. Certainly those who had plunged into large scale purchases had potential conflicts of interest as the truth in relation to the real magnitude of the mining potential began to be revealed.

Though of necessity our inquiry into the incidence of such mis-reporting has been far from exhaustive, Queensland Mines did not provide the only example of inaccurate geological reporting that came to this Committee's attention. Other instances, of varying degrees of seriousness, are mentioned elsewhere in this Report.

Since 1970, the A.A.S.E. List Requirements have been tightened. They now prescribe that a company's report on its mineralisation of ore should be based on information compiled by a member of the Australasian Institute of Mining and Metallurgy who has had at least five years experience in his field of activity. Some definitional guidelines for the public description of ores and mineral reserves have also been provided. This tightening is commendable, but it falls short of providing adequate protection from recurrences of deliberate misrepresentation. The new stock exchange provisions, if they had been in force in 1970, would not in themselves have prevented Mr Hudson and the board of Queensland Mines from acting as they did. The exchanges' investigatory powers, and the sanctions at their



disposal, are limited.

It appears that unusual expectations and demands must be placed on the directors of mining companies because of the absence of a formal procedure for the regular outside audit of the executives' geological reporting. This Committee has pointed to numerous instances of defective standards of financial auditing, which we consider a serious source of weakness in the securities industry, but at least there is an auditing system which can be improved. The comparison between the acceptance by a Board of Directors of its executive's financial statements, and the acceptance by a board of its executive's geological reports, cannot be pressed too far. In one case the members of a board have, and in the other case they do not have, an independent outside functionary to whom they can delegate monitoring responsibility. We conclude that in a mining company it should be the entire board's duty to take steps to assure itself directly of the factual basis for the company's announcements, and furthermore that the performance of this function provides a major reason for the existence of the board of a mining company. We submit that a national Securities Commission would be in a position to influence standards of individual responsibility in mining company directorates. We recommend that the power to call for 'geological audits', on lines analogous to this Committee's commissioning of the McOuat Report, be vested' in the Securities Commission proposed elsewhere in this Committee's report.

## Insider Trading

In this chapter we have detailed the individual share trading activities of Messrs Hudson, Antico and Hohnen, together with that of trading and investment companies associated with Messrs Dowling and Roberts.

The Committee received considerable evidence and information in relation to a wide variety of transactions in various companies, suggesting that the purchase or sale of securities or of put and call options had taken place on the initiative of persons with information about the relevant company's affairs which had not been disclosed to the public market. The evidence indicated a wide range of insiders with various means of access to information. In summary:

(i) The Committee received prima-facie evidence of substantial insider trading by directors. In one case, from evidence and information received substantially in camera, the Committee was satisfied that a director who was in charge of an important part of his company's operations had, through nominees, engaged in heavy trading in the listed securities of his company over a brief period at a time when he was aware of very material information which had not been disclosed publicly. Profits of nearly \$1 million were made, to which he was prima-facie beneficially entitled.

(ii) The Committee also received evidence indicative of insider trading by geologists and employees of geologists.

(iii) One other relationship with a company which has been

widely regarded as a potentially fertile source of inside information, involving special risks of insider trading, is that of the substantial shareholder. Following the lead of substantial shareholders has become a common feature of the securities market in recent years. Whatever the ethics of the action it is apparent that in a volatile, rumour-prone market, which did not know whether it was fully informed, this practice became near to the prudent course from the point of view of business and profit-making.

(iv) Not all situations in which a person had direct access to information about a company's affairs are covered by the relationships with the company of director, officer, employee, consultant, employee of consultant and substantial shareholder. A wide range of business and other relationships and dealings and informal associations or understandings may provide access to information about a public company's affairs not disclosed to the public.

(v) Apart from direct access to company property or documents, confidential information about a company's affairs may be communicated in various other ways to outsiders; the 'tip' is one such way.

(vi) The Committee received, on the one hand, evidence apparently disclosing breaches in corporate security which led to outsiders having confidential information. On the other hand, it received evidence indicating numerous instances of attempts to obtain information not generally disclosed to the public market.

The evidence revealed some practices which were clearly improper. For example, the Committee was informed of a practice of paying consultants to divulge information to outsiders about exploration work. In some instances this occurred even before the management of the company concerned was itself informed. The Committee was also advised that share traders had paid geologists to telephone information about exploration developments before informing their own companies.

The Problems Involved in Detecting Investigating Insider Trading and the National Ramifications of these Problems

Several points can also be made as a result of the Committee's inquiries about the detection, investigation and proof of insider trading.

First, it is clear to the Committee that transactions in shares of a company frequently will not be apparent from an inspection of a company's share register. That register records the legal ownership of shares. It was uncommon to find an insider engaging in transactions for the benefit of himself or other individuals or for known public companies where the names of the beneficial holders appear on the share register. That was sometimes because the transactions were never shown on the share register, the beneficial ownership of the shares passing without any request being made to alter the register. This was often because the shares were registered in the names of nominees, including the nominee companies of banks, brokerage houses and investment banking companies.

Second, even when access to the scrip cards and other records of brokers was obtained it was commonly difficult to identify any insiders or their associates from those records. This was often because nominees were used. In some instances a proprietary company appeared to be the client of a broker. On further investigation it might appear that the shares in the proprietary company were held in the names of accountants, solicitors, or others acting as trustees under trust deeds in respect of the shares in the company for insiders or their families. The broker himself might not know the ultimate beneficiary of any profits from trading - he may have dealt only with nominees. In other instances banks were used as nominees. The Committee also became aware of the use of fictitious names in brokers' records. The Committee is most concerned by the manner in which nominee shareholding is used to cloak real activity in the capital markets.

Third, the Committee observed several instances involving the use of foreign companies, trustees and banks. The use of Swiss and other European banks by Australians was noted.

The Committee also examined several instances in which a company incorporated in a foreign jurisdiction, such as Hong Kong or Singapore, with its shares registered in the names of accountants there, engaged in transactions in shares of Australian companies through Australian brokers; the ultimate beneficiary was in fact a company insider resident in Australia. Such operations commonly involve the creation of foreign funds for the foreign company. The Committee was informed that at least one so-called investment banking company offered a service whereby it would deposit foreign funds to the credit of the foreign company in exchange for a deposit of Australian dollars

to the credit of the investment bank. This would provide foreign funds which would be brought in as foreign investments after Reserve Bank approval had been obtained to remit profits made on capital. In some instances insider trading was undertaken through the medium of a foreign company, creating profits which could be remitted overseas. Various advantages with respect to income tax, estate and death duty, the non-detection of the insider's activity and other matters would accrue.

In the Committee's view, the investigation of securities abuses involving such international aspects is properly and only a matter for national, not State, authorities. It is also an area in which it is appropriate to have the authority of the national government so that means of co-operation can be worked out between it and comparable authorities of other countries. The Committee believes the international regulatory ramifications are of major significance to Australia.

Fourth, it became apparent to the Committee that it would be difficult in many cases to prove that a person who engaged in share transactions did so with knowledge of confidential information. It was frequently asserted by those suspected of engaging in insider trading that orders were placed before the insiders became aware of facts, or that they did not become aware of facts at a time when one would have expected them to have done so if keeping themselves properly informed, or alternatively and equally ingenuously that despite telephone calls or other communication with associates having knowledge, no communication of confidential information occurred. Proof of communication is particularly difficult where, for example, a broking or investment banking house has a member on the board of

a listed company and the house engages in short term trading for its own members' accounts in the shares of the listed company at happily appropriate times.

Fifth, it is clear that insider trading in shares of listed Australian companies involves national and international ramifications. For example, Queensland Mines is incorporated in the Australian Capital Territory. Its principal office is in Sydney. Its reserves of uranium are in the Northern Territory and Queensland. Its relevant documents and records were held in two states and two territories. Its laboratory assays were carried out in South Australia. Trading in its shares occurred through brokers and nominees all over the country and on every major stock exchange in Australia as well as in London. Tasminex N.L. is incorporated in Tasmania. Its Mount Venn claim is in Western Australia. The communication of inside information occurred in Western Australia, in Sydney and by telephone calls between Perth and Melbourne, and Perth and Sydney. Transactions in its shares occurred on numerous Australian stock exchanges and in London. The Committee has been informed that some insider transactions not recorded in the Inspector's report were through Singapore companies.

To investigate insider transactions it is desirable to be able to investigate within hours, transactions all around the nation and overseas, and to be clothed with the authority of the only sovereign legislature in the nation. In one situation investigated by the Committee a delay of several days in investigation and detection of interstate transactions would have resulted in remittance of substantial insider trading profits overseas, beyond the jurisdiction of existing Australian

regulatory and legal process. The implications of those observations are discussed below.

The Poseidon chapter of this Report raises clearly the interstate and international character of both opportunities and abuses in the securities industry.

#### The Effects on the Securities Market

During the period investigated by the Committee, legal restrictions on insider trading were minimal and disclosure of such trading was either accidental or the result of naivety or indifference, and easily avoided with a little forethought. Efforts to detect and investigate insider trading were virtually non-existent in five states and relatively ineffectual in the other state - New South Wales.

Links between boards of companies and brokerage houses, and between geologists and share trading companies were evident everywhere. Tipping sheets and periodicals reporting rumours were common, as were newspaper reports of information being divulged by consultants and others. In such a situation it is not surprising to find that credence was given to rumours believed to be based on leakages of inside information. The belief that confidential information was frequently known to those with the right connections or systems for obtaining it increased the proneness of the market to be moved by rumour. The belief that insiders could and did trade, as evidenced by repeated reports that prices and turnover moved 'ahead' of announcements, assisted those who sought to create false markets by creating false turnover to draw the public into the market.



In the Committee's opinion, insider trading and the weakness of its control contributed significantly to the creation of false speculative markets.

In such volatile, speculative and poorly informed markets, and given the absence of effective control of insider trading, it is scarcely surprising that the large scale and professional share traders should seek to obtain and utilise as much inside information as possible.

A feature of the Australian securities market has been the extensive interlocking of boards of companies with intermediaries in the securities markets and with share trading and investment companies. These links served many purposes, from the much-vaunted provision of experience on the boards of the companies to assisting the underwriter in the placement of shares in funds and other investment companies. It is difficult to avoid the conclusion that the links were also a major source of information and guidance to those conducting major share trading activities. For a time these activities held promise of substantial short term profits and in some cases appear to have been of dominant concern. Such links were not exclusively in the form of directorships for those engaged in share trading and broking. The Committee also received evidence, for example, of a geologist, employed by a sharebroking house, being hired out to a listed company.

The notorious plunder of markets by insiders and professional sharetraders with highly efficient systems for gamering inside information has caused a severe loss of investor

confidence. The long term institutional and individual investor is entitled to invest with reasonable assurance that prices are realistic and will continue to rise with inflation and economic growth. The realisation that the market has been false and that the average investor was at a serious disadvantage by comparison with insiders and those with extensive inside information-gathering systems has been harmful to investor confidence. The confidence of the average Australian and overseas investor in the Australian securities market has been damaged by the paucity of regulation of insider trading.

Relatively minor regulatory alterations will not restore that confidence.

DOCUMENTS

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QUEENSLAND MINES LIMITED  
Suite 3701,  
Australia Square,  
SYDNEY, N.S.W. 2000

5 February 1971

The Secretary,  
Sydney Stock Exchange Ltd.,  
20 O'Connell Street,  
SYDNEY 2000.

Dear Sir,

This report is issued in compliance with the Stock Exchange listing requirements.

The Company, in addition to carrying out geological investigation within its various exploration areas, completed the following developmental work.

Nabarlek Deposit - N.T. Prospecting Authority 2046

Forty seven drill holes with a total footage of 14,023 feet were completed between 1st July 1970 and 31st January 1971.

Drilling, with the exception of some deep exploratory holes, is of a pattern of 50 foot centres with intersections at vertical depth of 50 feet, and is to be followed by another line at 50 foot centres to vertical depth of 100 feet and a further one at 50 foot centres to the bottom of the economic mineralisation.

Completion of such drill pattern will establish proved reserves and grade of the main orebody, exposed or partly exposed. It is expected the main drilling programme will be completed by July this year, but will be followed at subsequent times by further deep drilling and drilling to the south seeking an extension of the orebody.

No calculation of proved reserves and grade is possible at this stage, but drilling indicates a strike length of the northern lode of 850 feet and reserves of at least 55,000 short tons of U308. Drilling has confirmed the existence of an outstanding high-grade uranium deposit.

Due to the wet season, little ground reconnaissance has been possible to date, although the Company was able to extend its ground reconnaissance some 20 miles from Nabarlek, locating three anomalous areas which are worthy of further investigation. Helicopter-supported ground parties will commence field work during February on the balance of the Prospecting Authority.

Our aerial reconnaissance and field surveys, together with discoveries by other companies within the area, indicate this part of the Northern Territory is a major uranium province, in which this Company has substantial areas covered by Prospecting Authorities.

#### N.T. Prospecting Authority 2221

Aerial radiometric and magnetic surveys were completed. Three helicopter-supported outcamps for geologic field parties will be operative in early February and will start semi-detailed work in areas selected, based on an evaluation of existing geologic maps and the radiometric and magnetic surveys.

#### Katherine Area - N.T. Prospecting Authorities 2222 and 2223

Aerial reconnaissance and ground investigations were completed without locating any economic mineralisation and the Authorities will be abandoned.

#### Rum Jungle - N.T. Prospecting Authority 2501

Following withdrawal from the Katherine area, ground investigation of this area has commenced. The area is held in conjunction with Australian Aquitaine Petroleum Pty. Limited.

#### Mount Isa Area

Twenty-five percussion drill holes with a total footage of 6,186 feet were completed on uranium prospects held by the Company under lease within the Mount Isa district to indicate diamond drilling targets for this year.

#### Westmoreland

Drill holes completed during 1970 were 70 diamond with a footage of 35,768 ft. and 170 percussion with a total footage of 7,368 feet. The original estimate of reserves was 10,300 short tons of U<sub>3</sub>O<sub>8</sub>. With one third of the primary zone still to be drilled, present reserves are 10,549 short tons U<sub>3</sub>O<sub>8</sub>.



Drilling at the Long Pocket area proved the extensive surface mineralisation did not extend to depth. Inferred reserves are 2,000 short tons of U308 of a grade of 1-2 lb., which are not being taken into reserve calculation, but could be of economic value as long term reserves.

Other known anomalies within our prospecting area are now being investigated.

Expenditure

Expenditure for the quarter ended 31st December 1970 totalled \$428,000 and for the year ended that date totalled \$2,084,000, subject to year end adjustments and audit.

Yours faithfully,  
QUEENSLAND MINES LIMITED

E.R. Hudson  
Chairman & Managing Director

QUEENSLAND MINES LIMITED

EXTRACT FROM PROCEEDINGS OF THE ADJOURNED 10TH ANNUAL GENERAL MEETING OF MEMBERS HELD AT 2.30 P.M. ON WEDNESDAY, 2 JUNE, 1971, ANZAC HOUSE AUDITORIUM, 26 COLLEGE STREET, SYDNEY

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Q. Mr Chairman - my name is Perl and I have three questions with regard to the Nabarlek area:

1. Will you re-affirm the statement you made on behalf of the Company on 1st September 1970, that drilling and costeaning the first lens gave indicated reserves of 55,000 short tons Uranium Oxide with an average grade of 540 lbs. per short ton of ore?

2. Will you give full details, including complete assays, of each of the 40 diamond drill holes completed by December 31st, 1970 as referred to in the Annual Report.

3. Will you give the approximate time when the Company first became aware of the presence of the dolerite sill in the central part of the deposit, as referred to in the Annual Report?

HUDSON: You have given me you name - perhaps you might indicate whom you represent.

PERL: I don't think it makes any difference.

HUDSON: I think it does - we would like to know whom you are representing?

PERL: I identified myself at the door - I have a valid representation as a shareholder and the answers that you give shouldn't make any difference.

HUDSON: You refuse to identify yourself beyond giving your name.

PERL: I have already done so at the door.

A: The first question - do I re-affirm that on the drilling and costeaning at the 1st September last year the indicated reserves as disclosed by our geologists were 55,000 tons of 540 lbs. grade - the answer is 'yes'.



[The second question] - I do not intend to give you full details of the 40 drill holes. They are not a matter for the share-

holders, and the Board and its technical people will assess the results of these holes in due course when the deposit has been fully drilled.

[The third question] - I became aware of the dolerite sill (I'm speaking from memory) I should say around November/December -approximately November/December.

PERL: Could I have clarification of the first question. You have reaffirmed that at the present time the indicated reserves are 55,000 short tons...

HUDSON: I did not; you asked me whether on the 1st September as a result of the then known diamond drill holes and the then costeans it was stated that the indicated reserves were 55,000 tons of 540 lbs. grade.

PERL: But my question is will you reaffirm now whether this is still the position?

HUDSON: I will neither confirm nor deny it. We gave indicated reserves at the time the deposit was found and we have since set about proving the reserves and we are now in the process of proving and until they are proved I refuse to make any further comment.

HUDSON: Do you represent Nestel Holdings? That last speaker - do you represent Nestel Holdings?

PERL: Mr Chairman - I have identified myself at the door.

HUDSON: I asked you a question - do you represent Nestel Holdings?

SHAREHOLDER: You have no right to ask it.

PERL: Thank you.

HUDSON: I have quite a right to ask it.

SHAREHOLDER: I don't think so.

SHAREHOLDER: I think he has.

HUDSON: That's enough - I'm in charge of the Meeting and if I want to ask a question, I will ask it.

Q. Mr Chairman - my name is T.C. Hastings, I come from Neutral Bay and I am a small shareholder in this Company. I have no other interests apart from the fact that I am a small

shareholder and I think perhaps I speak for many small shareholders like myself. I spoke to you at the end of the K.I. Meeting of which I am also a shareholder.

These are the questions I would like to put to you. First of all, I would like to ask you Mr Chairman. Since I asked you a question at the close of the Meeting of K.I. concerning the uneasiness in the minds of thousands of shareholders, I have been approached by many fellow shareholders to seek from you and your Board today answers to questions which are necessary to enable us (the ordinary shareholders who form your company) to make up our minds on how to vote at this vital Meeting of Q.M.

You said at the Meeting last week that your duty was to your shareholders yet, on the spur of the moment and without full discussion of all the facts, a record number of us were asked to demonstrate by a show of hands vital decisions which could affect the whole future course of the company which is claimed to have the richest uranium find in the world. Now I say this to you with all respect, Mr Chairman, this type of pressure voting must not be allowed to occur again. It is not true democratic voting and it causes the suspicion of planned tactical moves aimed at serving only the interests of groups, and not the shareholders as a whole.

So, Sir, with all respect, I have these questions to put to you and what you say, or elect not to say, will depend the reaction of the stock markets of Australia today.

The first question is this:

Why have we been kept up to now completely in the dark as to progress or lack of it, at Nabarlek, since your first announcement that our company has the richest uranium deposit in the world. Now since you announced it, and your subsequent hurried visit to the Prime Minister which made world headlines, you have for reasons perhaps known only to yourself, maintained a complete and utter silence. Now what has been going on at Nabarlek all these months? What has been revealed and what have you achieved on your visits abroad - I presume at the Company's expense?

That is Question No. 1.

A. HUDSON: Well, there are two questions involved in that, namely,

(a) The criticism that we have not disclosed to you the full information regarding Nabarlek, and

(b) You want to know what I was doing overseas. Is that the position?

HASTINGS: Yes, that is broadly the position, because 8 months ago you made this announcement and in 8 months you have not made

one public announcement nor have you issued one circular to your shareholders. Not you, yourself, but I am talking about your company as a whole. I know you have been a busy man, and this criticism is not aimed at you personally in that sense.

HUDSON: As Chairman, I have to take responsibility for the Board and I accept that responsibility.

The original assessment or indication of reserves at Nabarlek was made on the information then available. They were shown as indicated and not as proved reserves. Now it was very important that a quick assessment of this deposit be made for advice to the Stock Market. You will appreciate our shares had remained at a steady angle, although the Directorate had known of the existence of Nabarlek for some two months. I obtained a detailed report from the technical people who advise the Board and the report was as indicated to the market and shareholders -that reserves in this deposit were as stated at 55,000 tons.

Following an indication of reserves, which is our usual custom - for instance we gave indicated reserves the prior year for Westmoreland at 10,000 tons and I think the proven reserves today are 14,000 tons - we then seek to go about and establish what are the reserves at Nabarlek and what is the average grade. And this is going to require about 100 drill holes to establish. We have done 40 at this time. The results of those 40 holes do not give a conclusive answer nor a full answer and in my view whatever the position might be, it would be most inadvisable to give a further assessment on one half of the necessary drill holes. We will not finish the total drill holes until December, and until they are finished you cannot get an accurate assessment. Uranium mineralisation varies terrifically every few feet. It needs close drilling to give an average grade and until we finish the full amount of drill holes we are not in a position to determine them. But I can say this, that from the indication of drilling to date, this deposit is still the best deposit in the world.

HASTINGS: Thank you, Sir, and now Question No. 2. I appreciate that answer very much.

HUDSON: Now secondly I will answer your question as to why I have been wasting your Company's money on a trip overseas.

HASTINGS: I didn't say you had been wasting the Company's money, I said that you had a duty to report to the Company, and if I hadn't asked you this question you would not have reported, except in general terms...

HUDSON: Can I say this to you. Getting uranium contracts is a bit like fishing. You haven't got a fish until you've got it in the bag. If you understood the problems and difficulties of negotiating uranium contracts, perhaps you would be a bit more understanding. I went first to Europe to negotiate three uranium contracts for delivery in 1971/72 - others in 1973/74. I was unsuccessful in obtaining the 1971/72 - which in any event would have caused us considerable problems in supplying. I am hopeful (and again I say I'm hopeful) that of three contracts currently being negotiated in Germany for 1974, of getting at least one or two.

I went to London because I am making arrangements with the United Kingdom Atomic Energy Commission to convert our material into UF<sub>6</sub> because the modern method of selling uranium is not in the form of U<sub>3</sub>O<sub>8</sub> but in UF<sub>6</sub>. I have satisfactorily concluded arrangements with U.K., which gives this company a considerable advantage.

I then went to Japan and saw every Power Station, every Government instrumentality interested in purchasing uranium and I am currently negotiating with Japan for contracts from 1974 up to 1980. Again I say that I will not complete these contracts within a short period of time, but I'm hopeful they are going to be successful. Otherwise we wouldn't be setting about to bring this mine into operation in 1974. But until a contract is signed we have extreme competition from both South Africa and from France, both of whom have stockpiles and are prepared to undercut every price that is made. It is a very competitive market, but I still think, even in spite of this competition, that we will obtain some contracts, although I am not prepared to sell forward our reserves at any give-away price. It takes a lot of negotiations and a considerable amount of detailed travelling to finally obtain overseas uranium contracts and that is the reason for my visits overseas.

HASTINGS: Well thank you very much sir, and my reply to your address is that I think it was a most comprehensive answer, it was very long delayed and I do not think that the public relations branch of your company does you justice. I mean that sincerely.

Q. How do you think we feel sir (and again I put this to you most respectfully) as small ordinary shareholders, wondering what the heck is going on when it is revealed that Castlereagh Securities, of which Mr Dowling is the head, has bought approx. (and here I am going on what I've read and piecing together) about a 20% interest in our company. You have elected to tell





us nothing, either by circular or by announcements in the press, while Mr Dowling, and Mr Roberts for that matter, have had access to all the reports on Nabarlek through their presence on the Board, and for that matter there must be the suspicion that Patrick Partners would know what was going on. Now is it always to be a case of the ordinary shareholders (the backbone of any company) being the last to know what their company has, while there is such room for possible manipulation and will our Stock Markets, in view of this, ever achieve the stability necessary for healthy trading and fluctuation?

A. You are posing some problems in the answering of these questions of course. The position of the Directorate may have changed with Castlereagh buying a large holding. I agree on that. I think I have already indicated that.

Following the death of three original Directors, Sir John Northcott, Sir Alex Reid and Dr Frank Louat, there was an imbalance on the Board and that Messrs Dowling, Roberts & Ferguson were associated with Patricks but I think the answer to some of your criticisms is this, that if the Board knew more than the shareholders and your suggestion that the thing isn't as good, why in the hell do they go on buying?

HASTINGS: You asked me a question then - you said "Why in the heck do they go on buying?"

HUDSON: Well, I'll put it this way to you. You are suggesting that they knew a lot more than what the shareholders knew.

HASTINGS: That is correct.

HUDSON: Now I want to say this to you. The procedure that I adopt to the Board and to the shareholders, is this:

That I request our Chief Geologist to give me a signed statement of the position of reserves and drilling and if they alter the position in my opinion then I take that signed statement to the Board, the Board approve of it and it is then released the same day to the Stock Exchange. My Directors would probably not know much more (unless they wanted to go out and look around and draw their own conclusions and not take it for granted) than the shareholders. I can say that my Directors did not know about Nabarlek until two days before it was announced.

The position is that you have in a company such as ours, a very strict procedure, in that your top technical men must issue a report to me as Managing Director and that report then

becomes available to the Board. If the report indicates in any way a variation (a significant variation) the Stock Exchange is

immediately notified. I agree that Directors must of necessity get information earlier than shareholders, because they are, in fact, directing the company and it is obvious that they must have a better knowledge of the company's affairs than the average shareholder. You can't supply 17,000 shareholders with the same knowledge that a close Board has. But this goes with every company in the world not only this company and there is nothing in the wide world you can do to prevent directors getting more information than the shareholders. After all, it is for the shareholders to determine who their directors are, whether they have confidence in them, whether they have loyalty in them, and it amounts to that.

HASTINGS: Alright, Sir, finally I would like to ask you this.

Mr Chairman, men in high power, in companies as important and vital to the economy as Q.M. and its parent, K.I., have (may I humbly suggest) a bounden duty to, at all times, allay fears, scotch false rumours, and speak clearly on protest and even at times lack of it at a mine as important as Nabarlek. Now our stock markets have been made the laughing stock of the world by what has been described as the "casino like" trading which occurs. Up to now we small shareholders, the countless thousands of us, have had no avenue in which to express our disquiet - we have been to put it very plainly sir, sick to the pits of our stomachs at what has been happening and many of us have had to pay the price of inefficient, and at times corrupt methods, of the powers that be in many mining companies.

HUDSON: Now just a moment - this is a Meeting of Q.M. and not the Senate Committee in Canberra.

HASTINGS: Sir, I realise that...

HUDSON: ...and I'm not going to allow you to use this Meeting to ventilate your views of the stock market. My view might be exactly the same as yours, but it is not relevant to this Meeting.

HASTINGS: It is relevant...

HUDSON: There is a newspaper column in which you can advertise your views, and there is a Senate Committee you can go and attend but this is a meeting of a company and unless your remarks are relative to this Meeting, I do not intend to allow them.

HASTINGS: Alright, Sir, my remarks will now be relevant and I will finish. I have this to say to you. Sir, we regard you as an honest man and a man of high integrity. We also regard you

as a man of exceptional ability. But, however, neither you nor your company, apparently has the slightest knowledge of the value of public relations (and I think that what you have said here revealed it) because you have said it, in some cases, eight months too late. I feel you owe it to us, not only your shareholders, but the people of Australia to give frequent, concise and clear reports on what is happening at what you claim to be the 'world's richest uranium deposit'.

HUDSON: Maybe my views about public relations, in regard to a mining company, are somewhat different to a lot of people's views. I have been aware at what has been happening to the mining market for some period in the last year. I know the slightest talk, the slightest rumour, will immediately put up shares and cause some poor person to lose money. I am very conscious that I do not have public relations and this company is here for one purpose - to find ore bodies, to prove them, to develop them and go into production. Now I don't care a damn about the stock market. I've got a duty to perform which is different to playing the stock market or assisting shareholders to play the stock market. This company's shares have a very good reputation. This company's shares have stood right through the collapse of the stock market at very high levels and I am not going to be a party to seeing some widow lose a lot of money because I make some statement that I can't fully back, and I'll tell you that while I am Chairman I will make no statements that will enable people to manipulate the stock exchange to their own advantage.

When I make a statement it will go to all the shareholders at the one time, and I'm not interested in public relations - I'm interested in building a company.

MR DRUITT (SHAREHOLDER): My name is John Druitt and I have been a shareholder of Kathleen Investments for over ten years and Queensland Mines Limited since its commencement.

I would like to ask you a series of questions which will be concise and brief.

Q. No. 1: Did the proxy vote of Kathleen indicate support for Mr Dowling commensurate with that for the Chairman?

No. 2: Is there any chance of Noranda gaining control of Kathleen?

No. 3: Is there any possibility of the Company being taken over by any other group?

No. 4: Why were Messrs Kennon & Rodgers appointed directors before the Annual General Meeting?

No. 5: What protective measures are in hand at Nabarlek to protect the work staff against the intense radiation from the rich ore?

A. HUDSON: Your first question was - Did I hold proxy votes commensurate with those held by the Patrick organisation. The answer is 'yes'.

A. No. 2: There is not the slightest chance of Noranda gaining control of this company. It is an overseas company who is limited to 5% and they would have a scramble to get 5%. I think perhaps I will turn to that more in answering your next question - but I will say this. I have seen some reports in the papers that Noranda is in a favourable position. Noranda is not in any favourable position.

Mr Rodgers is an Australian, he is an engineer and I am satisfied that he sits on the Kathleen Board as an ordinary director in the interests of the shareholders. If he shows any other interest, I'd know what I'd do about it. Noranda hasn't the slightest, (and I've received this assurance) interest other than as an investment. Nor do I see in any way the slightest risk of Noranda obtaining any influence in management control of the company at all.

A. Nos. 3 & 4: I want you to realise this. Maybe I have been silent on a lot of matters. As you Chairman one of the main duties is to keep a harmonious Company, because nothing can affect the market more for our friends here, than a split in the company. And one of my duties is to try and hold it together.

And for this reason I haven't said as many things as I could have said.

A. No. 4: I have been asked this question - 'Why did I agree to the appointment of Messrs Kennon & Rodgers?'

For some years, as I have indicated to you, there was an imbalance in our Board in that three directors were associated with Patrick & Co. After the Minsec collapse, I became aware of the Power Resources Scheme. I then saw the position that Patricks could control the Board and could also have a big pressure from a large shareholding. I regarded this as a dangerous position. Whether it would or would not have been, I am not making any comment. All I say I did regard the position

as vitally dangerous. Mr Rodgers and Mr Kennon approached me and said that they would be interested in

purchasing the shares of Minsec if they had representation on the Board. I took advantage of the opportunity to get a better-balanced Board by getting two other Directors on. But before I agreed to their appointment to the Board, I obtained their unqualified assurance that they were interested only as investors, and that they would not, under any condition or circumstance, use their shareholding to collaborate with any other large shareholder. Although they have only been on the Board for a period of a month or two, I have the utmost confidence that the assurance to me is going to be carried out and I think they will both make excellent Board Members and I think they give the Board balance.

On the question of Kathleen Investments being taken over. I suppose there are two factors to consider when discussing whether your company can be taken over. One is your Board and are they completely loyal to you and the other is the loyalty of the shareholders to their company. If the shareholders of the company are loyal to their company, and attended Meetings, and if they couldn't attend, issued proxies, and policed who went on their Board, they would be able to effectively resist any takeover, even if an outside interest bought 35% of the shares. You can only have a takeover by controlling the Board, by outside shareholders massing sufficient voting power, to be able to put their representative on the Board and to be able to control the management of the Board to their own interests. Now candidly, it mainly depends on the loyalty of the shareholders to their own company. All I can say about most Australian shareholders is that they are damned apathetic. What they do mostly when they get proxies, is to throw them in the waste-paper basket. So if you are going to complain about a takeover it is up to you people to do something about it. You are the ones who can stop it. You can't ultimately stop someone if they want to go into the market and purchase a 51% interest. But whether any company can do that today, is, in my opinion, extremely doubtful.

No overseas corporation can do it because it is prohibited by the Regulations. All our major companies in Australia are Australian companies and it is a nice thing about Australian major companies they don't go about trying to take over other Australian companies - they go about finding their own resources.

I couldn't imagine Broken Hill Proprietary, North Broken Hill or South Broken Hill, etc. trying to take over your company without the consent of the directors and shareholders. So that unless



you get a power group together and I will say this now - that Power Resources to me was an impractical idea. I cannot concede that you are going to have an effective takeover made to you. The thing to control is your own Board and its loyalty to you. That is in your hands.

SHAREHOLDER: My name is Bovill and I represent a small company with a relatively small shareholding in Q.M., which it has held since the company became public. I would firstly like to say how fully I understand your dilemma and your problems in not being able to make any announcements of tonnages and grades at the Nabarlek deposit. I must confess I am immeasurably heartened by your statement today that had there been any change in the original statement that 55,000 tons with a grade of 540 lbs. it would have been indicated immediately, and this I think should be interpreted in the context in which you said it - not that you can confirm anything because quite obviously with the very close spacing of drilling that is necessary to do this before you can make any confirmation, that at least we have not had anything to alter that view of your technical people. I would rather like to have some further information on this dolerite sill. When the announcement was originally made, I think it was stated that the deposit was open ended at the bottom, and at one end. Does the finding of this sill mean that it is no longer open-ended or that the sill came after the mineralisation - in other words what is the significance, if any, of this sill?

HUDSON: There is some uncertainty about the significance of the sill at the present time. The sill apparently came after mineralisation, and it is at a depth of about 170 feet. We are drilling under the sill at the present time to see what happens to the mineralisation underneath. Some drills have disclosed mineralisation under the sill and we have not yet been able to determine whether the mineralisation contains uranium or not. I'm pleased with your understanding of the position because any statement I make now which is not absolutely in conformity with the drilling could only confuse the issue. I must see those other 40 drill holes before I can give you a final answer, and I think if I made a statement now it wouldn't help. I think that you can only now assess the thing in toto and that can be made only after we have done the full work. You see people don't appreciate we started drilling there not a year ago in difficult country. As a matter of fact during the wet season we couldn't use one of our drills because the leg used to sink into the ground. The drilling has now been delayed, and no-one can prove out an ore body as quickly as we proved ours. It will

be proved as quickly as possible. I am confident of the deposit whatever it might be but I will not be led into making a statement now of the position unless I have the correct technical evidence to support it.

I've simply said this - whatever it is, whatever it might be I don't think it will make much material difference to Q.M., because what we do know makes it an extremely rich and a very good deposit. I wouldn't be going ahead, trying to negotiate contracts for 1974 if I didn't have the fullest confidence that I could go into production in a proper way in 1974.

SHAREHOLDER: Mr Chairman, my name is P.T. Edwards of Castlecrag a very small shareholder in Q.M. I would like to refer to the Balance Sheet and I see that the exploration and development expenditure is 2.1 million per annum and yet our current liquid assets are sufficient for about 6 months. Could I ask you how the company can finance the next 3 or 4 years?

A. HUDSON: You mean what I think I will do? I don't know shareholder - maybe I will be able to make some arrangement where I don't have to issue further capital and I would like to do that if possible - because the smaller the capital the better for the shareholder. If I can't make those arrangements, then of course I will make an issue of shares and as you know they'll always go back to the original shareholders. K.I. never makes a placement - there'll never be a placement of shares in Q.M. If there is any alteration in the issue of the shares, it will be to the current shareholders.

I cannot tell you at this stage just what would be the situation - I'll be giving consideration to it shortly. I did point out, I think, in my report of K.I. that K.I. has assets in excess of \$100 million, and debts of \$2 million. I did tell our Bank Manager that statement was directed at him. So I don't know but at some time or other, obviously, this company will have to make another share issue - just when or how long I'm not too sure - I might obtain loan funds to carry on, or I might try to obtain them in another way, by selling forward uranium for delivery at a later date. Whatever I do will be in the best interests of the shareholders - I can give you an assurance that there will be no placement of shares to any organisation or company - if we do issue shares to get further money at a premium it will be issued back to the shareholders.

SHAREHOLDER: My name is Saxton of Paddington and my question relates to the map on Page 6 of the report.

Q. It would appear that Mount Isa Mines had over-pegged certain

sections of the uranium lode at Red Tree in the Westmoreland area. Could you please advise if over-pegging had in fact taken place?

A. HUDSON: No, actually, the position is quite the reverse. When we decided to take this area up we made an application for an authority to prospect for about 300 sq. miles. It is only when we obtained the authority to Prospect that we noticed there were two leases currently held in Mount Isa Mines' name in this particular area. I understand the leases are held in conjunction with CRA and they were looked at by the company some years ago and were decided of no economic value and were left. Since we have been there they have been drilled. They are relatively small areas as you can see, and they are not sufficiently big to be developed themselves and I have some hopes about them myself of being able to make a deal with them. I can say they were held for some 10 years before we went there.

SHAREHOLDER: My name is Paul Haig and I represent 3 or 4 companies with small interests in Q.M. and also in K.I.

I think that, like myself, all shareholders here today will appreciate the obvious sincerity and informative way in which you have answered all the questions and have given your views on the situation and we all regret the position in which you have been placed through no fault of your own. It does occur to me on the question of public relations that your views are no doubt correct but it would be of great benefit to the shareholders generally, if some post annual meeting report should be published by the company. I realise that it would not be possible to cover all the points that have been raised here today but I think it would be of great use to the shareholders generally if they got a circular from the company in which at least the more important points you made and perhaps some of the questions were set on record. I know in Australia there are only a few companies - such as the Bank of N.S.W., etc. who do publish post annual general meeting reports but this is not so in the world and we all know in America it is the usual thing.

I think in view of all the circumstances that have taken place and all the problems that have arisen, it would be to the benefit of K.I. and Q.M. that such a report be published and I submit this to you for your favourable consideration.

A. HUDSON: Thank you Mr Haig - I will give it careful consideration and submit it to my Board.

SHAREHOLDER: My name is Fred Berry - I am a shareholder and so is my family - there is one question which has not been asked

and not been answered.

Q. Was any information additional to that available to the shareholders generally, given by the company or the directors to Noranda Mines or their representatives to enable them to come to a decision as to whether they would buy the shares in this company?

A. HUDSON: I'm pleased you said there has only been one question that hasn't been asked.

No discussion at all took place with Noranda or the AMP Society relative to the company's exploratory activities nor was any information supplied. I can say that beyond question as far as I am concerned (and I had discussions with these men and with their representatives before they came on to this Board) that they had no more knowledge than what the ordinary shareholder has.

SHAREHOLDER: Cole is my name representing a small company shareholding.

Q. Will the company advise the current position of overseas shareholdings and could the company possibly keep shareholders more frequently informed of the position from time to time during the next few months?

A. HUDSON: You asked a very awkward one there, because the company doesn't decide - it is decided by the Registrar of Companies in Canberra. At this stage they have not yet been able to complete an assessment. You must remember that I thought we had 19,000 shareholders but one of the papers said I was overstating it ' but say we had 17,000. There are a lot of people who own shares with a foreign address and the Registrar in Canberra has been fairly busy over the past three months trying to sort it out because it involved communicating with those shareholders. Maybe in about a month to 6 weeks the company will know what its overseas shareholding is worth - numbers actually. At this stage we don't know as it depends on information supplied by the Registrar in Canberra. I don't know that is of much relevant importance to the shareholders - the thing is overseas shareholding is limited to 15% and supplying shareholders with a tally - whether it 14, 14½ or 15% - I don't know that it would be of much value to them because you can guess that in our company quite a lot of shares have been dealt with on the English market. This has been variable up and down each month I suppose.

Do you really feel that it could be important to shareholders



knowing that the maximum is 15%?

COLE: I feel that it would be quite important to those people who would like to be shareholders.

HUDSON: Well they can enquire of the Secretary of our company once we have the score and get immediate advice on the position. I had discussions in London with the Stock Exchange on this question and probably we might keep them informed to help the overseas purchasers as far as the English buying is concerned. But I am inclined to think that the full 15% will be taken up and maintained, and there won't be much variation, but you will have 15% and other overseas purchasers will be blocked from obtaining registration. That looks the answer to me at the present time.

Are there any further questions?

An earlier question was asked regarding the radiation effect at Nabarlek.

A. HUDSON: Well I had a couple of big lumps of ore in my office, and I did have a geologist next door who complained bitterly because he used to keep a geiger-counter on it and finally they decided, for my safety, to remove it from my office.

We've had discussions with the Atomic Energy Commission here who are quite expert in this field and the problem as you know is radiation. I think it is fair to say we will not be able to mine - we'll have to open cut. It would be too dangerous I feel (and we have been informed to this effect) for us to shaft and try and mine this deposit out - we will have to do a major open-cut. If this is done and reasonable precaution is taken by the men to wash their hands and not roll cigarettes, there is no real danger in the mining of the property.

SHAREHOLDER (MR DRUITT): I have already had the privilege of addressing this Meeting so I won't introduce myself again.

May I refer to the Nabarlek Ordinance which limits the overseas ownership of Q.M. to an individual 5% for a total of 15%. All this business was hurriedly implemented by Mr Gorton at a time when it appeared that Q.M. was in danger from overseas interests. At this stage Mr Hudson was driving ahead looking through his windscreen, perhaps neglecting the rear-vision mirror. The method of control imposed by the Ordinance creates many areas of doubt - Is it unique to Queensland Mines or does it apply to all uranium companies in Australia? How does it apply to companies like Mount Isa Mines, Union



Carbide, Rio Tinto, Noranda and many others. The overseas  
ownerships of these companies far exceeds

the ratio of the Ordinance. (Indistinct tape) Are they expected and called or is it that Queensland Mines is one out?

As a consequence of this Ordinance our shares have been delisted from overseas exchanges and our stature greatly diminished. A great degree of uncertainty exists at the international level and must affect the development of the uranium industry in this country and this at a time when we require vast sums far beyond the Australian capacity to build enrichment plants to absorb the major production of uranium. Surely a better method of controlled ownership is needed and needed urgently.

(Again distorted tape)

DRUITT (continued): Might I analyse the position of Q.M. as it appears to me, and also K.I. We find that more than 5% of Kathleen's capital is owned by the AMP Society and another 5% by Noranda Mines.

HUDSON: This is not correct.

(Indistinct tape) I feel this strength can be of benefit to our company. Another 10% is owned by Castlereagh and this I do not welcome, I do not feel these can be readily absorbed on the Australian market alone, and that is my comment.

HUDSON: I think we have now had quite a lot of discussion and at this stage I am going to put the motion and would ask all those in favour to raise their hands.

QUEENSLAND MINES LIMITED  
Suite 3701,  
Australia Square,  
SYDNEY, N.S.W. 2000

13 August 1971

Chairman and Board of Directors,  
Queensland Mines Limited,  
SYDNEY 2000.

Sirs,

The undersigned officers of Queensland Mines Limited agree that the statement of estimated tonnage and grade of ore reserves submitted to the Board of Directors of Queensland Mines Limited at today's meeting represents a fair appraisal of the actual position based on the information available at this date.

We have reviewed the draft release to the Stock Exchange and agree with its contents.

Yours faithfully,

R.D. HUTCHINSON

P.R. STORK

QUEENSLAND MINES LIMITED

MEMO

TO: The Chairman and Directors

FROM: R.D. Hutchinson

DATE: 16 August 1971

As requested by the Chairman on July 6, the writer formed a committee with Dr Rod and Mr Stork in order to assess the ore reserves of Nabarlek. We commenced work during the week ending July 9. As instructed, we assembled all available information from Nabarlek and made the best estimate of ore reserves possible, using whatever methods seemed most suitable to us.

This work was completed on August 11, and the results were

submitted verbally to the Board at its meeting on August 12 and 13, supported by relevant plans, sections, assay information and calculations.

The estimate was done using a normal cross sectional ore estimation method. Reserves were calculated in two categories as follows:

1. Ore based on a cut-off grade of 0.1% U308 per short ton, and including all ore up to a grade of 5% U308 per short ton.
2. High grade ore based on a cut-off grade of 5% U308 per short ton.

The following assumptions were made because the urgency of the matter precluded a detailed computerised statistical analysis of assay data.

1. Grade 0.1% up to 5% U308.

In determining the length of drilling intercepts to be used in this study, samples below cut-off grade up to 3 feet in length were included if the material both above and below was above cut-off grade.

2. Grade above 5% U308.

(a) Exact assay limits were rigorously followed.

(b) For indicated high grade ore it was assumed that the extension of the high grade ore laterally in each direction in the plane of the section was twice the length of the intercept.

(c) For inferred high grade ore it was assumed that the high grade lenses extended to the mid point between drill holes.

All assay data from the results of 105 drill holes, of which 28 did not intercept ore, and from the surface costeans were plotted on cross sections on a scale of 10 feet to the inch. Raw assay data were used in all cases. Separate geological interpretations for each cross section were made by Dr Rod and checked, and modified where necessary, to fit the above assumptions, by Mr Stork and the writer.

The area for each ore type in each cross section was determined by planimeter readings and the grade was determined by the weighted average of grades from drill intercepts and surface assay data.

As the calculation of ore reserves was to follow a block-wise

method, the block grade was determined by a weighted average of the grades of each two adjoining sections. Cross section areas for the two sections bounding each block were also averaged before computing block volume. Block volumes were determined by multiplying the average block cross section by the block length. The tonnage factor used to arrive at crude ore tonnage was 11.5 cubic feet per short ton. After the computation of each block, the total ore reserve calculation was developed additively and the results were as follows:

Proved ore 398,500 tons @ 16lbs per short ton	= 3,144 tons U308
Indicated ore 36,400 tons @ 240 lbs per short ton	= 4,388 tons U308
Inferred ore 11,600 tons @ 240 lbs per short ton	= 1,400 tons U308

Total	<u>8,932 tons U308</u>
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All supporting data is available at the office for inspection.

R.D. Hutchinson

CORPORATE AFFAIRS COMMISSION  
175 Castlereagh Street,  
SYDNEY, N.S.W. 2000

16 December 1974

Mr D.V. Selth,  
Secretary,  
Senate Select Committee on  
Securities and Exchange,  
Parliament House,  
CANBERRA, A.C.T.

Dear Mr Selth,

I refer to your telephone conversation with me on 13th December seeking information with respect to enquiries made by the Commission in connection with Queensland Mines and Kathleen Investments. I set out hereunder the questions which you raised with me, together with the answers thereto:

Q.1. What were the results of enquiries made by the Commission in relation to share trading in Queensland Mines and Kathleen Investments which were announced about August 1971?

A. In a news release dated 17th August, 1971 the Attorney General said, inter alia:

(i) the Commission had commenced inquiries into share trading in Queensland Mines Limited and Kathleen Investments (Australia) Limited;

(ii) the inquiries were, among other things, to ascertain if there has been any informed selling or insider trading in securities of either company;

(iii) the inquiries would be directed towards determining whether there is evidence of any offence against the provisions of the Securities Industry Act of this State and, if so, the prosecution of the offenders; and

(iv) both companies were incorporated in the A.C.T.

The inquiries for the purpose stated under (ii) were completed prior to 19th October, 1971 and failed to

disclose any evidence of a breach of the insider trading provisions of the Securities Industry Act.

As regards the matter referred to under (iii) inquiries were concentrated on announcements to the Stock Exchanges made by Queensland Mines Limited on and after 1st September, 1970. The purpose was to ascertain whether any announcement, and in particular that of 5th February, 1971, offended against s.73 of the Securities Industry Act. A report on this aspect of the inquiries was referred to the Crown Solicitor who advised that no offence had been committed.

A further matter arising out of the inquiries was the possibility of an offence having been committed against s.124 of the A.C.T. Ordinance. The Commission was advised that the Companies Office in Canberra, after receiving legal advice on the problems relating to jurisdiction, decided that further inquiries into this matter should not be proceeded with.

Q.2. Was any action taken?

A. No proceedings were instituted for the reasons stated above.

Q.3. Was any report made? If so, is it public?

A. No formal report was made.

Yours sincerely,

Mr F.J.O. Ryan  
Commissioner for Corporate Affairs



QUEENSLAND MINES LIMITED

## MANAGING DIRECTOR'S REPORT

23 July 1970

A review of expenditure of Queensland Mines indicated that, if the present costs of exploration were maintained to the end of the year, the Company would be short of funds by October to an amount of \$214,000 and to \$371,000 before the new call, necessitating the Company financing its commitments for two months. Statement of projected expenditure is attached.

A reorganisation of the development and administration of the Company was effected during the month. Costs at Westmoreland have been materially reduced. Withdrawal of two diamond drills at Westmoreland and one diamond and one percussion at Mount Isa, with reduction in staff, will reduce costs in these areas by \$250,000 by December. The drilling out of the Red Tree primary zone, which normally would have been completed by December, will now run on to probably the middle of next year. All forward exploratory work beyond Long Pocket is suspended until the next wet season and concentration will be given to determining reserves in the Long Pocket mineralised areas and extension of secondary reserves at Red Tree.

Mount Isa drilling is limited to one percussion drill at present seeking a new target for diamond drilling. Deep drilling of the Valhalla Lease gave no conclusive extension of reserves at depth. A check of drill holes disclosed they flattened. For the time being, no further drilling will take place at Valhalla.

Two diamond drills will be operating at Oenpelli, one already in operation and the other to commence in the next week. Priority in expenditure until October will be given to Oenpelli. The costeaning of this area by backhoe to a depth of 12 feet disclosed a 2½ foot reef of pitchblende of approximately 72% uranium, or about 1,350 lb. to the ton. The material within a distance of 30 feet was highly mineralised in a range of 10-500 lb. to the ton. The strike of the lode would appear to be 900 feet with a possible extension under a laterite covering to the south. Plans, assays and additional information will be available at the Board Meeting.

Dr Rod and other Company geologists who have inspected the area consider there is every possibility of the mineralisation



extending to depth. The area is flat and there is about 4,000 tons of material at the surface, the higher grade portion of which will need to be removed before the wet season or stored in a shed.

The area has been inspected by the Atomic Energy Commission and correspondence and discussions have taken place with the Commission with a view to retaining the Rum Jungle plant to enable the high grade ore from the deposit to be processed, giving the Company an opportunity to move into a production and attaining a cash flow position by 1972. Carting costs are estimated to be \$8 per ton but, should the ore body persist at depth, such cost would be negligible having regard to the grade of ore, which will enable the Company to sell at a considerable profit below the present world price of \$US7-00. Copy of correspondence with the Atomic Energy Commission is attached.

Negotiations are at present pending with Tokyo Electric for a possible contract for supply during 1971 at a price of \$US7-00 per lb. The plant at Rum Jungle is due to close in April next and a conference is taking place in Canberra to consider the transfer of the plant from the Dept. of National Development to the Dept. of the Interior which, if effected, would mean the break-up of a large part of the Rum Jungle operation.

Unfortunately we are not in a position to determine reserves or to make any concrete proposal to the Government, although I understand the Atomic Energy Commission, following inspection, are of the opinion that we should be able to supply Rum Jungle with ore to extend its operation. Maps and samples of the ore will be available at the Board Meeting.

Our exploratory work from Katherine is now well under way and aerial photographic magnetic and spectrometer flying are being studied to delineate specific targets. The helicopter has arrived in Sydney and is being assembled and radiometric equipment installed. The helicopter will leave for Darwin on 17th August. One of its first assignments will be close spectrometric flying of our A to P in the vicinity of Oenpelli. Peko Wallsend have found a deposit some 20 miles west of Oenpelli and it is thought that the 15 miles from Oenpelli to our boundary should receive urgent close scrutiny.

E.R. Hudson

DOWNING & DOWNING  
(Solicitors and Notaries)  
21 Howard Street,  
PERTH, 6000  
Western Australia.

22 December 1971

Edward Frank Downing, Q.C.  
Robert Holmes  
V.J.A. O'Connor, LL.B.  
Derek Rose Gascoine, LL.B.

REF. RH/DB

The Secretary  
Select Committee on Securities  
& Exchange  
Australian Senate  
CANBERRA A.C.T. 2600

Dear Sir,

re J.H. Hohnen

Further to our previous correspondence we now enclose as requested, our client's statement of facts in the form of a statutory declaration.

Our client retired some two and a half years ago as the result of a severe coronary occlusion followed by a second attack. As a result of the wide publicity given to the statements made by your Chairman with regard to our client's share purchases between the 31st August 1970 and the 3rd September 1970 our client was caused great distress and embarrassment, particularly as our client was then overseas and was not aware that investigation was being made into his affairs. His medical adviser considers that a personal attendance before your Committee could seriously affect his health and it is hoped that the very full statement submitted herewith will meet the Committee's requirements. Nevertheless if so required our client is prepared to attend before the Committee in which case we assume his expenses of attending will be reimbursed to him.

Yours faithfully,  
DOWNING & DOWNING



Western Australia

Statutory Declaration

I JOHN HAROLD HOHNEN of 44 View Street Peppermint Grove in the State of Western Australia Mining Engineer do solemnly and sincerely declare as follows:

1. I am an Australian by birth. My parents were Australian and in fact I am of the 4th generation of an Australian family.

2. In the month of August 1970 I received an invitation by telephone from Mr John Roberts, Chairman of Longreach Metals NL, to join a party proposing a visit by air to a number of mines in Northern Australia. He asked me to join the party as there was a spare seat in the aircraft. I have known Mr Roberts for approximately 10 years and had assisted him as consultant in matters pertaining to the Ripon Hills ferruginous manganese deposits held by Longreach Metals NL.

3. I accepted Mr Roberts' invitation, travelled by air to Sydney (paying my own fare) and there met the other members of the party, some of them for the first time.

4. On the 23rd day of August 1970 we left Sydney by air for Mount Morgan and after looking at operations at Mount Isa, Westmoreland and Tennant Creek we visited Nabarlek on the 27th day of August 1970 of which to that time I had no previous knowledge and was quite unknown to me.

5. At Nabarlek I was shown some costeens and some drill cores which indicated that a rib of pitchblend had been intersected and I was impressed by what I saw and by the potential which was thus indicated. I have since learned that an announcement to shareholders of Queensland Mines had been made and published to the Sydney Stock Exchange on the 3rd July 1970. I was not aware of nor had I seen the announcement at the time of my visit to Nabarlek.

6. At no time was it suggested by Mr Dowling or any other member of the party that there was anything confidential in what we learned during the visit to Nabarlek or, for that matter, in what we had seen at any of the other mines visited by the party. In fact, with the knowledge of Mr Dowling, I brought away with me a number of specimens from Nabarlek which I showed to various persons, feeling perfectly free to do so.

7. From Nabarlek we went to Mr Antico's property at Mudginberry where we spent the night and next day flew to Darwin



where Mr Dowling left the party and we then proceeded to Port Hedland where we stayed overnight and went on to visit Ripon Hills on the 28th August 1970. After visiting Ripon Hills we returned to Port Hedland where I left the party and returned to Perth by McRobertson Millar Airlines arriving in Perth on the 28th August 1970.

8. On Monday the 31st August 1970 following my return, by telephone I discussed the possibility of making some investments with two Melbourne sharebrokers and explained the circumstances in which I had some knowledge of Nabarlek and I was told that the then Chairman of Queensland Mines had through the Sydney Stock Exchange issued a preliminary statement to shareholders on that day the 31st August 1970 and the shares had moved upwards. I instructed these two brokers and also a Perth merchant banker to make a purchase of shares in Queensland Mines and Kathleen Investments for me, my family and for certain companies with which I am associated. To buy shares under such circumstances is normal procedure for visitors to mines particularly from overseas after they are shown the potential of particular mining operations. The following shares were purchased at my request:



<u>Date</u>	<u>Company</u>	<u>Bought for</u>	<u>No.</u>	<u>Price</u> \$	<u>Through whom</u>
31/8/70	Queensland Mines	C.H. Trading Pty. Ltd.	1000	11.02	Perth merchant bankers as portfolio managers
"	"	"	300	10.60	"
"	"	"	200	10.80	"
"	"	"	500	11.10	"
3/9/70	"	"	1000	six months call options premium \$8250.00 exercise price \$23.00	"
31/8/70	"	J.H. Hohnen	200	4.60	First Melbourne broker
"	"	Sherlock River Co. Pty. Ltd.	200	11.00	"
"	"	"	200	10.80	"
"	"	"	200	10.20	"
"	"	"	140	10.60	"
"	"	"	60	10.50	"
"	"	J.H. Hohnen	100	10.80	Second Melbourne broker
"	"	"	100	11.20	"
"	"	"	100	8.00	contribs"
"	"	"	150	8.60	" "
"	"	"	50	8.40	" "
"	"	G. Hohnen	100	10.60	" "
"	"	"	100	11.20	" "
"	"	M. Hohnen	100	10.60	" "
"	"	J.R. Hohnen	100	11.00	" "
"	"	D.J. Hohnen	100	11.00	" "
"	"	C.J. Hohnen	100	11.00	" "

<u>Date</u>	<u>Company</u>	<u>Bought for</u>	<u>No.</u>	<u>Price</u> \$	<u>Through whom</u>
2/9/70	Queensland Mines	ChurchHill Securities Aust Pty. Ltd.	70	20.00	First Melbourne broker
"	"	"	930	19.50	"
31/8/70	Kathleen Investment s	J.H. Hohnen	100	4.30	"
"	"	"	300	4.20	"
"	"	"	100	4.23	"
1/9/70	"	"	300	4.60	"
3/9/70	"	Miss J. Hohnen	1000	6 months call options premium \$1450.80	"
"	"	Mrs M. Hohnen	1000	exercise price 4.80	"

9. C.H. Trading Pty. Ltd. is a wholly owned subsidiary of Church Hill Securities Aust. Pty. Ltd. in which my family company St. Just Investments Pty. Ltd. owns one third of the issued share capital.

Sherlock River Co. Pty. Ltd. is a company in which my said family company holds a substantial interest.

10. I wish to make it perfectly clear that I did not personally for myself or any members of my family at any time use a nominee company nor was there any attempt made by me to conceal the purchases. The 2000 Queensland Mines shares purchased as above on the 31st August 1970 and the 1000 Options in Queensland Mines purchased as above on the 3rd September 1970 for C.H. Trading Pty. Ltd. were purchased on my suggestion to the portfolio managers for C.H. Trading Pty. Ltd. I have since learned that these shares were purchased and held in the name of the managers nominee company. The 1000 Queensland Mines shares purchased on the 2nd September 1970 for Church Hill Securities Aust. Pty. Ltd. were purchased through the first Melbourne brokers, in the name of that company.

11. I have for many years as a mining engineer been associated with major mining companies and projects both in Australia and elsewhere and have always conducted my affairs in accordance with highest ethics of the profession. Since my retirement I have retained my interest in mining as a director and consultant to various companies. I regarded the purchase of the shares in Queensland Mines and Kathleen Investments as a normal business transaction.

12. The above purchases constituted the whole of my investments in Queensland Mines and Kathleen Investments and there were no purchases at my request or instigation through any broker in Australia other than those mentioned nor were any shares purchased for or on my behalf or for members of my family or for any company in which I am associated outside Australia.

And I make this solemn declaration by virtue of section 106 of the Evidence Act 1906

DECLARED at Perth in the State of)  
Western Australia this 22nd )  
day of December 1971 Before me :)

J.H. Hohnen (signed)

THE MOUNT ISA SYNDICATE

Report on Visit to Queensland and Northern Territory, May 11th  
- 19th, 1971.

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MEMBERS OF MT. ISA SYNDICATE

Paul Bentivoglio	Investment Adviser, Patrick Partners
Colin Callegari	Mining Analyst, A.M.P. Society
Peter Davies	Economic Adviser, New Zealand Insurance
Robert Gottliebsen	Partner, Patrick Partners
Jack Hurley	Investment Officer, National Mutual Life
Garry McDouall	Investment Officer, Colonial Mutual Life
Lionel Milligan	Geologist, Patrick Partners
Brian Nolan	Investment Manager, Castlereagh Securities
John O'Connor	Mining Analyst, Darling & Company
Kerry O'Connor	Manager, Commercial Nominees, C.B.C. Bank
John Sennitt	Investment Officer, Australasian T & G
Robert Smith	Investment Analyst, Ord B.T.
Ray Willing	Investment Manager, N.R.M.A. Investments
Malcolm Wilson	Investment Analyst, Patrick Partners

General Impressions

The following report covers the 5,000 mile trip through Queensland and the Northern Territory that the Mount Isa Syndicate made during May 1971. In the short space of nine days, we visited no less than 14 major mineral developments and gathered a substantial amount of first-hand information on the companies involved.

The overall impression from the trip is that over the next few years we can expect a rapid expansion in mineral output in northern Australia as new mines come into production and existing mines increase their rates of output. At Mary Kathleen, M.K.U. is preparing to recommence operations in 1974 and Mount Isa Mines is developing its Hilton deposit for 1978 production. At Tennant Creek, Peko-Wallsend is about to bring its Warrego mine into production and shaft sinking at Gecko is in progress; to the north at Gove the 12 miles conveyor belt system is in place and bauxite shiploading will commence on schedule to begin shortly, mining will commence in June 1973, and the first ore is scheduled to go down the track in January 1974.

But more importantly - as far as the share market is concerned - was the significant amount of valuable information we were able to obtain from the company personnel, which has helped provide a much fuller picture of the mining operations than a mere reading of the directors' intermittent public statements on their progress.

A brief resume of the trip is as follows:

- May 11th Flew from Sydney to Mt. Isa, then in afternoon visited Mary Kathleen uranium.
- May 12th Underground and surface visit to Mt. Isa mine. Visit to Hilton silver-lead-zinc deposit.
- May 13th Flew to Gunpowder and saw Mammoth mine and copper concentrator of Surveys & Mining. Then flew to Lady Annie where Broken Hill South showed us over their phosphate deposit and then Placer Exploration showed us over their copper and lead-zinc prospects.
- May 14th Full day with Peko Mines at Tennant Creek. Saw Peko, Juno, Warrego and Gecko mining operations.
- May 15th Flew over McArthur River where M.I.M. Holdings have huge zinc-lead-silver deposit. Then flew on to Groote Eylandt in morning and saw B.H.P.'s manganese mining. Then flew to Gove to see Nabalco's bauxite and aluminium operations.
- May 16th Visit to Nabarlek to see Queensland Mines' uranium deposit.
- May 17th Flew to Weipa to see Comalco's bauxite mining, then on to Townsville for the night.
- May 18th Saw Greenvale nickel deposit in morning, then flew south to see Utah's Blackwater open-cut coal operations.
- May 19th Drove to Mt. Morgan to see Peko-Wallsend's open-cut, then drove to Moura to see Thiess-Peabody-Mitsui's coal operations, then flew back to Sydney.

#### NABARLEK

On Sunday morning we left Katherine early and arrived at the Nabarlek airstrip at 9.30, where we were met by the geologist in charge of the project, Mr Okuyu. 'Ocky' told us that they have drilled 89 drill holes at Nabarlek and drill hole No. 90

was started on the day we were there. Drilling so far has totalled

23,000 feet. The extent of drilling compares to only ten drill holes which had been drilled when Queensland Mines announced they had 55,000 tons of uranium oxide. So far most of the drilling has been done to try and prove up this 55,000 tons. We were told that in December next Mr Hudson may make a further announcement on higher ore reserves.

#### Current exploration activities

The company currently operates three outcamps with a total of 20 people. The parties go out on Monday morning and don't come back until the next Saturday. To locate anomalies the company uses a helicopter with a scintillometer for prospecting. Aerial surveys by the D.M.R. using a DC3 on quarter mile spacings last year found plenty of anomalies and it was this original survey which resulted in the discovery of Nabarlek. We saw an aerial survey map in the office and it showed that there were perhaps 50 to 70 anomalies which had been discovered on Queensland Mines areas and it is only one of these anomalies which has produced these very substantial reserves of uranium oxide. So far they haven't done any work in the northern part of AT2046 but they will commence a survey in the central area in a fortnight's time.

The orebody, which has a length of 830 feet, maintains a steady strike and dip and has a number of individual ore shoots and lenses, with solid or patchy pitchblende surrounded by zones of disseminated pitchblende. In the central part of the deposit, at a depth of 210 feet, a dolomite sill striking at 292 degrees and dipping 19 degrees towards south-south-west was located. Deep drilling showed the sill to be 700 feet thick. Under the sill the same type of metamorphics as existed at the surface occurs again.

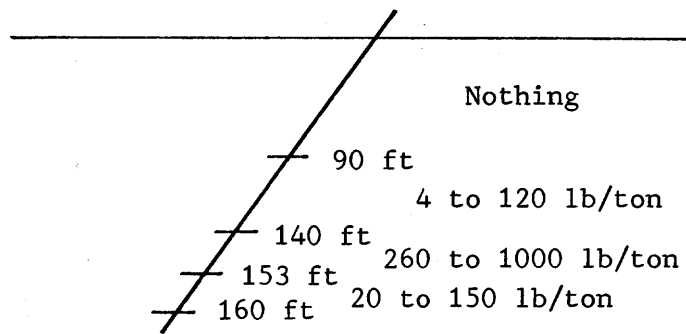
The company has commenced deeper drilling to ascertain whether the metamorphics under the sill contain mineralisation. When we were there a drill was going down and its programmed depth was 1,600 feet. It had reached 1100 feet and was still in dolomite. We were told that the drilling has only once been through the 1400 ft. level, but we weren't able to ascertain what the result of this drilling was. In a couple of weeks time Queensland Mines will have four drills going in the central area to prove up the orebodies.

#### No. 1 drill hole

We were shown the results of the first drill hole the company put down and it showed a marked gradation in the ore values obtained.







As can be seen, the 13 feet of high grade ore between 140 and 153 feet averages 30%, or 700 lbs to the ton and the grade falls away from this central part of the core.

Minor copper traces were found in the area but these have not been shown to be economical and Ocky told us they probably won't proceed on the copper.

#### BEATRICE PROSPECT

This is 20 miles south of Nabarlek and present indications are that it is 600 feet long. The best sample in manually dug costcans gave greater than 2% U308.

QUEENSLAND MINES LIMITED

MANAGING DIRECTOR'S REPORT

19 November 1970

NABARLEK

Thirty five drill holes have been completed with a total footage of 9,984 feet. Grades are very variable as the drills move north and south of the high grade zone. It is considered sufficient drilling will be completed by April next year to enable a final assessment of reserves. A separate report on results of drilling will be issued at the Board Meeting.

In line with negotiations for contracts, it is planned to bring this orebody into production in the latter part of 1973, which will necessitate material extension of technical staff in Queensland Mines in the early part of next year to undertake studies on plant engineering etc. I am having discussions with some experienced U.S. contracting firms, who would build a plant on a turn key basis.

Three hundred and fifty tons of ore of a +10 lb. grade was excavated and stockpiled. This material was to be forwarded to Rum Jungle but, as a result of lack of various departmental co-operation, permission to export has not been received. The Atomic Energy Commission are submitting a plan to Cabinet this week to maintain Rum Jungle in operation on the basis of this Company supplying them with ore during the next 3 years.

Exploration has been fanning out from Nabarlek and two new anomalies have been located within 12 miles therefrom. Uranium ochres were found in shallow pits within the metamorphic rocks, of a grade ranging from 2-6 lb.

The camp is being completed at Nabarlek to allow drilling to be maintained during the wet season.

KATHERINE

The helicopter has been doing field work on A.P. 2222 and 2223 at Katherine. No uranium anomalies or other mineral occurrences were discovered and these Authorities will be abandoned. The camp at Katherine will be moved in June 1971 to Batchelor to undertake the exploration of A.P. 2501, the joint venture with Aquitaine which is under our management.



The helicopter has moved to Nabarlek, which will enable exploration work to be carried out during the wet season on Mrs Stevens' area, although no large scale ground exploration will commence until the end of the wet. Examination of our own A.P. 2221 south of Mrs Stevens' area will not commence until the end of the dry season, although some reconnaissance surveys will be undertaken.

#### MOUNT ISA

Work at Mount Isa continued on a reduced scale. Drilling has been confined to a lease known as the Watta, which is now being evaluated. Next year deep drilling of the Valhalla lease will be undertaken. A survey of the deep drill holes by instruments on loan from Mount Isa Mines showed previous deep drills had deviated.

#### WESTMORELAND

Discussions took place with the Queensland Government in regard to expenditure conditions at Westmoreland, which require an expenditure of \$700,000 per annum over the next two years. The Government indicated their willingness to reduce our expenditure requirements to \$50,000 per annum, but no formal approval has yet been received.

Drilling continued in the Red Tree joint zone by diamond drill to establish proved reserves. One Halco rig has been testing the new anomaly at Namalangi East and at Long Pocket. One Halco rig and two diamond drill rigs were withdrawn.

The Long Pocket area has proved disappointing. Although fairly high grade mineralisation was located over an extensive surface area, drilling established mineralisation did not continue to depth and indications are that the area has a substantial quantity of lower grade material of 1-2 lb., which could not be regarded as of any economic significance, except on a long term basis.

We are surrendering 289 square miles of the A. to P., retaining 100 square miles - which contains the only mineralisation. It was thought some copper mineralisation existed in the balance of the area, but investigations by ourselves, Anaconda and AMAX were not favourable.

It is intended to maintain the camp with about 17 personnel until the dry season, when more extensive exploration will be undertaken.

Normal development of the Mount Isa and Westmoreland areas was interrupted by the necessity of transferring our activities to the Northern Territory. While greater emphasis will be placed next year on exploration therein, more progressive development will take place at Mount Isa during the wet season to bring our reserves to 10,000 tons.

#### URANIUM SALES

Discussions have taken place with the Minister for National Development and we have requested no guideline price be determined by the Government, but each contract be made subject to Government consent.

Market conditions prior to 1975 are difficult, some uranium is being offered by the South Africans and French down to US\$6-00. No great increase in demand will take place until about 1975, with a major upsurge in 1976/1977, although negotiations for substantial contracts will commence in 1972/1973 because of the necessity to complete negotiations for delivery of uranium 3 years prior to consumption to enable enrichment and core construction.

I feel that the Government will agree to the request, which will allow continuation of my present efforts to obtain any available small contracts for delivery 1972-1975 on a basis of US\$6-00, rising to about US\$6-20 for delivery in 1974 and US\$7-00 in 1975. The policy at present being adopted is to offer material on a more than competitive basis in order to get a cash flow for the Company during the next 3-4 years.

I have had extensive discussions with representatives of most of the consumer countries, both on a short term and long term basis. Of particular interest were discussions with Westinghouse on a requirement of 25,000 tons for delivery 1975-1990. Problems with this contract are the possibility of devaluation of the U.S. dollar and the lifting of the American embargo. These aspects are being studied and further discussions will take place. Westinghouse is the most interesting buyer because of its large requirement and the fact that it is the largest consumer, requiring the material for the initial cores in its reactor construction programme throughout the world. The embargo problem may not be as great as anticipated because Westinghouse could use the uranium on plants being constructed outside the U.S.

A study has been made of the Japanese market and attached is a statement showing the plus and minus quantities of each of the

Japanese reactors. The majority of Japanese trading houses have exclusive contracts with various uranium producers. These are as follows:

Mitsui Bussan Kaisha	-	with DENISON (Canada)
Mitsubishi Shoji Kaisha	-	with RIO ALGOM (Canada)
Sumitomo Shoji Kaisha	-	with NUFCOR (S. Africa)
Marubene-Iida	-	with EL DORADO (Canada)
Nissho-Iwai	-	with C.E.A. (France)
C. Itoh & Co. Ltd.	-	with KERR MCGEE (U.S.A.)

I have made contact with the individual utilities and expect to visit Japan early next year for discussions. It may be necessary to set up a sales organisation in Japan, but this will be dependent on the attitude of the utilities and their nomination of agencies.

Discussions have taken place with representatives from Germany of Urangesellschaft, which is the uranium based organisation of Metallgesellschaft. It is considered that the only way we can maintain close contact with uranium demand in Central Europe would be in conjunction with a major German organisation.

The suggestion being developed is that a joint company be formed by Queensland Mines and Urangesellschaft, in which Q.M. will hold a 51% interest, but management will be undertaken by Urangesellschaft, and that this joint company purchase from Q.M. and re-sell on a commission basis. I have made an offer to Urangesellschaft for a new small contract for delivery in 1972/73 preparatory to further discussions on the possibility of a joint company.

Previously, I had made contact with the Italian atomic agency E.N.I., and have been in touch with Somiren - a major part-owned Government organisation - with a possibility of appointing them the Company's agents for Italy.

Discussions have also taken place with the United Kingdom Atomic Energy Authority. The trend, particularly in the European market, is for the utilities to require the material converted to UF<sub>6</sub> and delivered to an enrichment plant in the U.S. on a c. and f. basis. The only conversion plant in Europe is in Britain, run by the U.K.A.E.A. They have indicated they are prepared to convert our material and undertake delivery to an enrichment plant in the U.S., and are of the opinion that they can deliver UF<sub>6</sub> to a U.S. enrichment plant at a cheaper conversion cost plus transport than if the material were sent

from Australia to a conversion plant in the U.S. for delivery to an enrichment plant.

The Authority has agreed that it will give me a fixed price to take the material from a shipment port in Australia to Britain, convert it and transfer it in cylinders to an enrichment plant in the U.S., looking after all transportation problems. If they are correct in their estimates - and they have made a very careful study - an arrangement with the U.K.A.E.A. for the sale of UF<sub>6</sub> rather than U308 would be of material advantage.

The purchasing officer for the U.K.A.E.A. is shortly visiting Australia and will have discussions with me on the possibility of sale to the Authority. The Authority purchases uranium for the various utilities in Britain.

I have been in contact with Brazil, who are installing a new reactor, and through various agencies with Switzerland. On my last visit to Europe I had discussions with the Spanish authority, and I see little hope of selling them uranium, although I have written to them and will see them again. The French are currently financing a natural uranium reactor in Spain and most of their present contracts are with the French.

At this stage, although nothing definite has been finalised, there does appear to be a possibility of obtaining some small short term contracts and favourable long term contracts. I am particularly anxious to push the contract position prior to 1976 in view of Peko's statement that they do not intend to go into production until this period, because of the possibility that the Commonwealth Government might not consent to my selling under the prices being offered by Peko - and the more contracts that can be finalised before Peko come into the picture, the better for the Company.

Both Italy and Germany have an 8% interest with the French in their deposits in Niger on the basis of their taking 8% of the output. The quantities at present being produced by Niger are not great even although French/African production will be expanded to approximately 6,000 tons by 1975/1976.

E.R. Hudson



JAPAN  
URANIUM ANNUAL EXCESS

<u>YEAR</u>	<u>HOKKAIDO</u>	<u>TOHOKU</u>	<u>TOKYO</u>	<u>CHUBU</u>	<u>HOKURIKU</u>
1969			530	90	
1970			-210	90	
1971		90	493	210	90
1972		90	-95	-330	90
1973		-320	-264	-180	90
1974		90	63	-160	-300
1975	-280	0	-873	-160	120
1976		20	886	-1,690	10
1977	-80	-570	-1,340	-290	20
1978	-70	20	-800	-1,470	20
1979	-70	-270	-1,390	-1,550	-100
1980	-70	-840	-1,970	-980	-100
1981	-70	-250	-50	-1,180	-100
1982	-70	-420	-690	-1,160	-100
1983	-70	-400	-610	-1,160	-100
1984	-70	-400	-3,110	-1,160	-100
1985	-70	-400	-3,110	-1,160	-100
<b>TOTAL</b>	<b>-920</b>	<b>-3,560</b>	<b>-12,540</b>	<b>-12,240</b>	<b>-560</b>

OR DEFICIENCYUnit S/T U<sub>3</sub>O<sub>8</sub>

<u>KANSAI</u>	<u>CHUGOKU</u>	<u>SHIKOKU</u>	<u>KYUSHU</u>	<u>JAPCO</u>	<u>TOTAL</u>
90	120				790
310	120				310
330	-200		90		1,103
-450	100		290		-305
-430	-20		-350		-1,474
-1,410	-10	10	90		-1,627
-110	10		0		-1,293
-1,290	-580	-110	-620		-3,374
-1,250	10	-100	10		-3,590
-1,470	-160	-100	-170		-4,200
-2,120	-260	-490	-900	-90	-7,240
-2,320	-850	-100	-270	-90	-7,590
-2,520	-260	-210	-450	-90	-5,180
-1,930	-430	-200	-430	-90	-5,520
-2,130	-410	-200	-430	-90	-5,600
-2,110	-410	-200	-430	-90	-8,080
-2,110	-410	-200	-430	-90	-8,080
-20,960	-3,640	-1,900	-4,000	-630	-60,950

CHAIRMAN'S REPORT

(Prepared for inclusion in this prospectus)

Castlereagh Securities Limited (herein called 'Castlereagh' or 'the Company') has been formed to raise a substantial volume of capital by public subscription for investment in the equity of Australia's expanding mining companies and in allied industries. The mineral industry is one of the most rapidly growing sectors of the Australian economy, and one which is making a steadily increasing contribution to Australia's national product and to export earnings. It can be foreseen that this industry will need the strongest possible support that can be provided by Australian financial institutions if it is to have access to an adequate flow of development capital in the years ahead.

The accompanying mining industry statistics, on pages 9 to 13 of this prospectus, provide measures of the remarkable and continuing expansion which is taking place in all phases of mining activity in Australia.

In recent years, exploration techniques have become more sophisticated and more capital intensive, and the economies to be gained from the organisation of exploration on a large scale have become widely recognised. Increasing outlays on exploration and improved methods are yielding a rising quota of mineral discoveries, which must result in an escalating demand for capital to bring mines into commission and to undertake refining and marketing operations; the volume of capital required to finance these latter activities will be much greater than the capital needed for exploration.

In these circumstances, even the larger and established mining companies which are able to provide a sizeable part of their capital requirements from internal cash flow can be expected to draw heavily on external capital sources, while the smaller and less well established mining companies will have to draw almost all of the funds needed for development from the capital market.

It will be a primary objective of this Company to contribute to capital formation within these developing companies by attracting a capital inflow from large and small investors which collectively is of significant amount, and by investing this capital in worthwhile development opportunities as they arise.

The Company's investment policies will be as follows:

(i) To participate directly in mining projects either on own account or, more readily, as a joint venture partner.

(ii) To contribute to the formation of new mining companies intending to engage in exploration, mining, refining and marketing activities, by providing finance and technical assistance.

(iii) To invest on a substantial scale in share placements and public issues of established companies within the mineral industry and its ancillary industries.

(iv) To hold mining and industrial stocks for purposes of both short and long term investment.

Castlereagh will commit significant proportions of its capital to individual projects, and will take major shareholding positions in companies. Its interests will eventually include direct mining operations, controlling interests in subsidiaries and minority shareholdings.

It is the Company's aim to offer to the mining industry the financial resources and the investment skills of a large mining-finance house. Essential requirements in the effective exercise of this function are that the capital of investors should be mobilised with the utmost economy, and management costs of the Company set at the minimum figure consistent with careful and effective control of its resources. The initial capital raising programme of the Company and its administration have been planned with these objectives in view.

There are considerable advantages to be found in adopting the large scale financing programme planned by this Company:

(i) The Company will be in a position to employ competent research and investigation systems which will enable it to appraise and select investments with the greatest care.

(ii) The Company will hold part of its assets in relatively liquid form so that it will be able to contribute at short notice to special investment situations, joint ventures and the urgent capital requirements of expanding companies.

(iii) The considerable volume of capital which the Company proposes to raise would enable it to participate

effectively in those large-scale development projects where investment is restricted wholly or largely to institutional investors.

(iv) The investment and financial advisers, sponsors and directors of the Company combine wide experience in mining-management and finance. Their extensive financial and technical associations within the mineral industry, and within industry generally, can be expected to provide Castlereagh from time to time with investment opportunities in new issues of merit.

Initially, the assets of the Company will be held in the form of mining and industrial stocks and liquid assets. As demand for additional development capital by the mineral industry provides the Company with investment projects consistent with its long-term objectives such assets will be converted into the shareholdings and other interests referred to above.

In matters of financial and investment control, it is intended that the Company should draw upon the advice and initiative of Patrick & Company (Members of The Sydney Stock Exchange Limited), a sponsor of the Company. In dealing with questions of mineral geology and related subjects, Castlereagh will have available to it from time to time the knowledge and expert advice of Australian Mineral Development Laboratories, Burrill and Associates Pty. Ltd., R. Hare & Associates Pty. Limited, and Layton and Associates Pty. Ltd., consulting geologists to the Company.

It is recognised that implementation of Castlereagh's policies, to be successful, must be based upon detailed knowledge and understanding of current developments within the mineral industry. For this reason, Castlereagh has been provided with the considerable degree of support from specialist mining and financial advisory groups referred to above. In addition, Castlereagh has as one of its sponsors Mining Traders Limited, a company which may best be described as progressing along the course of investment banking. Under appropriate conditions, Castlereagh will seek to participate with the Mining Traders Group in particular mining projects and investments.

In the expectation that Castlereagh's policies will call for an increasing flow of funds for investment in the mining industry over time, it is planned, given appropriate conditions, that the present issue to the public will be followed by supplementary issues over future years.

Castlereagh will provide for investors a diversified interest in exploration, mining, refining and marketing companies operating within the Australian mineral industry. The Company is confident that the mineral industry will continue to offer expanding opportunities for profitable investment, and considers that its objectives and investment policies will enable it and its shareholders to participate fully in the benefits to be derived from this growth.

Sydney, 5 May 1970.

J.S. MILLNER,  
Chairman.

A Proposal for a Prospectus for  
POWER AND RESOURCES OF AUSTRALIA LIMITED

<u>Directors</u>	JAMES SINCLAIR MILLNER, Farnell Avenue, Carlingford, Sydney, N.S.W., Company Director.  KENNETH HAROLD McMAHON, 38 Seaforth Crescent, Seaforth, Sydney, N.S.W., Company Director.  THOMAS ALEXANDER NESTEL, 18 Thomas Street, Roseville, Sydney, N.S.W., Company Director.  FRANCIS ALBERT ROBERTSON, 20 Lucretia Avenue, Longueville, Sydney, N.S.W., Company Director
<u>Secretary</u>	MAX LEONARD LIPS, 24 Newark Crescent, Lindfield, Sydney, N.S.W., Accountant.
<u>Registered Office</u>	12th Floor, 2 Castlereagh Street, Sydney, N.S.W.
<u>Auditors</u>	Bowie, Wilson, Miles & Co., 171 Clarence Street, Sydney, N.S.W.
<u>Solicitors to the Company</u>	Allen, Allen & Hemsley, 55 Hunter Street, Sydney, N.S.W.
<u>Bankers to the Company</u>	Australia & New Zealand Bank Ltd. Bank of New South Wales Commonwealth Trading Bank of Australia
<u>Investment Bankers</u>	Patrick Corporation Limited, 2 Castlereagh Street, Sydney, N.S.W.
<u>Share Registry</u>	Cooper Brothers & Co., 20 O'Connell Street, Sydney, N.S.W.
<u>Underwriters</u>	Patrick Partners (Members of The Sydney Stock Exchange Limited) 2 Castlereagh Street, Sydney, New South Wales 151 Queen Street, Melbourne, Victoria 379 Queen Street, Brisbane, Queensland 189 St. George's Terrace, Perth, Western

Australia  
28-36 Ainslie Avenue, City Square,  
Australian Capital Territory



181 Keira Street, Wollongong, New South  
Wales  
13 Place Leemans, Brussels, Belgium.

Solicitors to the  
Underwriters

POWER AND RESOURCES OF AUSTRALIA LIMITED  
(Incorporated in New South Wales on 1970  
under the Companies Act, 1961, as amended)

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PROSPECTUS

Of an issue at par of 20,000,000 ordinary shares of 50 cents  
each payable in full on application

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Authorised Capital

<u>300,000,000</u>	shares of 50 cents each	\$150,000,000
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Issued Capital

	2 subscribers' shares issued to the subscribers to the Memorandum of Association	\$1
100,000,000	ordinary shares of 50 cents each issued as paid to 10 cents per share for cash to Mincast Pty. Limited	\$10,000,000
16,000,000	ordinary shares of 50 cents each issued at par for cash to Mincast Pty. Limited	\$ 8,000,000
5,000,000	ordinary shares of 50 cents each issued as paid to 10 cents per share for cash to Patrick Corporation Limited	\$ 500,000
3,000,000	ordinary shares of 50 cents each issued at par for cash to Patrick Corporation Limited	\$ 1,500,000

14,000,000	ordinary shares of 50 cents each issued at par for cash to financial institutions	\$ 7,000,000
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Shares Now Offered for  
Subscription

30,000,000	ordinary shares of 50 cents each at par of which 20,000,000 are reserved for prior right of application by the shareholders of: Castlereagh Securities Limited Mineral Securities Australia Limited Aberfoyle Limited Cudgen R.Z. Limited Consolidated Rutile Limited	\$ 15,000,000
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\$ 42,000,001

Uncalled Capital \$ 42,000,000

Shares Held in Reserve

131,999,998	ordinary shares of 50 cents each	\$ 65,999,999
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<u>300,000,000</u>		<u>\$150,000,000</u>
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Patrick Corporation Limited, Investment Bankers, have undertaken to arrange provision of a credit line of \$ ..... as and when required.

## CHAIRMAN'S REPORT/STATEMENT BY DIRECTORS

Power and Resources of Australia Limited (herein called 'the Company') has been formed by Mineral Securities (Australia) Limited (herein called 'Minsec') and Castlereagh Securities Limited (herein called 'Castlereagh') to provide a corporate base for large scale investment in the production and marketing of Australian mineral fuels and other mineral resources.

The initial capital inputs required to finance this undertaking have already been subscribed in cash by the sponsors and by financial institutions. The balance of the funds required to complete the first stage of the Company's investment base will be raised by the current issue, which is the subject of this prospectus. Patrick Corporation Limited, acting as investment bankers, have undertaken to arrange from time to time certain short term loans to the Company to assist its development programme.

Minsec and Castlereagh have made it possible for the Company to obtain large minority shareholdings in the equity of Kathleen Investments (Australia) Limited (herein called 'Kathleen') and in Thiess Holdings Limited (herein called 'Thiess') by selling x% of the issued ordinary capital of Kathleen and y% of the ordinary issued capital of Thiess from their own holdings to the Company at a discount on current market prices of these securities. At the date of this prospectus the Company has committed the greater part of its capital, including the proceeds of the current issue, to the foregoing purchases. However, considerable flexibility has been allowed in the structuring of the Company to enable rapid access to both capital and loan funds as the need arises. Kathleen and Thiess have substantial interests in the production and marketing of uranium and coal respectively as described on Page ... of this prospectus. Apart from the intrinsic merits of these investments, it has been considered essential, at the outset, to purchase these share-holdings as a means of providing the Company with a strong and established base in the mineral fuel industry.

Minsec and Castlereagh are mining finance and development houses, which include amongst their principal objectives the raising of capital for long and short term investment in the mineral industry. Their long term investments may include controlling interests and substantial minority positions in mining companies. In the case of Minsec, this company's holdings already include control of seven mines, which produce eight



different minerals. After careful analysis of the size, development prospects and profitability of important sections of the mineral fuel industry, Minsec and Castlereagh have concluded that they should join forces, through the agency of Mincast Pty. Limited (herein called 'Mincast'), to undertake investments in this sector which otherwise would be unavailable to their respective shareholders because of the magnitude of funds required to obtain a significant position.

Investment in this sector, if it is to provide any measure of control to the investing companies, must be on a very large scale; it is also recognised that such investment must be supported by a specialised management group able to draw upon intensive technical and marketing research which again calls for large scale operations; while formation of a broad capital base at the beginning of operations will assist with future financing.

Concurrently with the current public issue dealt with in this prospectus, a Notice of Offer in terms of Part B of the Tenth Schedule of the Companies Act of New South Wales, indicating the intention of the Company to make a takeover offer for x per cent of the ordinary shares in y has been delivered to the Chairman of y. Should the offer be made and accepted on the terms indicated, it will increase the issued and paid up capital of the Company by \$ ..... to \$ millions. There will be a corresponding increase in assets held by the Company.

As an extension of its short term expansion, the Company intends to add to its investments in the mineral industry (maintaining its emphasis upon mineral fuels) to the extent of its liquid capital resources, as may be considered appropriate from time to time.

As a matter of long term development policy, the Company will maintain an intensive search for additional major developments in the production and marketing of proven fuels and other minerals. New projects will be subject to close analysis to ensure that they meet the expansion objectives of the group. It is the intention of the Company to develop a network of inter-related mining activities, each of which has proven mining potential (possibly with attendant exploration prospects), and is capable of development by capital intensive mining techniques Marketing and financial aspects of each project will also carry considerable weight, and it is regarded as necessary to bring together projects which lend themselves to large scale long term marketing contracts and related financing agreements.



Statement of Acquisition of Assets Minsec and Castlereagh have sold to the Company x ordinary shares of 50 cents each par value fully paid in Kathleen at an average price of \$ ..... per share and y ordinary shares of 50 cents each par value fully paid in Thiess at an average price of ..... per share, making a total consideration of \$ ..... The average price for these purchases was established by averaging sale prices recorded on The Sydney Stock Exchange in the month preceding these transactions.

Minsec and Castlereagh have taken up their interest through Mincast Pty. Limited, a company owned as to 50% by Minsee and 50% by Castlereagh by the subscription for cash by Mincast for 100,000,000 ordinary shares of 50 cents each issued as paid to 10 cents per share and 16,000,000 ordinary shares of 50 cents each fully paid.

Mincast has agreed not to sell any of its partly paid shares in the capital of the Company until such shares have been paid up in full, and in any event not before the expiration of three years of the date of this prospectus; further the uncalled balance on the contributing shares held by Mincast will not be called up in any part before 30/6/72 without the consent of Mincast.

Alternative last sentence:

The uncalled balance on the contributing shares held by Mincast may only be called up in any part before 30/6/72 with the consent of Mincast.

#### Objects of the Company

To invest in, control and organise management and finance for the development, production and marketing of Australian mineral resources and associated industries either directly or in consortium or association with established companies.

#### Purpose of the Issue

The issue will furnish the Company with additional funds for investment in development projects within the mineral industry. In selecting the initial investments, emphasis has been placed upon the production and marketing of coal, uranium and other mineral fuels.

NOTICE TO SHAREHOLDERS OF KATHLEEN INVESTMENTS  
(AUSTRALIA) LIMITED

1. You will probably have read in the press reports of certain allegations made against me, M.R.L. Dowling, and, to a lesser degree, Mr J.E. Roberts, as directors of Kathleen Investments in the course of the evidence given by Mr K.H. McMahon before the Senate Select Committee on Securities and Exchange.

2. I am preparing a sworn statement to be submitted to the Select Committee and I have accepted an invitation to appear before it early in June.

3. Since the Annual Meeting of Kathleen Investments will take place before I give evidence, I think I should answer the allegations now.

4. Mr McMahon alleged that Mr Roberts and I, as Directors of Kathleen Investments, acted improperly in that we did not inform our co-directors of a plan by Mineral Securities Australia Limited that it and Castlereagh Securities Limited (of which company we are also directors) combine to form a company to take over Kathleen Investments.

We deny any impropriety. The facts are as follows:

5. Minsec proposed that Castlereagh Securities join with it to pool their shareholdings in Kathleen Investments for the purpose of floating a company which would obtain a 51% interest in Kathleen Investments. I rejected the proposal as unrealistic and impractical as it involved about \$90,000,000 expenditure and because such a company could not be floated on the market. The Board of Castlereagh Securities Limited rejected this proposal for the same reasons. Subsequently, Minsec modified the proposal by reducing the proposed shareholding in Kathleen Investments to approximately 20%.

At a joint meeting of representatives of Minsec and Castlereagh Securities, this modified proposal was accepted in principle on condition that a secured interest in coal plus a third mineral interest in prospect, also, be part of the proposed float and that the market conditions be favourable. It was also agreed, without question, that, as soon as the project appeared to have any chance of proceeding, the Board of Kathleen Investments should be advised and Mr Hudson invited to join the Board of the proposed company. Indeed, I suggested he be asked to become Chairman or President of the Board.





6. In fact, the whole project was shelved indefinitely at that meeting because at no stage did it look like getting off the ground, as the share market generally was falling. There was nothing for us to report to the Board of Kathleen Investments. No question of any conflict of interest or duty arose.

7. It was suggested in a question put to Mr McMahon and widely reported to the Press that, without revealing my intention to the other directors of Kathleen Investments and Queensland Mines, I took deliberate steps with major overseas consumers and producers to take control of those companies in contravention of the Nabarlek Ordinance. This suggestion is highly damaging and totally untrue, and in all fairness to Mr McMahon, he did not assent to it.

8. Something was said about my wearing many 'hats'. There is nothing very remarkable about this. I am active in the financial world: hence I have a number of business interests. I have always used the experience I have gained in the best interests of Kathleen Investments and the other organisations with which I am concerned.

9. Mr Roberts has read this letter and associates himself with it. I enclose a proxy in favour of your specific nominee or the Chairman of your company, directing him at the Annual General Meeting on 28th May, 1971, to vote for the re-election of Mr Roberts and myself as directors. If you have already given a proxy, the enclosed proxy will supersede it.

10. We would far prefer that, if it is possible, you attend that meeting and vote in person, but, if you are unable to do so, please return the proxy to the Chairman, Kathleen Investments (Australia) Limited, Level 37, Australia Square, Sydney, New South Wales, 2000, by return mail as proxies have to be in the Chairman's hands forty-eight hours before the meeting.

20 May 1971

M.R.L. Dowling

J.E. Roberts

13-12

AUSTRALIAN SHAREHOLDERS'  
ASSOCIATION

59 Elizabeth Street,  
Melbourne, 3000.  
Telephone: 62-5885

KATHLEEN INSTRUMENTS (AUSTRALIA) LIMITED

Dear Shareholder,

The Australian Shareholders' Association would like to draw your attention to the forthcoming election of directors of Kathleen Investments (Australia) Limited.

Normally most shareholders do not exercise their vote on such occasions, or at best send a blank proxy to the Chairman of the Company without indicating any special voting directions.

However, in this instance certain unusual features have arisen, and the Association would like all members of the Company to give them particular consideration. You are therefore urged to cast your vote, either for or against two of the retiring directors, in accordance with your own individual assessment of the situation. Only in this way will it be possible for shareholders' true feelings in this matter to be ascertained.

The importance of this particular election lies in the fact that it will be the first occasion on which shareholders have the opportunity to express their views on the desirability of having sharebrokers as directors of public companies since the hearings of the Senate Select Committee on Securities and Exchange drew to public attention the conflicting interests which can arise. It is also the first occasion since the Sydney Stock Exchange introduced its rules regarding broker-directors.

The position of a company director is one of great responsibility, a responsibility which he must exercise in the interests only of the company itself and its members as a whole, and not in the interests of individual members or of others. While some people may well be able to carry out such a responsibility despite apparent conflicts, the real point is that, in the public field, justice should both be done and appear to be done.

In this particular case the spotlight has been turned on Mr M.R.L. Dowling by the allegations made by Mr K.H. McMahon, the former chairman of Mineral Securities Australia Limited in the hearings before the Senate Select Committee. Mr McMahon gave evidence which revealed what appeared to be very severe conflicting interests which Mr Dowling was alleged to have had at the time when Minsec and Castlereagh Securities Limited were heavy buyers of shares in Kathleen Investments (Australia) Limited and Queensland Mines Limited. Mr Dowling has not as yet had the opportunity to comment on Mr McMahon's evidence, so it would be quite wrong to suggest that he did act other than in the interests of Kathleen Holdings (Australia) Limited.

This is not the real issue. The point is whether any person should be allowed to have conflicting interests in the public company area at all.

For guidance of shareholders the following background information is supplied:

Mr M.R.L. Dowling is standing for re-election to the Board. He is a director of Castlereagh Securities Limited which acquired a large parcel of Kathleen Investments shares at about the time of the announcement of the Nabarlek uranium find. Castlereagh is a share trader and investor of considerable size, and was sponsored by the Sydney stockbroking firm of Patrick Partners.

Mr Dowling is also senior partner of this firm, which has been very actively involved as brokers, underwriters and advisors to clients in the recent mining share boom.

Mr J.E. Roberts is also standing for re-election to the Board. He is a director of Castlereagh Securities Limited, Patrick Corporation Limited, and many other companies, as well as Kathleen Investments (Australia) Limited and Queensland Mines Limited.

Before shareholders exercise their right to vote at the forthcoming meeting the Association recommends that they should seriously consider whether, as a matter of principle, public company boards should include members who may have interests which could conflict with those of the companies themselves.

When you have formed your views, please indicate them by sending the enclosed proxy form to the chairman of the meeting marking the paper to either instruct your proxy to vote for

the re-election of Messrs Dowling and Roberts or against the re-election of Messrs Dowling and Roberts.

Do not forget to sign the proxy form, have it witnessed, and post it to reach the Secretary of Kathleen Investments (Australia) Limited no later than 9.00 a.m. on Wednesday, 26th May, 1971.

R.W. Parry, President,  
Victorian Branch,  
59 Elizabeth Street,  
Melbourne, 3000.

(Phone: 62 5885)

17 May 1971

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The Australian Shareholders' Association (a non-profit organisation formed in 1960 to promote the interest of investors on the Stock Exchange) recommends that shareholders in Kathleen Investments (Australia) Limited should attend and participate in the company's annual general meeting on 28th May, 1971. The Association will, on request, endeavour to present the views of any shareholder unable to attend in person.

Investors who support the general philosophy of the Association or who would like to participate in its educational activities are cordially invited to become members. Annual subscription is only \$5.

THE SYDNEY STOCK EXCHANGE  
LIMITED,  
20 O'Connell Street,  
SYDNEY, N.S.W. 2000

26 March 1975

Mr D.V. Selth,  
Secretary,  
Senate Select Committee on  
Securities and Exchange,  
Australian Senate,  
Parliament House,  
CANBERRA, A.C.T., 2600.

Dear Sir,

I must apologise for the length of time that has elapsed before I have been able to reply to your letter of 20th February in which you sought our views concerning the evidence given by Messrs Hudson and Madden as set out on pages 2179 and 2180 of your Committee's Transcript of Evidence.

Unfortunately, we are not able to be of any great assistance to you in this matter in view of the personnel changes that have taken place since the relevant time period concerning Queensland Mines' quarterly reports. These staff changes apply not only to the then Manager of Companies, Mr L. Foldes, who is now in Hong Kong, but also to the positions of General Manager and Chairman of the Exchange.

It is difficult, therefore, for us to comment on these matters other than to acquaint you with the requirements and procedures operating at that time.

The most important and overriding consideration then, as now, would be Requirement 3.A.(1) of the Australian Associated Stock Exchanges, which states that a company should notify the Exchange immediately of any information concerning the company or any of its subsidiaries necessary to avoid the establishment of a false market in the company's securities. Accordingly, any significant mining and/or mineral exploration activity, such as the entering into of joint exploration agreements with other companies, receipt of significant geologist reports, etc., must be advised to the Home Exchange by the listed company as soon as the event occurs.

Accordingly, the quarterly report should be a summary of the exploration and/or development which occurred during the quarter, together with advice of the expenditure incurred thereon. Significant events such as those outlined above should justify their own immediate report.

The Requirements of the Australian Associated Stock Exchanges in relation to reporting by mining and/or mineral exploration companies changed considerably during the period 1st January, 1969 to September 1971, and we detail below the pertinent listing requirements that were in force during this period:

Listing Requirement, Section 3.F.(1)  
1.1.1969- 1.3.1970

To publish at quarterly intervals during each year or more frequently if the company desires, production and development reports, and to forward four copies thereof promptly to the Exchange.

Listing Requirement, Section 3.F. (1) and (2)  
1.3.1970- 31.12.1970

(1) To publish at quarterly intervals during each year or more frequently if the company desires, production and development reports, and to forward four copies thereof promptly to the Exchange.

(2) Notwithstanding Official List Requirement 3.F.(1) above, all Mining and Oil Companies which are prospecting and/or exploring and/or engaged in search for minerals including oil shall provide on a quarterly basis, and more frequently when circumstances warrant full disclosure of production, development and exploratory activities and expenditure incurred therein. Six copies of such Report shall be lodged with the Stock Exchange not later than the end of the month following the termination of the quarterly period. Where there has not been any production, prospecting and/or exploring activities the Company shall lodge a report to that effect.

September, 1971, Amendment

(1) To publish at quarterly intervals during each year or more frequently if the company desires, production and development reports, and to forward six copies thereof promptly to the Exchange.

(2) Notwithstanding Official List Requirement 3.F.(1) above, all Mining and Oil Companies which are prospecting and/or





exploring and/or engaged in search for minerals including oil shall provide on a quarterly basis, and more frequently when circumstances warrant a report giving details of any changes in the company's issued capital and full disclosure of production development and exploratory activities and expenditure incurred thereon. Six copies of such Report shall be lodged with the Stock Exchange not later than the end of the month following the termination of the quarterly period. Where there has not been any production, prospecting and/or exploring activities the Company shall lodge a report to that effect.

A period of grace is usually granted following the introduction of any listing requirement to enable companies to become conversant with and set up the organisation necessary to obtain the information required to be reported. We believe that in the introduction of Listing Requirement 3.F.(2) in March 1970 a period of one quarter was allowed in order for companies to become familiar with their obligations.

The majority of companies report strictly on a calendar quarter basis, i.e. periods to 31st March, 30th June, 30th September and 31st December. Many companies include in the Chairman's address to the Annual General Meeting information necessary to comply with the quarterly reporting requirement in respect of the first quarter of any financial year, and this practice is accepted by the Exchange. Similar information may be contained in the company's interim (i.e. half-yearly) report.

It is difficult for us to add anything further to the foregoing, for the reasons stated earlier - namely staff changes that have taken place since 1970. We regret, therefore, that we have no way of verifying what conversations took place between the Exchange and Queensland Mines at the time in question.

Again, we do apologise for the delay in replying to your letter and the fact that we are not able to assist you as much as we would like in this matter.

Yours faithfully,

J.H. Valder  
Chairman.

LEGAL OPINIONS

## Introduction

On 29 January 1971, the Committee sought the advice of four eminent Professors of Law - Colin Howard, of the University of Melbourne; P.H. Lane, of the University of Sydney; Geoffrey Sawyer and Leslie Zines, both of the Australian National University - as to the constitutional power of the Commonwealth Government to regulate the securities industry in Australia.

On 9 September 1971, the Committee requested advice from the same scholars on the extent to which the decision of the High Court in Strickland v Rocla Concrete Pipes Limited<sup>1</sup> gave any further indication of the attitude of the Court towards the power of the Commonwealth Government to regulate the securities industry, and as to the extent of the corporations power.

We have set out below in Section A the opinions received in response to the Committee's first request and in Section B the opinions received in response to the later request.

A-1 Professor Colin Howard  
A-2 Professor P.H. Lane  
A-3 Professor Geoffrey Sawyer  
A-4 Professor Leslie Zines

B-1 Professor Colin Howard  
B-2 Professor P.H. Lane  
B-3 Professor Geoffrey Sawyer  
B-4 Professor Leslie Zines

1. (1971) 45 A.L.J.R. 485

## LEGAL OPINION A-1

The main question which arises is as to the extent of legislative power in the Commonwealth to regulate the issue and marketing of shares and similar securities without reference to the States or State legislative power. The answer to this question is not altogether certain because it raises some issues of principle to which the High Court has not yet directed its attention; but on any view the Commonwealth has sufficient legislative power to achieve, by one means or another, effective control of the sharemarket.

### The Trade and Commerce Power of s. 51(1) of the Constitution

This power extends to legislation with respect to trade and commerce with other countries and among the States, and also, by well-established constitutional doctrine reinforced by the express words of s. 51(39), to matters incidental thereto. Two questions present themselves: whether the issue and marketing of shares (in which term I include for brevity's sake a reference to the numerous other analogous securities in which people customarily deal) is trade or commerce or incidental thereto; and, if so, whether it is capable of being interstate in character. In my opinion there can be no doubt that share dealing is well within the modern concept of trade and commerce and that the issue of shares, whether with a view to trading in the shares themselves or as a step in the formation of a trading company, is incidental thereto. These points seem to me to have been put beyond doubt by the judgments of the majority in the Bank Nationalization Case (1948) 76 C.L.R. 1, upheld by the Privy Council, (1949) 79 C.L.R. 497. The court was concerned in that case with banking, not share marketing, but the following passage from the judgment of Dixon J., which expresses the majority view of himself, Rich, Starke and Williams JJ., and was adopted by the Privy Council, 79 C.L.R. 632-3, seems to me to conclude the matter.

Having referred to 'the modern American view of the commerce power' Dixon J. continued, 76 C.L.R. 381-2: 'I am not

speaking of the spread of that power over an immense field of activities that are incident to commerce. It is the central conception expressed in the word to which I refer. It covers intangibles as well as the movement of goods and persons. The supply of gas and the transmission of electric current may be considered only an obvious extension of the movement of physical goods. But it covers communication. The telegraph, the telephone, the wireless may be the means employed. It includes broadcasting and, no doubt, it will take in television. In principle there is no reason to exclude visual signals. The conception covers, in the United States, the business of press agencies and the transmission of all intelligence, whether for gain or not. Transportation, traffic, movement, transfer, interchange, communication, are words which perhaps together embrace an idea which is dominant in the conception of what the commerce clause requires. But to confine the subject matter to physical things and persons would be quite out of keeping with all modern developments. The essential attributes which belong to the conception should determine the field of human activities to which it applies. To place among the essential attributes the requirement that there should be goods for sale or delivery or a man upon a journey, is to mistake the particular for the general, the concrete example for the abstract definition, and to yield to habits of thought inherited from a more primitive organization of society.'

A concept of trade and commerce which is of this character and has the scope envisaged manifestly includes such a characteristically modern commercial activity as dealing in shares.

Whether share dealing is capable of being interstate in character is in my opinion more difficult. I do not think the logically parallel question whether share dealing is capable of forming part of trade with other countries is of comparable importance or difficulty. I see no reason to doubt that if a foreign interest wishes to enter Australia for commercial purposes, the Commonwealth may impose such conditions and restrictions as it sees fit under s. 51(1). The same seems to me to apply if the entry takes the form of buying shares on the Australian market or setting up subsidiary companies in Australia. In such situations there must of necessity at some stage be the overseas transmission of communications and money at the very least. The Commonwealth would therefore be able to rely also on its exclusive control of customs under s. 90, the postal power of s. 51(5) and possibly in appropriate

circumstances on the foreign corporations power of s. 51(20). The real problem is whether dealings which are wholly domestic are capable of being interstate in character. This bears not only on the scope of legislative power under s. 51(1) but also on the possible application of s.92, guaranteeing freedom of interstate trade.

It is possible that this question also is in effect concluded by the Bank Nationalization Case, for both the High Court and the Privy Council held not only that banking is trade and commerce but also that in present-day Australia it is interstate in character. Whether the same conclusion follows for share marketing depends on the relevance to share marketing of the reasons advanced for banking. These, again in the words of Dixon J., were as follows, 76 C.L.R. 379-80: 'Now, the existing system of private banking maintains an Australia-wide business upon which its whole structure rests. It sustains with respect to the transfer of money or bank credit the greater part of the commerce of the country. Branches and agencies of the various private banks are distributed over the Commonwealth and there are few towns or centres in which one or more of them is not represented. The volume of the banking transactions which cross State lines is, of course, widely different with different banks, and that is said to be true also of the proportion which in number or value inter-State transactions over a period bear to the whole business done. But the total quantity for all banks is very large, although the proportion in money is said to be but ten per cent of the amount involved in all transactions. If it matters it appears that there are constant changes in the funds made available in the various States, the excess of advances over deposits in one State being supplied or supported by resources in other States. In the daily course of business the private banks (with two minor exceptions) regularly transfer funds among the States, establish credits across State boundaries, and collect cheques, bills of exchange and promissory notes drawn and lodged in one State and payable in another, and of course they negotiate such instruments. There have been placed before the Court elaborate descriptions of the many different kinds of inter-State transactions the private banks carry out, considered both from the banks' side and from the customers' side, that is an essential part of his commercial dealings. But it is enough to say that, as common knowledge might suggest, this material confirms in detail what seem to be the essential conclusions. These are that the business of the private banks necessarily includes:

(a) the constant inter-State transmission of funds and transfer of credit; (b) constant business communication and intercourse among the States; (c) the regular use for the purposes of inter-State transactions of instruments of credit and of title to goods and their inter-State transmission; (d) the integration of inter-State banking transactions with the entire business of the bank to form a system spreading over the Commonwealth without regard to State lines; (e) the furtherance of commercial dealings by inter-State traders in goods by performing an indispensable part in such transactions.'

This reasoning also was expressly adopted by the Privy Council, 79 C.L.R. 632-3. Clearly it raises a question of fact: whether conditions (a)-(e) enumerated by Dixon J. apply substantially, with appropriate minor changes of wording, to stock exchanges as much as to banks. I do not have any special knowledge of the working of the securities market in general and stock exchanges in particular but it seems to me that for the present purpose there is a reasonably close analogy. I believe it to be the case that the securities market operates nowadays in significant measure as an interdependent nationwide phenomenon (as witness the current move for a voluntary national secretariat), that it relies heavily on credit and that much interstate communication and intercourse takes place. If this is correct, it is reasonable to infer from the Bank Nationalization Case that the Commonwealth may legislate with respect to the share market but that in doing so it must keep within restrictions imposed by s. 92. I return to s. 92 below. There is however another line of thought which has to be taken into account. In the Hospital Provident Fund Case (1963) 87 C.L.R. 1, the High Court considered whether insurance is interstate in character and decided by a majority of five to one (one judge not relying on this point) that it is not. The quickest way of conveying the reasoning of the majority is again by quotation. Dixon C.3., 87 C.L.R. 14-15: 'The essence of the business from the point of view of the persons engaged in it is the making of contracts involving on the one hand the receipt of money and on the other hand the payment of money on the occurrence of certain contingencies. From the point of view of the statute no doubt it is the character of the contingencies that forms the distinguishing and important feature of the business. But neither the character of the contingencies nor the character of the monetary side of the contract could bring the transaction within the conception of inter-State trade, conlnerce or intercourse. For a company to contract with a man that, in



consideration of the latter making payments to it at any given place, the company will in a specified contingency make a payment to him at some other place is not to engage in inter-State commerce. Neither the making of the contract nor the performance of the contract by either side involves any step or dealing which of itself forms part of inter-State commerce even if a State line runs between the two places. If it is found necessary or convenient by either party to communicate with the other across a boundary between the two States in the course of making the contract, that is an accidental feature which cannot make it an inter-State contract, although the sending of the communication itself will, of course, form an act of inter-State commerce or intercourse. In the same way, if either party finds it necessary to transmit money across such a boundary so that he may make a payment in pursuance of the obligation of the contract, the transmission of the money will be an act of inter-State commerce, but that will not make the performance of the contract an inter-State transaction.

Neither the contract nor its performance contemplates or of its nature involves the movement from one place to another of things tangible or intangible, and certainly not from a place in one State to a place in another.'

As with the reasoning of the Bank Nationalization Case to the opposite effect, there are analogies with share marketing. The basis of the reasoning here is that the contract does not contemplate as an essential the interstate movement of anything and that the absence of this characteristic is not remedied by such incidentals as the interstate transmission of communications or money. It is possible to say the same thing of share marketing: that the contracts entered into contemplate only a transfer of interest at one place, the stock exchange in question, and that the exchange of information, funds and documents interstate is an accidental and inessential feature of such a contract. This line of thought produces an apparent conflict in the present context between the Bank Nationalization Case and the Hospital Provident Case. There are however two considerations which suggest that the former is the stronger authority so far as share marketing is concerned.

The first is that the form of insurance under review in the Hospital Provident Case was insurance against hospital and medical costs. It does not follow that the same analysis applies in relation to insurance against loss in interstate

commerce, which may be thought to bear the banking characteristic seized on in Bank Nationalization of being an integral part of such commerce. It has to be admitted however that the judgments of the majority give little or no support for such a line of thought (for the little cf. Fullagar J. at 87 C.L.R. 37) and indeed tend against it by reliance on American precedents denying to insurance as a business the character of commerce.

Secondly, it has to be remembered that the question in Hospital Provident was whether (State) legislation infringed the freedom of interstate trade and commerce guaranteed by s. 92. It is well established that although s. 92 protects interstate trade and commerce it does not protect matters incidental thereto: it is only the central activity which is protected. To deny to insurance, and therefore by analogy share marketing, the character of interstate commerce (for lack of the quality of interstateness) is not to deny that it is incidental thereto. If it is incidental thereto, the Commonwealth has power under s. 51 (1) to legislate with respect to it and it is not within the protection of s. 92. There is no close precedent on whether share marketing is capable of being an incident of interstate commerce. What one can say is that the few reported cases on the scope of the trade and commerce power suggest that it is to be given a wide scope, from which it is reasonable to suppose that an institution of such fundamental importance to commerce generally as the share market is at least incidental to interstate trade and commerce. [On the scope of the power see further Howard, Australian Federal Constitutional Law, 203-210.]

Lastly on s. 51 (1) it is to be observed that if the true situation in law is that some share marketing is inter-state commerce and some is not, the Commonwealth is not thereby debarred from exercising a high degree of control over the whole. Redfern v. Dunlop Rubber (1964) 110 C.L.R. 194, establishes the proposition that if a person is subject to Commonwealth regulation under s. 51(1) by virtue of his engaging in interstate trade or commerce, he does not escape that regulation by engaging also in intrastate trade or commerce of the same kind. If he can clearly segregate the two aspects of his business, then of course the intrastate aspect is not subject to Commonwealth law; but if he cannot or does not segregate them, then the whole is subject to Commonwealth regulation, at all events if the interstate component is a significant part of the whole. The practical effect of this decision is no doubt to reinforce what would in any event be

the natural tendency of traders to run their business in conformity with one uniform set of regulations, those of the Commonwealth, rather than with two or more. No doubt this applies to the share market as much to any other trading activity.

#### The Communications Power of s. 51(5) of the Constitution

The question here is whether the Commonwealth can make it impossible for the share market to operate otherwise than in accordance with Commonwealth regulations by prohibiting the transmission of information by any of the usual means unless its own regulations are complied with. This would be a straight case of the Commonwealth's using a legislative power granted to it for one purpose, in this case central control of communications, to achieve a quite different one, in this case central control of the share market. The question thus raised depends for its answer less on specific interpretation of s. 51(5), of which there has been little, than on inference from general principles of interpretation of the Constitution.

It would be a lengthy business to cite every context in which the High Court has sanctioned the indirect legislative achievement by the Commonwealth of an end which it has no power to accomplish directly. It is perhaps enough at this stage to say that there is only one case, Barger's Case (1908) 6 C.L.R. 41, in which Commonwealth legislation has been held invalid for misuse of a power, and that there are many, particularly in taxation, in which it has not although it clearly might have been. A recent example is Fairfax's Case (1965) 114 C.L.R. 1.

In Barger's Case a Commonwealth statute was held invalid on the ground that although on the face of it a tax law it was in substance and effect an attempt to use the tax power to control intrastate conditions of labour. Although there are many dicta since which assert the continued existence of the principle upon which Barger's Case proceeded, there is no other case in which it has been clearly applied to invalidate a Commonwealth Act. [Possible but doubtful exceptions are R. v. Burgess (1936) 55 C.L.R. 608, and the Flour Tax Case (1937) 55 C.L.R. 390.] In truth, at the time when Barger's Case was decided, over sixty years ago, the High Court was much influenced by doctrines of constitutional interpretation which have long since been discarded. In Fairfax's Case, by contrast, in which the question of principle involved was expressly

discussed, a statutory provision which gave a tax exemption for superannuation funds invested in certain classes of securities was upheld as a law with respect to taxation although its substance and effect was to compel trustees of such funds to invest a proportion of their funds in the specified classes of securities.

Another recent case of some relevance, in that it was on the communications power of s. 51(5) itself, is Herald & Weekly Times v. Commonwealth (1969) 115 C.L.R. 418, in which it was not only confirmed that the control of television is within the power but held also that far-reaching and detailed restrictions on the holders of commercial television licences are within the power. The court denied that the case was to be characterised as one of ulterior purpose but was clearly of opinion that the power should be given a very wide scope. The restrictions in question were designed to preserve a degree of independence from each other of the holders of such licences but extended even to prohibiting the holding of shares or debentures in which the holder had no beneficial interest and which gave him no effective voice in the affairs of the other company or licenssec.

It is a reasonable inference from such precedents as these that so far as s. 51(5) is concerned the Commonwealth can prohibit the transmission of any information it wishes, the reason for the prohibition being irrelevant. If it can do this it can also prescribe such relaxations as it wishes. Two reservations must be made. First, it is always possible that if the indirect extension of Commonwealth power in this way strikes the High Court as too flagrant or too great, the principle of Barger's Case will be unexpectedly revived. As I have indicated, I see no sign of this at present. Secondly, since the dictum quoted above from Bank Nationalization clearly contemplates that the transmission of information is within the concept of trade and commerce, s. 92 has to be taken into consideration.

#### The Corporations Power of s. 51(20) of the Constitution

At the time of writing this power seems to add nothing in the present context to the trade and commerce power of s. 51(1). The obstacle to effective use of s. 51(20) by the Commonwealth is the decision of the High Court in Huddart Parker v. Moorehead (1909) 8 C.L.R. 330, (the Corporations Case), which, so far as it said anything certain, gave s. 51 (20)

a very restricted scope but revealed much judicial disagreement on what specific matters are actually within it. The effect of that case is conveniently summarised in the Report of the Joint Committee on Constitutional Review, 1959, pp. 108-109, to which I can add nothing significant. The antiquity of the decision in terms of changed constitutional doctrine generally suggests that the question should be regarded as entirely at large, awaiting consideration by the High Court.

#### The Banking Power of s. 51(13) of the Constitution

The banking power in itself would not support direct legislative control of share marketing. Its significance lies in its being the source of power to control credit. There can be no question that in so far as banks are direct sources of credit for share marketing, or for any other activity, the Commonwealth can act under s. 51(13) to control the supply of credit, and therefore the dependent activity, by its control of the central banking structure. Equally it is obvious that this is what the Commonwealth in fact does whenever it sees fit as one of the normal processes of government. I do not have sufficient knowledge of the ways in which credit is made available to the share market to be able to say whether present banking control alone would enable the Commonwealth to exert enough pressure to compel acceptance of its own regulatory standards. On the assumption that it would not, because there are other sources of direct credit, the question arises whether these other sources themselves come within the banking power by virtue of their credit activities.

The obvious example is a finance house of some description not falling within present banking legislation. The extent to which the banking power includes fiscal activities on the fringe of, or out of the context of, currently orthodox banking, is uncertain. Of course, ultimately all credit is dependent on the central banking structure, and therefore within Commonwealth reach, but in many specific instances the control exercisable indirectly through the banks seems to me likely to be too remote and blunt an instrument for the present purpose of detailed regulation of the share market. As to the legal uncertainty which surrounds regulation under s. 51(13) of fringe credit activities, one can say only that the banking power has proved generally to be a strong and extensive one and that there is no reason to suppose that the High Court will now turn a restrictive eye upon it. It may be of political significance to remember that s. 51(13) does not extend to

Commonwealth control of banks run by the States themselves in so far as they conduct intrastate business.

#### The Insurance Power of s. 51(14) of the Constitution

The significance of this power in the present context appears to lie in its relation to insurance companies as the largest single group of dealers on the share market: as institutional investors, with consequential significance to the whole phenomenon. It is within the scope of this power for the Commonwealth, as a means of assisting towards the financial stability of the insurance market, to exercise direct legislative control over the classes of securities in which insurers may invest their funds. This would include the prescription of standards of disclosure and so on accompanying the issue of the securities in question and the amount of credit permissible in dealings. By analogy with the banking power, this power does not extend to Commonwealth legislative control of intrastate insurance business undertaken by the States themselves as insurers.

#### The Tax Power of s. 51(2)

The foregoing concludes the list of specific Commonwealth legislative powers as to which comment has been invited. It is possible however that the significance of the tax power has been overlooked. A reference has already been made above, in connection with the communications power of s. 51(5), to the line of cases establishing that if a law is in form a law with respect to taxation it is valid under s. 51(2) notwithstanding that its effect and purpose may be to accomplish some object otherwise unconnected with taxation. It seems to me to be quite open to the Commonwealth by the selective application of tax rebates or higher rates of tax to inhibit the issue of or trading in shares and securities which do not conform with whatever standards the Commonwealth cares to prescribe.

#### The Effect of s. 92 of the Constitution

Section 92 says that trade, commerce, and intercourse among the States shall be absolutely free. The expression 'absolutely free' does not in practice mean absolutely free but nevertheless in appropriate contexts constitutes a formidable barrier to legislative restriction or control of activities across State borders. It is relevant to a number of observations made above. One point already made must be borne

constantly in mind when considering the effect of s. 92 in relation to a legislative power: that the protection of s. 92 extends only to the interstate activity itself and not to matters merely incidental to it, whereas the scope of a legislative power extends always to matters incidental to the subject matter of the power. This means that s. 92 can never operate to the complete exclusion of or in total contradiction to a legislative power.

Two propositions have been advanced above which bring s. 92 in question. The first is that whilst share marketing undoubtedly is commerce, it may not be capable of being interstate in character. If this is the case, s. 92 does not come in question, and whether the Commonwealth can regulate the share market depends on whether share marketing is incidental to interstate trade. If on the contrary share marketing can and to a significant extent does have the characteristic of interstateness in this country, it does not necessarily follow that the Commonwealth has no power of effective regulation by reason of s. 92. In the present state of the law it appears to be possible for any legislature to prohibit what it considers to be undesirable business practices without infringing s. 92 in so far as the prohibition affects interstate trade. The principal case leading to this conclusion is Reader's Digest (1967) 43 A.L.J.R. 116, in which the High Court, with only the Chief Justice dissenting, held valid South Australian legislation prohibiting the use of trading stamps in its application to a company sending records for sale to South Australia from New South Wales. The majority of the court held that since the South Australian Act left the company free to trade in records, it was not an infringement of this freedom to prohibit an incidental business practice, the offer of trading stamps to encourage the purchase of records, which South Australia regarded as undesirable.

It is a reasonable extension of this line of thought to conclude that if the Commonwealth wishes to prohibit certain business practices as undesirable adjuncts to interstate share marketing, it can do so without infringing s. 92. Moreover it is fundamental to reasoning under s. 92 that regulation of interstate activity is permissible to the extent that the effect of the regulation is to preserve the freedom guaranteed by the section. The familiar example is road traffic regulations. As applied to share marketing s. 92 would have nothing to say against regulations having the basic effect of ordering the share market on a national scale. It seems to me that these

two principles reduce the nuisance value of s. 92 to the Commonwealth in the present context to minor proportions so far as the trade and commerce power is concerned.

The second proposition advanced above which brings s. 92 in question is that the Commonwealth may be able to make use of the communications power of s. 51(5) to regulate the share market. The basic s. 92 proposition here is that it would not be open to the Commonwealth, or any other legislature, simply to prohibit interstate communication in so far as it is a form of Interstate trade or commerce. That would prima facie be a straightforward infringement of s. 92. The old argument that communication in itself can never be interstate trade but only a means whereby interstate trade is carried on, and therefore only incidental to it, is, by analogy with the situation in respect of interstate transportation, no longer tenable. The point arises however that as a matter of fact the Commonwealth has an unchallenged monopoly over the usual means of communication. Whatever the theoretical constitutional position with respect to this monopoly and s. 92, for practical purposes it seems unlikely to be effectively challenged. In any event s. 92 does not affect Commonwealth control under s. 51(5) of purely intrastate communications, which category comprises the vast majority of transmitted messages, including those to do with share marketing. Here again, therefore, and with one reservation, s. 92 does not seem to be a significant obstacle to effective Commonwealth action.

The reservation is that s. 92 protects not only trade and commerce but also 'intercourse' among the States. There is almost nothing by way of judicial construction of this word but it is reasonable to suppose that it includes communication between people in different States by artificial means. If this is so, the Commonwealth cannot arbitrarily prohibit people from sending messages and information interstate, or indeed impede them at all beyond the requirements of reasonable regulation in the interests of the means of communication itself. But in the present context it is hard to see that this need significantly affect the Commonwealth in view of its potentially absolute and unchallengeable control of intrastate communication.

The question is asked whether s. 92 may have some different operation in relation to disclosure and investigation than to merely prohibitory legislation. The answer appears to



be in principle no, for any requirement of disclosure or submission to investigation must ultimately depend for enforcement on the threat of penalties. This in turn means that disclosure or investigation measures must fall within the concept of reasonable regulation of the industry in so far as they directly affect interstate activities protected by s. 92. It is of course clear that s. 92 has nothing to say against such measures otherwise. In Kerr v. Pelly (1957) 97 C.L.R. 310, the question arose whether the driver of a truck on an inter-state journey could be required to diverge to the nearest weighbridge for the weight of his load to be checked. The High Court had no hesitation in holding that he could. Section 92 would be infringed only if he were harassed by constant and unnecessary demands to diverge for this purpose.

#### Inconsistency of Legislation under s. 109 of the Constitution

Under s. 109, State laws which are inconsistent in their operation with valid Commonwealth laws become inoperative to the extent of the inconsistency during the currency of the Commonwealth laws. Such a rule does not necessarily prevent the inconvenience of complying with parallel sets of regulations, for if they operate to the same effect, or if some regulations are stricter than others and therefore merely cumulative in their effect, it can be argued that there is no inconsistency in the sense of contradiction. This problem however has been eliminated in principle by doctrine in the High Court generally known as the 'covering the field' criterion of inconsistency.

According to this doctrine the question in any given case is whether the Commonwealth legislation, operating either directly or through regulations which it authorises, is intended to cover the whole subject matter to which it relates to the exclusion of all State legislation upon the same subject matter. If it is, and provided of course that it does not exceed Commonwealth legislative power in so doing, all State legislation upon that subject matter is displaced, whether contradictory or cumulative or not.

There should be no difficulty in including in Commonwealth legislation an indication that it is intended to cover the field to which it relates to the extent of Commonwealth power therein. There is no rule against an express statement to this effect in the Act. In this way the problem of multiple Commonwealth-State regulations becomes co-extensive

with the question of Commonwealth legislative power itself, ceasing to have any separate existence.

#### The Inter-State Commission of s. 101 of the Constitution

Section 101 contemplates the establishment of an interstate commission to execute constitutional provisions and laws made thereunder relating to trade and commerce. There was such a commission between 1912 and 1920 but the experiment was not a success. The difficulty was, and remains, that the High Court will not countenance the mingling in one Commonwealth tribunal (except in the Territories) of both judicial and administrative powers. Since this doctrine applies as much to the Inter-State Commission as to any other federal judicial or administrative body, there is no case for re-establishing the Inter-State Commission in the context of share marketing instead of setting up some new administrative body altogether. [See further on the Inter-State Commission Howard, Australian Federal Constitutional Law, 108-110; Sawyer, Australian Federal Politics and Law 1901-1929, 193, n. 81, 204.]

#### A Commonwealth Securities and Exchange Commission

Whatever the scope of Commonwealth legislative power in relation to share marketing may ultimately prove to be, there is no reason why a national commission should not be brought into existence to administer the legislation. The doctrine that Commonwealth judicial and administrative powers may not be intermingled would have to be observed and its effect circumvented, in the same way no doubt as in the industrial sphere. The practical problem is that effective enforcement of determinations of the administrative body has to be entrusted to a purely judicial tribunal. A familiar example is that determinations of the Commonwealth Conciliation and Arbitration Commission, a non-judicial body, have to be enforced, if it becomes necessary to enforce them, by the Commonwealth Industrial Court, a strictly judicial body. An advantage of setting up a wholly new Securities and Exchange Commission (by whatever name called: this name of course is suggested by the American body) would be the avoidance of possible jurisdictional limitations on the Inter-State Commission arising out of the wording of s. 101.

#### Commonwealth-State Co-operation

Commonwealth-State co-operation at the legislative level could take one of three forms: uniform legislation to

establish the same standards throughout the country, the legislation being administered by parallel bodies in the various States and Territories; the establishment of a national administrative body staffed and legislatively validated by both Commonwealth and States; or the reference by the States to the Commonwealth of legislative power under s. 51(37) of the Constitution. Neither of the first two courses of action has, from the constitutional point of view, much to commend it.

As to the first, the difficulties of first achieving and then maintaining uniformity of uniform legislation are notorious. For effective administration it is a course to be avoided if there is any reasonable alternative. Moreover even if uniformity is achieved, its administration by different bodies in different States is almost certain to lead to varying interpretations which can be brought into line only by some national supervisory body. Lastly this alternative is wasteful of resources.

The second alternative, a joint national tribunal, seems to be at least equally cumbersome and suffers from the additional defect of vagueness. The basic fault is the lack of a single government or legislature to which it is responsible. If its policies and determinations are potentially subject to seven different governing bodies, which seems to be unavoidable, the danger is that it will be at best inefficient and at worst ineffective.

If these are the only possibilities of State co-operation available, it seems far preferable for the Commonwealth to use its own legislative powers to the full to set up a national commission responsible only to itself. Only if, which is highly unlikely, this proves to be altogether beyond effective Commonwealth constitutional power, should co-operative legislative action with the States be contemplated. Political co-operation is of course another matter and would no doubt be wise.

There remains however the third possibility, that the States refer express power to the Commonwealth to legislate with respect to the share market. Legislation by the States to this effect would enable the Commonwealth in turn to legislate, within the terms of the reference, under s. 51(37), a section which expressly contemplates this procedure. This device has been little used and is correspondingly uncertain in its scope and effect. A major theoretical problem of obvious practical

importance is whether a matter once referred can be withdrawn again, and if so under what circumstances. For example, whether such a withdrawal by the State concerned, if possible in the first place, invalidates existing Commonwealth legislation in relation to that State or only prevents the Commonwealth from enacting such legislation in the future. Moreover to be properly effective in the present context the grant of power would have to be made by all of the States and not only some of them. The chances of this happening may well be regarded as remote. Nevertheless it represents the most useful way in which the Commonwealth and the States might cooperate and therefore should be borne in mind in a survey of the constitutional position.

#### Other Matters

The other matters with which the Select Committee is concerned are technical problems in the control of a share market upon which I do not feel qualified to comment.

Colin Howard

LEGAL OPINION A-2

1. It is all but futile to express an opinion on the scope of s.51(xx) until the present High Court decides what it will do with Huddart Parker below and - at least during argument - gives some hint of its understanding of the power in s.51(xx).

This material may well become a major contribution to the Committee's inquiry.

2. Even so (and I can say this much), there is a severe limitation in the Commonwealth's use of its corporation power to establish a Securities and Exchange Commission. For, acting under s.51(xx) the Commonwealth can only supervise the three kinds of companies specifically named in s.51(xx) - foreign corporations and trading or financial corporations formed within the limits of the Commonwealth.

3. (1) A trading corporation does not include a manufacturing, mining or exploratory corporation. See Isaacs, J., in Huddart Parker & Co. Pty Ltd v Moorehead (1909) 8 C.L.R. 330, at pp.392, 393; compare Menzies, J., in Beal v Marrickville Margarine Pty Ltd (1966) 114 C.L.R. 283, at p.306 ('... to manufacture is not, of itself, to trade').

But a manufacturing company qua distributor or a mining company qua distributor would be under this aspect a trading company; Isaacs merely alludes to 'a purely manufacturing company'. Share dealings, say, in Marrickville Margarine would be share dealings in a manufacturing-distributing company. The latter element of distributing would attract s.51(xx). Compare Redfern v Dunlop Rubber Australia Ltd (1964) 110 C.L.R. 194, at pp.202 arguendo, 213, 220-221, 228-229, 230-231, permitting s.51(i) to extend to an agreement even if it had an intra-State element as well as an inter-State element.

(2) A trading company certainly includes wholesale or retail distributors.

(3) Transport companies can now be included, too: compare Australian National Airways Pty Ltd v The Commonwealth (1945) 71 C.L.R. 29, at pp.56, 83, 106-107, a case strictly on 'commerce' in s.51(i) of the Constitution; but I do not think the Court would subtilize a distinction between 'trade' and 'commerce'.

4. (1) A financial corporation within s.51(xx) semble does not include a banking company - the latter is expressly catered for by s.51(xiii), Bank of New South Wales v The Commonwealth (1948) 76 C.L.R. 1, at pp.203-204 (and see p.184), 256; and see p.304 ('it may well be').

But all that this means is that the Commonwealth in its share-regulation of banking corporations can rely on s.51(xiii) instead of s.51(xx). For that matter, the Commonwealth in acting under s.51(xiii) is in a better position, for s.51(xiii) allows the Commonwealth to make a law with respect to 'the incorporation of banks', whereas under s.51(xx) the Commonwealth must not make a law trespassing on the incorporation of financial corporations. On this contrast between s.51(xiii) and s.51(xx), see Isaacs J., in Huddart Parker above, at p. 393; on the limitation in s.51(xx), see ibid., at pp.349, 362-363, 371, 393-395, 412; Insurance Commissioner v Associated Dominions Insurance Society Pty Ltd (1953) 89 C.L.R. 78, at p.86 (s.51(xx) confers no 'general power to make laws with respect to the creation of corporations, or the powers and capacities of corporations, or the liquidation and dissolution of corporations'); Bank of New South Wales v The Commonwealth above, at pp.202, 255-256, 304.

(2) A building society, if incorporated, and an investment company are financial corporations - examples suggested by Quick and Garran, Annotated Constitution of the Australian Commonwealth, p.607 (1901).

(3) Hire purchase companies and other lending agencies, say, pastoral finance companies, are financial corporations.

(4) An insurance company under one aspect seems to be an investment company, and so a financial corporation within s.51(xx) of the Constitution. But query whether the Court might not read 'financial corporations' in s.51(xx) as financial corporations in their own right, not as some other corporations which can only be described as financial corporations in their incidental activities.

The insurance power itself in s.51(xiv) of the Constitution is not a power concerned with corporations, much less financial or investment corporations. It is a power concerned with the relations between the insurer and the insured and those relations *visa vis* third parties, Insurance Commissioner v Associated Dominions Insurance Society Pty Ltd (1953) 89 C.L.R. 78, at pp. 87-88; compare Carter Bros. v Renouf (1962) 111 C.L.R. 140, at pp.147-148, 159-160.

Still, under the insurance power the Commonwealth can, for example, insist on fidelity funds and general measures to safeguard the insured and to preserve the soundness of the insurance company, Insurance Commissioner above, at pp.87-88. Then, from this point of view the Commonwealth could supervise investment adventurism of insurance companies.

#### The Trade and Commerce Power

5. What one must do in this area is to isolate the precise transaction, dealing or activity which Federal Parliament - through a Securities and Exchange Commission or otherwise - intends to regulate. For there is a distinction in trade and commerce law between an inter-State transaction or a transaction in direct relation to inter-State trade, on the one hand, and an intra-State transaction with inter-State incidentals, on the other hand.

6. An inter-State transaction is exemplified in an inter-State contract, that is, an agreement the very terms of which expressly or impliedly require the movement of goods across State lines. Such a transaction is within s.92 of the Constitution, Williams v Metropolitan and Export Abattoirs Board (1953) 89 C.L.R. 66, at pp.69, 74-75; W. & A. McArthur Ltd v State of Queensland (1920) 28 C.L.R.

530, at pp.559, 560. A fortiori such a transaction is within the trade and commerce power in s.51(i) of the Constitution.

7. A transaction in direct relation to inter-State trade is exemplified in an agreement which is in fact carried out by dealings across State lines, say, the selling and delivering of goods across State lines. Such a transaction is within the trade and commerce power, Redfern v Dunlop Rubber Australia Ltd (1964) 110 C.L.R. 194. The agreement (transaction, dealing or activity) need not itself stipulate movement across State lines. It is enough that the agreement is in fact fulfilled by such movement. And it does not matter if the agreement is partly carried out by the movement of goods across State lines, partly carried out by the movement of goods within State limits, ibid., at pp.202 arguendo, 213, 220-221, 228-229, 230-231.

8. An intra-State transaction with inter-State incidentals is exemplified in an insurance business with a head office in Victoria, a branch in New South Wales. The precise business of insurance consists in effecting insurance agreements (policies) either in Victoria or in New South Wales - an intra-State, localised transaction. True, there will be inter-State comings and goings between the Victorian head office and the New South Wales branch. But these are incidentals to the essential business of insurance. Certainly, such a business, despite its inter-State incidentals, is not within s.91, Hospital Provident Fund Pty Ltd v State of Victoria (1953) 87 C.L.R. 1, for example, at pp. 17-18, 36-37. Equally Federal Parliament could not regulate this (intra-State) business under s.51(i).

9. In its shareholder protection the Commonwealth may seek to regulate the form and contents of prospectuses, advertisements or solicitations to take up shares when these prospectuses etc. intend to induce the buying of shares by a person in one State from the issuing company in another State. Such prospectuses etc. are within s.92, Re Readers Digest Association Pty Ltd (1969) 43 A.L.J.R. 116; Consolidated Press Ltd v Lewis (1956) 95 C.L.R. 550, at p.603; W. & A. McArthur Ltd v State of Queensland (1920) 28 C.L.R. 530, at pp.559, 563. Equally such prospectuses etc. are within s.51(i), the trade and commerce power. Besides, the prospectuses etc. are 'directly related' to



inter-State selling, see Redfern in paragraph 7 above.

Then the Commonwealth could regulate the form and content of these prospectuses, advertisements or solicitations to take up shares by relying on its trade and commerce power.

10. In its shareholder protection the Commonwealth may seek to regulate share registrations and share transfers. Even if such registrations and transfers are accompanied by inter-State incidentals (such as communications across State lines and the transmission of funds across State lines), the registrations and transfers in themselves are intra-State, localised transactions. Compare Hospital Provident Fund in paragraph 8 above.

Then the Commonwealth could not regulate the share registrations and share transfers by relying on its (inter-State) trade and commerce power.

#### The Postal Power

11. There has not been much law on the Commonwealth's postal power in s.51(v) of the Constitution, and what law there has been does not assist the particular problem before us. Thus, it has been held that the power with respect to 'postal, telegraphic, telephonic and other like services' extends beyond sheer inter-personal communications to mass broadcasting by radio, R. v Brislan; ex parte Williams (1935) 54 C.L.R. 262. The power also extends to, not merely the provision of television services, but also the programming or preparation of material for television, Jones v The Commonwealth (No. 2) (1965) 112 C.L.R. 206.

12. (1) The Privy Council in James v The Commonwealth (1936) 55 C.L.R. 1, at p.54, strongly argued that the freedom of inter-State trade assured by s.92 (see below) was a qualified freedom. The Privy Council then made much of the Commonwealth's Post and Telegraph Act 1901-1923 which dealt with posting, delivery etc. of letters, matters within s.51(i) and s.51(v) - the trade and commerce power and the postal power.

Particularly the Privy Council singled out s.98 of the Post and Telegraph Act which forbade or penalized the sending or carrying of letters for reward otherwise than by post. Not only did the Privy Council assume

this drastic power to be valid, it asserted that the provision did not offend s.92 of the Constitution. Finally, the Privy Council concluded that much the same was true of the Commonwealth's Wireless Telegraph Act 1905.

If the Commonwealth can altogether prohibit the handling of letters for reward by carriers other than the Postmaster-General's Department, then presumably the Commonwealth can prohibit the use of its own letter-carrying service to particular forms of trading, say, misleading prospectuses. Presumably, the Privy Council would say that the latter prohibition - as it did say of the former prohibition - was a limitation notoriously existing in ordinary usage in all modern civilized communities' that the use of the Commonwealth's mail services was limited 'just as "free speech" is limited by well known rules of law'.

In the result the Commonwealth could make regulations supervising the use of mail services by share dealers.

(2) Compare the use of 'the television power' in s.51(v) of the Constitution considered in Herald and Weekly Times Ltd v The Commonwealth (1966) 115 C.L.R. 418. There the Postmaster-General issued licences to companies for commercial television stations. The legislation then went on to prevent monopolising - either by legal control or business influence - of these television licences. That is, the Broadcasting and Television Act 1965 (Cth.), s.92, prohibited a person from holding 'a prescribed interest' in more than two, or in some cases three, television licences. A person held such a prescribed interest if, for example, he held a stipulated shareholding interest in a licensed company; s.91 of the Act.

These shareholding provisions, to dissociate television companies, were upheld although their relation to television services may seem tenuous.

#### Freedom of Inter-State Trade

13. Section 92 cases, on freedom of inter-State trade, raise two issues. First, the kind of activity for which freedom is asserted. Second, the kind of burden from which the trade

is to be free.

14. A shareholder protection law - whether enacted by Commonwealth or State - may not be within s.92 because it (even) prohibits an activity which is an intra-State transaction.

(1) The prohibited intra-State transaction may have inter-State incidentals. Yet the prohibition would not come within s.92. See Hospital Provident Fund in paragraph 8 above. Thus, the State could prohibit the share registrations and the share transfers instanced in paragraph 10 above without hinderance from s.92. Whether the Commonwealth could prohibit such registrations and transfers depends upon the Commonwealth first finding a power in its catalogue to do so - and this may be difficult to find.

(2) The prohibited intra-State transaction may be preparatory to, or incidental to, inter-State movement. But if the transaction is not 'inseverably connected' with inter-State movement, it does not come within the protection of s.92. See Harper v State of Victoria (1966) 114 C.L.R. 361, at pp.377, 382 (sale of goods brought in from another State); R. v Anderson; ex-parte Ipec-Air Pty Ltd (1965) 113 C.L.R. 177, at pp.193, 196 (importation of inter-State planes); Grannall Marrickville Margarine Pty Ltd (1955) 93 C.L.R. 55, at pp.71-72, 79 (manufacture of inter-State goods).

15. A shareholder protection law - again, whether enacted by Commonwealth or State - may not be within s.92 because it does not impose an acknowledged burden on inter-State movement.

(1) A law may not impose an acknowledged burden within s.92 because it merely prohibits a 'particular method' or a 'particular practice' in inter-State trade, Re Readers Digest Association Pty Ltd (1969) 43 A.L.J.R. 116, at pp.124, 128 (allowing South Australia's prohibition of inducing inter-State sales of record albums by the method of offering the 'bribe' of prizes); Hughes and Vale Pty Ltd v State of New South Wales (No. 2) (1955) 93 C.L.R. 127, at p.218 ('directions as to the manner of participation in a

form of inter-State trade'); The Commonwealth v Bank of New South Wales (1949) 79 C.L.R. 497, at p.640.

So, a law on share dealings, even if these share dealings consisted in inter-State transactions, may not be struck down by s.92, if the law can be characterised as a law merely regulating a method, a practice or a manner of doing inter-State trade.

(2) A law may not impose an acknowledged burden within s.92 in the following instances:

A law requires the filing of returns by inter-State share dealers: compare Wilcox Mofflin Ltd v State of New South Wales (1952) 85 C.L.R. 488, at p.534.

A law stipulates the keeping of records by inter-State share dealers, Hughes and Vale Pty Ltd v State of New South Wales (No. 2) (1955) 93 C.L.R. 127, at pp.163, 205-206.

A law provides for the registration of inter-State share dealers: compare McCarter v Brodie (1950) 80 C.L.R. 432, at p.495 (dissent, but now accepted by Hughes and Vale Pty Ltd v State of New South Wales (No. 1) (1954) 93 C.L.R. 1, at pp.24, 32).

Inter-State share dealers are required to supply information about their share dealings, Rogers v Jordan (1965) 112 C.L.R. 580, at pp.585, 591-592, 594.

16. The use of the Commonwealth's postal power and its comparative freedom from a s.92 attack have been discussed in paragraph 12 above.

#### The Prevalence of Commonwealth Law

17. If State regulation of share dealings is not desired by the Commonwealth, Federal Parliament can enact an exclusionary provision. This provision expressly excludes the operation of any State law in the area covered by Commonwealth legislation.

Examples of such exclusionary provisions already appear in the Conciliation and Arbitration Act 1904-1970, s.65; the Life Insurance Act 1945-1965, s.8; the Matrimonial Causes Act 1959-1966, s.8; and see the Trade Practices Act

1965-1968, s.8(5).

18. However, the effect of the exclusionary provision is merely to indicate Parliament's intention to cover a particular field, R. v Members of the Railways Appeals Board; ex parte Davis (1957) 96 C.L.R. 429, at p.439; Collins v Charles Marshall Pty Ltd (1955) 92 C.L.R. 529, at pp.548-549; and see Wenn v Attorney-General (Vict.) (1948) 77 C.L.R. 84, at p.120.

If the Court, aided by the exclusionary provision and otherwise -- for example, the comprehensive scope of the law, its 'national' subject matter - reads the whole Commonwealth law as intending 'completely, exhaustively, or exclusively' to cover share dealings, then s.109 of the Constitution gives prevalency to the Commonwealth law over the State regulation in the same field, Ex-parte McLean (1930) 43 C.L.R. 472, at p.483.

That is to say, the exclusionary provision is only one factor in the ousting of State regulation. Whether or not the State regulation will in fact be excluded will depend upon the operation of s.109, Davis and Collins above. And the operation of s.109 will depend in turn on the Court's finding of a 'complete, exhaustive or exclusive' intention by the Commonwealth legislation to cover the particular field.

19. But the Commonwealth through its exclusionary provision cannot fabricate inconsistency. It cannot eject State regulation of share dealings in areas in which the Commonwealth has no powers by concocting or affecting an inconsistency. See Insurance Commissioner v Associated Dominions Insurance Society Pty Ltd (1953) 89 C.L.R. 78, at p.85; West v Commissioner of Taxation (N.S.W.) (1937) 56 C.L.R. 657, at p.707; Stock Motor Ploughs Ltd v Forsyth (1932) 48 C.L.R. 128, at pp.147-148.

Then, before the Commonwealth legislation attempts to monopolise a given area of share dealings, the Commonwealth must first ensure that it has some power in its catalogue to deal with matters in this particular area.

For instance, it seems to me that a Commonwealth exclusionary provision would not oust State regulation of share dealings

by mining exploration companies. Such share dealings may be trade, but they are not necessarily inter-State trade. And so, the Commonwealth's trade and commerce power in s.51(i) of the Constitution is not available. Such mining exploration companies do not seem to be trading corporations; see paragraph 3 above. And so, the Commonwealth's corporations power in s.51(xx) does not seem to be reliable, either. Lacking power in the area, the Commonwealth cannot exclude from 'its' field State regulation.

#### Revival of the Inter-State Commission

20. The first thing to notice about this Commission, regulated by ss.101-104 of the Constitution, is that its role is severely limited. Reading these sections, especially s.101, one discovers that the Commission can only act in matters 'relating to trade and commerce', that is, the kind of trade and commerce found in 'the provisions of this Constitution' - viz., 'trade and commerce with other countries, and among the States': see s.51(i) of the Constitution. Thus, Morgan v The Commonwealth (1947) 74 C.L.R. 421, at p.454; Riverina Transport Pty Ltd v State of Victoria (1937) 57 C.L.R. 327, at pp.351-352.

In other words, what has been said about the limits of the Commonwealth's trade and commerce power in paragraphs 5-10 above will apply to the role of the Inter-State Commission when it comes to supervise share dealings.

21. There is, indeed, a further limit imposed on the Inter-State Commission, a limit which is not imposed on the trade and commerce power in s.51(i). For the Commission is authorized by its terms of reference in s.101 to execute and maintain s.51(i) laws 'within the Commonwealth'. Then, 'the commission cannot deal with foreign trade outside the Commonwealth', ibid., at p.351. The Commission could not supervise the overseas element in share dealings between Australia and other countries.

But the Commonwealth, merely acting through s.51(i) legislation, could regulate that overseas element. See Crowe v The Commonwealth (1935) 54 C.L.R. 69, at pp.83, 85-86, 90, 93-94, where the Commonwealth controlled an exporter of dried fruits from Australia but in regard to

his first sale of fruit in United Kingdom and elsewhere.

22. Apart from the substantive limits just given, the Inter-State Commission is further circumscribed. It is not a court with such judicial powers as the granting of an injunction, the awarding of damages, the imposition of penalties, the conclusive settling of controversies, State of New South Wales v The Commonwealth (1915) 20 C.L.R. 54, for example, at pp.61-65, 83, 89-90, 94-95, 108-110.

23. Since the Commission is expressly given powers of 'adjudication and administration', it probably could not act as a rule-making body. It probably could not issue regulations to govern overseas and inter-State share dealings. 'The Inter-State Commission is not a legislative body. It cannot make laws', Riverina Transport above, at p.351.

24. (1) To speak positively, the Inter-State Commission's 'powers of adjudication', assigned to it by s.101 of the Constitution, comprise 'such powers of determining questions of fact as may be necessary for the performance of its executive or administrative functions' (viz. in relation to trade and commerce laws), New South Wales v The Commonwealth above, at p.64.

(2) These factual findings, it seems, could be made binding on the parties before the Commission, Rola Co. (Australia) Pty Ltd v The Commonwealth (1944) 69 C.L.R. 185, at pp.200-201, 211, 212, 213; and see British Imperial Oil Co. Ltd v Federal Commissioner of Taxation (1925) 35 C.L.R. 422, at p.442.

(3) Moreover, proceedings could be constituted before the ordinary courts on the basis of these conclusive fact-findings, Rola above, at pp.200, 217-218.

#### Federal Statutory Body

25. In the area of shareholder protection a federal statutory body or commission has two advantages over direct legislative action by Parliament itself. First, a statutory body can make rules expeditiously and tailor rules with some detail. Second, a statutory body can act the surveillant over share dealings by a case-by-case

method.

26. Certainly a federal statutory body can be given rule-making powers. '(T)he Federal Parliament has, within its ambit, full power to frame its laws in any fashion, using any agent, any agency, any machinery that in its wisdom it thinks fit', Baxter v Ah Way (1909) 8 C.L.R. 626, at p.646.

Parliament can empower its statutory body to lay down terms and conditions, see Deputy Commissioner of Taxation (N.S.W.) v W.R. Moran Pty Ltd (1939) 61C.L.R. 735, at p.763, as Parliament has empowered its Taxation Commissioner to go to the length of choosing under which section a taxpayer is to be assessed, Girls Pty Ltd v Commissioner of Taxation (1969) 43 A.L.J.R. 99.

Parliament can authorize its statutory body to make rules 'over a large and by no means unimportant subject ... to determine the ends to be achieved and the policy to be pursued as well as the means to be adopted', and a wide discretion can be conferred, Victorian Stevedoring and General Contracting Co. Pty Ltd and Meakes v Dignan (1931) 46 C.L.R. 73, at p.100.

27. The limits to a statutory body's rule-making powers are, of course, those immediately laid down by its enabling statute (which is Parliament's creature).

Ultimately the limits are those laid down by constitutional law on delegated powers, namely, the terms of reference prescribed by Federal Parliament must not be vague or uncertain and they must not be too wide, Dignan above, at pp.101, 119-120, 121; Wishart v Fraser (1941) 64 C.L.R. 470, at pp.484, 488.

As for vagueness or uncertainty, this can be overcome by precise drafting.

As for width, so long as the rule-making power deals with matters within the Commonwealth catalogue of powers, the rule-making power is allowed much scope and much discretion. See paragraph 26 above.

28. A federal statutory body can be given adjudicative powers,



as the Income Tax Board of Review has been given decision-making powers, Mobil Oil Australia Pty Ltd v Commissioner of Taxation (1963) 113 C.L.R. 475, at pp.488, 491, 502; Shell Co. of Australia v Federal Commissioner of Taxation (1930) 44 C.L.R. 530, at p.544.

(1) In the exercise of its decision-making powers a federal statutory body can decide questions of fact. See Rola and British Imperial Oil in paragraph 24(2) above. And these fact-findings can form a conclusive basis in proceedings before ordinary courts, say, State courts exercising federal jurisdiction. See Rola in paragraph 24(3) above.

(2) In the exercise of its decision-making powers a federal statutory body can interpret and apply the law, as the Income Tax Board of Review does, Sutton v Commissioner of Taxation (1959) 100 C.L.R. 518, at p.523. But the statutory body cannot decide the law conclusively. That is, review of the law must be left with the courts, if the parties so wish, Shell Co. of Australia v Federal Commissioner of Taxation (1930) 44 C.L.R. 530, at pp.543, 544.

29. A federal statutory body cannot exercise the judicial power of the Commonwealth by exercising punitive or enforcement powers, such as imposing penalties for breach of its orders, enjoining the parties against disobeying its orders or ordering compliance with its orders, Boilermakers Case (1957) 95 C.L.R. 529 and (1956) 94 C.L.R. 254; Waterside Workers' Federation of Australia v J.W. Alexander Ltd (1918) 25 C.L.R. 434.

But there could be administrative-judicial co-operation between a federal statutory body and the ordinary courts. The orders of the statutory body could be enforced by the courts. See Rola in paragraph 24 (3) above. Compare the co-operation between the Arbitration Commission and the Commonwealth Industrial Court: the Commission makes the awards, the Court enforces the awards - a co-operation assumed to be valid, Seamen's Union of Australia v Matthews (1956) 96 C.L.R. 529, at p.534.

30. A federal statutory body can require the attendance of parties to give evidence on oath, Shell Co. of Australia v Federal Commissioner of Taxation (1930) 44 C.L.R. 530,

at p.544, as the Trade Practices Tribunal does under the Trade Practices Act 1965-1968, ss.72, 82, 83. Under the former Australian Industries Preservation Act 1906-1950, s.15B, the Comptroller-General of Customs could require information and the production of documents; and his requirements were backed up by statutory penalties. These powers were permitted to an administrative officer, Huddart Parker & Co. Pty Ltd v Moorehead (1909) 8 C.L.R. 330, at pp.354-357, 366, 376-381, 383-384, 418. Such powers are now found in the Commissioner for Trade Practices under the Trade Practices Act, ss.103, 104, and could be given a federal statutory body.

31. A federal statutory body could combine two powers, a rule-making power and a decision-making power. The doctrine in Boilermakers Case (1957) 95 C.L.R. 529 and (1956) 94 C.L.R. 254 prevents the mixing of the judicial power of the Commonwealth with a non judicial power, such as an executive power or a legislative power. But a federal statutory body, while it acts in a judicial manner, does not exercise the judicial power of the Commonwealth, Rola Co.(Australia) Pty Ltd v The Commonwealth (1944) 69 C.L.R. 185, at pp.203-204. And so, the doctrine in Boilermakers Case insisting on a separation of powers does not touch a federal statutory body, such as the one described in these paragraphs.

#### Federal-State Body

32. The fact is one cannot say that the Commonwealth has control of securities and exchange in Australia. It has no specific and wholesale power over that matter in its catalogue of powers. At best the Commonwealth must warily exert its control in a piecemeal fashion, acting in the interstices of its existing powers. On the other hand, the States have altogether general powers to make laws at large for the peace, welfare and good government of the States.

Then a complete control of securities and exchange must come from Commonwealth-State co-operation.

33. There have been from time to time instances of such gap-filling by the States to complement Commonwealth powers.

(1) For instance, 'all air navigation within Australia (was) subjected to the one code by a combination of Commonwealth and State legislative power', the Commonwealth regulating overseas and inter-State air navigation, the State intra-State air navigation, Airlines of New South Wales Pty Ltd v State of New South Wales (1964) 113 C.L.R. 1, at p.48; and see p.40 (Commonwealth and State legislation 'complementary to one another'), pp.51-52.

So, the one federal authority, a Securities and Exchange Commission, could draw its powers also from the Commonwealth (to control overseas and inter-State share sales) and from the States (to control intra-State share sales). And there could be 'one code' of shareholder protection throughout Australia.

(2) The Australian Hide and Leather Industry Board, established by the Commonwealth, drew its powers from the Commonwealth and States to acquire and dispose of hides.

The hides were acquired in the territories by the Commonwealth, in the States by the States. The hides were marketed not only in overseas and inter-State trade (see s.51(i) of the Constitution) but also in intra-State trade. The enterprise was struck down in a s.92 challenge, for it prohibited the sales of hides unless appraised; and these sales might include inter-State sales, Wilcox Mofflin Ltd v State of New South Wales (1952) 85 C.L.R. 488. The co-operative plan is described by the Court on pp.508-511, 526-528; but the Court did not, apart from the s.92 attack, pass on the validity of the plan.

To take a particular example of the plan, dealers in hides were required to be licensed. The Federal Act authorized the Board to licence dealers for the territories. The State Acts authorized the Board to licence dealers. Under the State Acts a person licensed under the State Acts was deemed to be licensed under the Federal Act. 'So that means in effect that the board's licence runs throughout Australia', Wilcox Mofflin above, at p.510. So, a similar parallelism between Commonwealth and State

legislation on the registration of share dealers could in effect make the registration 'run throughout Australia'.

(3) The Australian Wheat Board is established by the Wheat Industry Stabilization Act (Cth.). State Acts authorize the Board to acquire wheat within the States, but not wheat destined inter-State. The wheat is then marketed overseas, inter-State and intra-State. Again, there are two sets of parallel and complementary legislation, Commonwealth and State.

(4) The Coal Industry Tribunal and its local coal authorities is yet another joint Commonwealth-State administrative body. Once more its powers derive from almost identical Commonwealth and State Acts, in this instance Commonwealth and New South Wales Acts. It has appeared frequently in High Court reports, but its validity has not been passed on. See, for example, R. v Gallagher (Constituting the Coal Industry Tribunal); ex parte Australian Coal and Shale Employees' Federation (1966) 40 A.L.J.R. 202; R. v Gallagher; ex parte Aberdare Collieries (1963) 37 A.L.J.R. 40; R. v Lydon; ex parte Cessnock Collieries Ltd (1960) 103 C.L.R. 15; cf. Australian Iron & Steel Ltd v Dobb (1958) 98 C.L.R. 586, at pp. 596, 602. Nevertheless, the Court has acknowledged 'this ingenious legislative device', Lydon above, at p.20.

The Coal Industry Tribunal seeks to maintain adequate supplies of coal throughout Australia - so far as this means supplies within New South Wales, New South Wales power must be relied on (contrast s.51(i), the trade and commerce power). The Tribunal also seeks to regulate and improve the coal industry in New South Wales - so far as this means labour relations not extending beyond New South Wales, New South Wales power must be relied on (contrast s.51(xxxv), the arbitration power).

34. It seems to me that a federal statutory body, an administrative body, can exercise such joint Commonwealth-State powers. If both Governments agree to direct their powers to the one body, then at least neither Government can speak of constraint or compulsion by the other party to the Federation.

Generally, the impression I gain from the cases given in paragraph 33 above is that the High Court accepts these Commonwealth-State attempts 'to give powers expressed almost in identical terms and conferred by the ... respective Parliaments a combined operation so that they will operate according to the constitutional validity which each respective Parliament was able to give them', Lydon above, at p.20.

35. One may query whether a State can give its State powers to a s.71 court, for example, the Commonwealth Industrial Court which might be introduced into the Commonwealth-State joint plan. See paragraph 29 above.

But there is a distinction between the foisting of State powers on a federal court and the concession of State powers to a federal court at the invitation of the Commonwealth. The latter concession and invitation cannot offend any principle of arms-length in a Federation. Moreover, the State powers given to the federal court need not be non judicial powers; and so the separation of powers doctrine, with which the federal court is saddled, need not be breached. Finally, Boilermakers Case was strictly concerned with the Commonwealth and Ch. III courts, and with the exhaustive specifications in Ch. III of Ch. III courts. It did not say whether or not a State, at the invitation of the Commonwealth, could offer further judicial power to a federal court.

#### National Commission

36. The essence of the federal-State body described in paragraphs 32-35 above lies in invitation and agreement between Commonwealth and State. There is no imposition put upon the States. A national commission created by Federal Parliament must rely on the same cement - invitation and agreement, not obligation.

37. It may be trite but it is true; ours is a Federation with a central government and independently co-existing member States.

'The Australian union is one of dual federalism, and until Parliament and the people see fit to change it, a true Federation it must remain', Airlines of New South Wales Pty Ltd v State of New South Wales (1965) 113 C.L.R. 54, at

p.115. There is to remain 'a number of State governments separately organized. The Constitution predicates their continued existence as independent entities', Melbourne Corporation v The Commonwealth (1947) 74 C.L.R. 31, at p.82.

38. There are few constitutional bridges whereby the Commonwealth can dictate to the States or, to put it another way, whereby the States are responsible to the Commonwealth. State courts must apply federal law, covering clause V. State Supreme courts even on State law are appealable to the Federal Supreme Court, the High Court, s.73(ii). State courts can be burdened by federal jurisdiction, s.77(iii). But there are not many of these provisions subjecting or obligating the States.

Even the judge of a State court when exercising federal jurisdiction remains a State officer answerable to the State. He does not become pro hac vice an officer of the Commonwealth, R. v Murray and Cormie; ex parte The Commonwealth (1916) 22 C.L.R. 437, at pp.452, 464, 471.

39. Parliament has itself recently acknowledged the independence of the States in Commonwealth concerns. While Federal Parliament could apply federal law in Commonwealth places in a State, it was for the States acting on their own motion to administer this federal law through their State officers - whence the Commonwealth Place (Administration of Laws) Acts of the various States to bolster the Commonwealth Places (Application of Laws) Act of the Commonwealth.

40. Then, if there is to be a national commission on shareholder protection, State officers in the Commission are not answerable to a Federal Minister or Federal Parliament. They may, of course, agree to take on that responsibility.

I can summarize my submissions as follows:

The corporations power is the main power on which the Commonwealth must rely in its shareholder protection. This power is restricted to foreign corporations and trading or financial corporations formed within the limits of the Commonwealth. If this power extends to the control of activities characteristic of corporations, being foreign and trading or financial corporations formed within the limits of the Commonwealth, then under this power the Commonwealth can regulate share dealings by the corporations

named in s.51(xx) of the Constitution.

The banking power is also available. Indeed, because this power includes a power with respect to the incorporation of banks it gives the Commonwealth control of the internal management of banking corporations, a closer control of corporations lacking in s.51(xx), the corporations power.

The insurance power may be invoked - but only to act the surveillant of investment by insurance companies in the interests of the insured.

The trade and commerce power permits the regulation of inter-State dealings in shares.

The postal power may be called in aid to deny the use of mail services to certain forms of share transactions.

Freedom of inter-State trade need not be offended by laws on shareholder protection, either because the laws attach to intra-State transactions or because the laws merely prohibit particular forms of (mal-) practices.

If the Commonwealth wishes to pre-empt State legislation from this area of shareholder protection the Commonwealth can do so. But, of course, the pre-empted area must be itself within the Commonwealth's own competence, viz., within its corporations power, and the rest.

A revived Inter-State Commission would have a limited use in shareholder protection. It could only supervise inter-State dealings in shares.

A federal statutory body could exercise wide rule-making powers. It could also exercise decision-making powers. But the latter powers would need to be backed up by enforcement powers contributed by the ordinary courts.

A federal-State body in securities and exchange could draw concomitant powers from the Commonwealth offering its limited pockets of power and from the States offering their general powers. In the result comprehensive surveillance of share dealings would be secured throughout Australia.

A national commission on securities and exchange would be answerable to a Federal Minister or Federal Parliament -

at least, so far as the federal members of the commission are concerned. State officers serving on the commission would be answerable to the national commission through the grace of the States.

P.H. Lane



### LEGAL OPINION A-3

The Committee is bound to be influenced by the course which has been taken in relation to securities regulation in the USA: in that country an elaborate federal system of supervision of dealings and dealers in company securities has been established, beginning in 1933, and its validity so far as the distribution of power between Congress and States is concerned appears to rest mainly on the interstate commerce and the postal powers. The control system has developed through stages which seem likely enough to be recapitulated in Australia - first mainly publicity, then direct controls of company activities, then controls over dealers in securities and stock exchanges, and finally a tendency for all the controls to move from objective external regulation to the creation of considerable quasi-judicial discretions vested in regulatory agencies, mainly the Securities and Exchange Commission. The history is well summarised in the first volume of Loss, *Securities Regulation*, 2nd ed.

2. (a) Unfortunately, so far as the constitutional problem is concerned, this US history is almost irrelevant for Australian purposes, and that in two ways. Firstly, the constitutional power under which the US legislatures and Courts have mainly proceeded - the federal interstate commerce power, Art 1 (8) (3) - has been given a completely different kind of interpretation in that country from the interpretation applied in Australia to the verbally similar federal interstate trade power, s. 51(i). Secondly, so far as securities control is concerned, the very few cases in which the Supreme Court of the USA has considered basic constitutional questions (as distinct from questions of statutory interpretation) in relation to the securities control legislation give only the faintest inkling of the way in which such legislation is related to the head of constitutional power. The result can be seen in Loss; his enormous work contains only one, extremely cursory, reference to the constitutional question - in footnote 1 at p. 178 of

the second edition, vol. 1. It is indeed unchanged from the first single-volume edition of the work, p. 120 n. 35, and Mr Harding has checked for me that the supplements to the second edition give no further reference on this point.

(b) Two moderately informative decisions on the US constitutional question are Electric Bond & Share (1937) 303 US 419 and Jones v SEC (1935) 298 US 1; note the very early dates. Even the authorities settling the general interpretation of the commerce power are very early - Jones and Laughlin Steel (1937) 301 US 1, Kirschbaum v Walling (1942) 316 US 517, Wickard v Filburn (1942) 317 US 111. As a result of the judicial revolution of 1936-42 on the Supreme Court of the USA, it has now become almost impossible for a federal statute concerned with trade and commerce to be held invalid by the Court, at least on a ground going to power; the Court is concerned, practically speaking, only with constitutional questions arising under the Bill of Rights - due process, equal protection of the laws, ex post facto laws etc - which have no counterpart in the Australian constitutions. However, so far as one can disentangle a legal principle from the above and other US constitutional decisions on the scope of the commerce power, it is that although the core of interstate commerce is a crossing of State boundaries, the Congress can regulate any activity which affects interstate commerce - whether the 'affecting' is legal in a direct sense (changing legal rights, duties etc) or is 'merely economic'. Translated into the securities case, this means that not only the sending of stocks and bonds, and payments for them, across State boundaries may be regulated, but also the whole of the business transactions having an economic or commercial or organizational connection with such dealings. Thus if a dealer in securities has some interstate business in the narrow sense - and it is almost impossible for him not to have such - then the whole of his business organization as such is amenable to federal control, because it cannot be said that any feature of his business organization is incapable of affecting the part of his business which is in the narrowest sense interstate. Sometimes called the doctrine of 'commingling', this mode of

thought has caused references in the American judgments to the actual interstate movements involved to be of the most perfunctory character. It is also my opinion that the postal power, while sometimes referred to in the US legislation and the judgments, is perfunctorily treated; before the expansion of the interstate commerce power from 1937 onwards, the ability to deny the posts to particular kinds of business was of some importance, but such use of the postal power always caused difficult enforcement problems and was most useful in relation to business which wished to obtain concession postal rates. So far as economic regulation is concerned, the interstate commerce power has pretty swallowed up the rest of the Constitution in the USA.

(a) The course of interpretation of the corresponding Australian interstate trading power has been completely different from that described in paragraph 2. It is arguable that the wide interpretation there mentioned was adumbrated very early in US judicial history - perhaps as early as Gibbons v Ogden (1824) 9 Wheat.1. This is disputable, and in any event it is certainly not how the first Australian High Court understood the US situation as at 1900, nor in my view has the High Court moved very far from the assumptions of its earlier Justices. It is not possible to make such confident statements about the Australian position as about the US because the number of Australian decisions bearing directly on the scope of s. 51(i) is small, a state of affairs partly reflecting the circumstance that the Commonwealth has legislated relatively little under that power. Much Commonwealth legislation which in the USA would require a footing in the interstate commerce power has been enacted in Australia under the banking and insurance powers - s. 51 (xiii) and (xiv) - having no US equivalent and not requiring an interstate component. In one important case - aviation - the Commonwealth has a good deal on the external affairs power - s. 51(xxix) - to achieve results which in the USA are achieved under the commerce power. By far the largest number of Australian judicial discussions of the scope of trade and commerce have occurred not under s. 51(i), but under the express guarantee of

freedom of interstate trade, s. 92, which has no US express counterpart, and whose US equivalent (judge-made) doctrine does not restrict the competence of the Congress at all, whereas our section is now held to bind both Commonwealth and States. But in any event the Courts have always recognised that the scope of interstate trade and commerce protected under s. 92 is narrower than the area of power over trade and commerce given by s. 51(:), and it is dangerous to treat dicta in s. 92 cases as being even persuasive on the scope of the former s. 51(i). At most, that which is protected by s. 92 must come within Commonwealth power under 51(i) - though of course with the immediate peril that it will be protected against Commonwealth as well as State legislative or legislatively-based interference by s. 92. However, ignoring for the minute the s. 92 complication and the hundred odd decisions under that section, it can be said that there have been about 21 decisions (all of the High Court) directly bearing on s. 51(i) or having important discussions of its scope. They are listed in the appendix. Of these the first (Railway Servants 4 C.L.R. 88) was overruled. Of the remainder, the most important for the purposes of this opinion were Turner (39 C.L.R. 411) Huddart Parker v Commonwealth (44 C.L.R. 492) Dignan (46 C.L.R.73) Burgess (55 C.L.R. 608) Nagrnt (61C.L.R. 688) Noarlunga (92 C.L.R. 565), Redfern (110 C.L.R. 194) and Second Airlines (113 C.L.R. 54). Taken together, these decisions decisively reject the US Supreme Court's 'affecting' and 'commingling' doctrines, and tie the Commonwealth's power very directly to the core 'interstate' activity - the actual crossing of State boundaries. Thus in Turner and Nagrnt, commingling was explicitly rejected as a reason for federal control of sea lanes adjacent to routes used by interstate and overseas shipping, contrary to US doctrine. In Burgess, commingling was rejected as a reason for federal control of all airways, though as we shall see this has been qualified in Second Airlines. Huddart Parker v Commonwealth and Dignan provided (with dissents) what may look like a more generous doctrine - namely that the interstate trade power authorises Commonwealth licensing and regulation of stevedoring activities affecting interstate and overseas shipping; however,

it should be noted that this was tied to the actual loading and unloading of vessels plying between States or overseas, and it was never suggested that the power extended to all aspects of the business of stevedores, merely because some of their activities fell within power. The efficacy of Commonwealth waterside control has depended in large measure on the practical circumstance that except in WA, intrastate coastal shipping has been a small and dwindling proportion of all shipping, and it has not been worth the while of stevedores to seek separate regulation for the tiny part of their business solely concerned with such intrastate shipping. In Noarlunga, the Court held - surprisingly - that treatment of carcasses for export came within the foreign trade power; however this was again tied to the circumstance that the works in question produced solely for export and were designed accordingly. It was not suggested that the Commonwealth could deal with anything more than the actual processing of meat intended for export - for example, that it could as incidental to that operation regulate the corporate structure of the meat processing company. Redfern has also been suggested as a possible basis for a wider construction; restrictive pricing agreements concerning the sale of tyres were held to come within the interstate commerce power, although on the facts stated for the purpose of the decision (which concerned only the validity of the pleadings) the agreement under attack included local sales within a State as well as sales across a State border. However, the critical point of the decision was that on the pleading there was a single agreement affecting all types of sales, including interstate sales, and the Court was concerned only to decide whether insofar as interstate sales might subsequently be proved to have been carried out in accordance with that agreement, the Commonwealth Australian Industries Preservation Act (predecessor of the Trade Practices Act) had been infringed. There was no suggestion that either the intrastate sales or the general corporate structure of the defendant companies also fell within Commonwealth control because of the presence of the interstate element in the transactions.

(b) In Second Airlines the High Court held (modifying to

this extent the approach in Burgess, and perhaps Turner and Nagrind) that the interstate trade power enabled the Commonwealth to lay down safety regulations for aircraft which bound intrastate as well as interstate operators, because of the physical and technological impossibility of having separate safety rules for the two classes of operation, as they both had to use the one continuous air space. But it was also in Second Airlines that the Court specifically rejected the US approach to interstate commerce. The consequence can be seen in the aspect of the decision which concerned the power to regulate air traffic not from a safety but from an economic point of view - rationing the number of operators, protecting train and road traffic against air competition and such factors. The Court held that as to what it considered a purely intrastate air route (Sydney-Dubbo) this competence belonged exclusively to the State. Hence two licences were needed and there was a deadlock - the Commonwealth choosing one operator and the State another, and neither being able to operate. If a similar case had arisen in the USA, the Supreme Court would have examined the extent to which the 'intrastate' route involved the carriage of interstate and foreign traffic, goods, mails etc, the corporate relationship between the rival claimants and interstate and foreign operators, the servicing etc agreements between the claimants and the last named operators, and the extent to which the 'intrastate' and interstate-foreign operators relied on the same terminals and flying aids. It would undoubtedly have concluded that the service in question not merely 'affected' interstate and foreign commerce, but was a part of it - a channel of such commerce, and so fully subject to federal law. This is the contrast in concepts between the two Courts which must be kept steadily in mind when speculating on the application of the interstate trade power to a subject such as securities control.

(a) There can be no question that the Australian inter-state trade power - 51(i) - authorises the Commonwealth to regulate (subject to s. 92) the transmission of buying and selling orders for securities across State frontiers, and many features of the contractual arrangements connected with such

transmissions. This is one of the features of the discussion of 'interstateness' in the s. 92 cases which is fully applicable to the extent of the power under s. 51(i). The point comes out particularly in the 'borderhopping' cases, where the Court denied the protection of s. 92 to some aspect of a complex transaction including a border-crossing, but insisted that however 'artificial' or designed to attract the protection of s. 92 the whole transaction might be, the actual crossing of a border is necessarily protected because this is the core of 'interstateness'; see, for example, the opinion of Fullagar J. in Harris v Wagner (1959) 103 C.L.R. 452 at 463-4. In the same passage, Fullagar J. quotes a famous passage from another s. 92 case, McArthur (1920) 28 C.L.R. 530 at 549, which has sometimes been thought to express a relatively wide approach to 'interstateness', though the passage also insists on border-crossing as a necessary part of the concept; the key words are: 'all the commercial dealings and all the accessory methods in fact adopted by Australians to initiate, continue and effectuate the movement of persons and things from State to State are also parts of the concept, because they are essential for accomplishing the acknowledged end'. McArthur also illustrates the fallacy of using s. 92 cases in order to discover the outer limits of the power under s. 51(i). The question was whether Queensland could fix prices in relation to certain interstate sales of goods; on the interpretation of s. 92 then applied by the Court (possibly not today applicable in similar circumstances) it was held that Queensland could not fix prices in relation to one of four classes of transaction - namely interstate contracts which by their terms required the delivery of goods and payment of purchase price across State borders. Another three classes of contracts which had interstate elements in fact but could be fulfilled without a border crossing of the goods to be delivered were held not protected by s. 92. In my opinion, however, all four of the kinds of transactions carried on by the plaintiff company in New South Wales through travellers collecting orders in Queensland would come under the scope of the Commonwealth's interstate trade power, because all four involved border crossings of orders, acceptances, instructions to the travellers etc. The

Commonwealth's ability to pursue such transactions down a line of sub-transactions within a State would certainly be curtailed by our Courts much short of the point now reached by the US interstate commerce power, but where this point is has never yet been authoritatively determined by our Courts, because appropriate cases have not yet arisen in which the problem arises from 51(i) and not from 92.

(b) It follows that the Commonwealth could, for example, prohibit the transmission from State to State of buying instructions and acceptances in relation to securities unless those securities were 'approved' in some manner defined by the legislation - e.g. they had been issued after advertisements in a particular form, or by companies with a specified proportion of paid up capital, or other such conditions designed to protect investors. All this, however, subject to s. 92.

5. There can be equally little question that the Commonwealth could use the postal power - s. 51(v) - in somewhat similar fashion to that outlined in 4(b). Such use of the postal power has not come directly before the Australian courts, but I agree with Wynes (Legislative etc. Powers in Australia, 4th ed., p. 131n 67) that US decisions would be followed, and the use of the power to prevent passage of specified articles or communications upheld even though the policy behind the prohibition had nothing to do with the running of a post office. The view is strongly supported by Herald and Weekly Times v Commonwealth dealt with post paragraph 6. This power would extend to intrastate as well as interstate communications, a matter of some importance in view of the size of our States. In so far as the communications were interstate, the control might be subject to the requirements of s. 92. However, it should be appreciated that the US decisions on the postal power have never gone to the lengths manifested in the decisions on the interstate commerce power. That is, it has never been suggested that because a business uses the mails, therefore all its business affairs 'affect' the mails and so come under federal control. Federal control on the postal basis applies only to the actual mail, telephone etc. transmission; the sanctions are denial of facilities for the prohibited material, and making it an offence to use those facilities in defiance of such prohibition (by stealth,



accommodation addresses etc.). However, the potential reach of these powers, at least in legal theory, could be very great. For example, I can conceive of no constitutional objection to a Post Office regulation which ensured the cutting off of telephone services to any person or corporate body which, in the opinion of the PMG, was carrying on a business inconsistently with the views of the Senate Committee on Securities; nor would it be easy to apply s. 92 to prevent such drastic action. The difficulties are political and practical rather than legal.

6. Yet another approach to transaction-regulation is provided by the taxation power - s. 51(i). In Barger, (1908) 6 C.L.R. 41, the High Court by majority held that taxation remission could not be used as a sanction for regulation, when the area of regulation was otherwise beyond federal competence, but the force of the decision has been much weakened by the decisions and dicta in Fairfax (1965) 114 C.L.R. 1 and Herald and Weekly Times (1966) 115 C.L.R. 418. Fairfax dealt directly with taxation remission; the use of this device to induce a particular investment policy by superannuation funds was upheld. Herald and Weekly Times dealt not with taxation, but with the television extrapolation of the postal power; it was held that television licensing could include conditions aimed at preventing concentration of ownership of such licences, although the policy so enforced had only a remote connection with the efficiency of the television services as such. Hence it is probable that the Commonwealth could reach a topic such as securities regulation through differential taxation. For example, a tax could be imposed on the profits of stock and sharebroking firms, with provision for reduction in the rates of such tax for firms which adopted to the satisfaction of a Commonwealth Securities Commission such practices as to advice, reserves, bonding of employees against frauds, dealing on margin, prevention of insider trading etc. as the Commission lays down. It might be in practice very difficult to apply such measures to company flotations, though possibly worth considering in relation to particular kinds of companies; for example, differential rates of land tax could be used as an incentive to mining companies to adopt specified standards. One advantage of tax-oriented control schemes would be their likely immunity from attack under s. 92.

7. In much of the above discussion s. 92 is mentioned as a limiting factor for possible Commonwealth controls of security trading. Even today, there are many unsolved problems in relation to s. 92 and there has recently begun to emerge on the High Court bench some fairly fundamental differences in approach to that section. There is a convenient summary of the established interpretation in Howard, Australian Federal Constitutional Law, chap. 5. I think a good enough summary of the effect of the section as now interpreted, for the purpose of this discussion, is as follows. S. 92 guarantees the continued existence of private enterprise in interstate trade and commerce, and protects such enterprise against legislative and legislatively authorised interference by Commonwealth or States unless such interference satisfies three tests; firstly, it is directed to objective purposes of public utility such as prevention of fraud, disease, accident etc. and maintenance of quality standards; secondly, it is 'reasonable'; thirdly, it does not depend on the use of wide discretions vested in administrative officers. I should think that the general public purpose of regulating securities trading so as to prevent intentional, negligent or even unintended injury to investors would be regarded by the present High Court as well within the first requirement, provided the means adopted came within the second. The main practical difficulty might come from the third requirement, because it may be more convenient and workable, at least in the early stages of a control system, to vest fairly wide discretions in a Securities Exchange Commission. This leads to the dilemma emphasised in chap. 11 of my Australian Federalism in the Courts (especially pp. 206-8); in so far as Commonwealth authority is extended further in economic and commercial matters on the ground of their 'interstateness', it will be difficult to prevent the power so gained from coming automatically within the restrictions created by s. 92. So far as activities are classified as 'intrastate', they will be unprotected by s. 92, but effective regulation may require State legislative action.

8. The desirability and possible effectiveness of Commonwealth controls under one or all or some of the above powers is almost entirely one of practical convenience and politics. Thus under the interstate trade power, questions requiring answer would include: how much trading in securities in fact goes on across State borders? How readily could

affected dealers rearrange their methods of doing business so as to avoid the elements of 'interstateness' attracting Commonwealth power? Under the postal power, relevant questions would be: is it politically practicable to deny all telephone etc. facilities to non-cooperating brokers? To interfere with the privacy of first class mails and 'bug' telephone calls so as to police regulatory systems? Under taxation powers, what are the administrative implications of differential tax systems? Would it be practicable to use them for controls over business generally, or only over share dealers, and would such indirect controls over the latter be worth the effort? Generally speaking, it can be said that Commonwealth attempts to use the peripheries of granted powers, or to seek constitutional toeholds in a collection of powers not directly bearing on the subject of regulation are apt to invite extensive litigation, cause extremes of administrative complexity and may not quite hit the specific conduct which it is sought to prevent or regulate. Hence it is a problem of weighing the undoubtedly greater directness and efficiency, legally and administratively, of State controls, against their local nature and the difficulties in getting and keeping them sufficiently tough and uniform, and on the other hand of weighing the advantages of resolute Commonwealth policy on a uniform national scale against the possible legal and administrative weaknesses of action to give effect to such policy through Commonwealth power alone, and finally weighing the result of the first calculation against the result of the second. I doubt whether any computer ever made or to be made could solve these equations.

APPENDIX

Chronological Table of Cases bearing on s. 51(i)

Federated Amalgamated Govt and Railway etc. Assn v NSW Railway etc. Assn (Railway Servants) (1906) 4 C.L.R. 88

Owners of 'Kalibia' v Wilson (1910) 11 C.L.R. 689

Australian Steamships Ltd v Malcolm (1914) 19 C.L.R. 298

Newcastle & Hunter River etc. Co. Ltd v AG Commonwealth (1921) 29 C.L.R. 357

Walsh and Johnson, ex p. (1925) 37 C.L.R. 36

Commonwealth v Australian Commonwealth Shipping Board (1926) 39 C.L.R. 1

R v Turner, ex p. Marine Board of Hobart (Turner) (1927) 39 C.L.R. 411

R v Gates (1928) 41 C.L.R. 519

Huddart Parker v Commonwealth (1931) 44 C.L.R. 492

Vic Stevedoring etc. Co. v Dignan (Dignan) (1931) 46 C.L.R. 73

R. v Burgess (Burgess) (1936) 55 C.L.R. 608

Radio Corporation v Commonwealth (1938) 59 C.L.R. 170

Nagrint v Ship Regis (Nagrint) (1939) 61 C.L.R. 688

Joyce v Australasian UN Steam Navig Co. (1939) 62 C.L.R. 160

Australian Nat Airways v Commonwealth (1945) 71 C.L.R. 29

Wagner v Gall (1949) 79 C.L.R. 43

Burton v Honan (1952) 86 C.L.R. 169

O'Sullivan v Noarlunga Meat (Noarlunga) (1954) 92 C.L.R. 565

R v Commonwealth Court of Conciliation etc. ex p Waterside Workers' Fed. (1955) 93 C.L.R. 528

Australian Coastal Shipping Comms v O'Reilly (1962) 107 C.L.R. 46

Redfern v Dunlop Rubber Aust. (1964) 110 C.L.R. 194

Logan Downs v Commsr Taxation (1965) 112 C.L.R. 177

Airlines of NSW v NSW (Second Airlines) (1965) 113 C.L.R. 54

The Corporations Power (s. 51(xx)) and Securities Control.

1. This power has been considered in detail only twice, in Huddart Parker v Moorehead (herein Moorehead) (1909) 8 C.L.R. 330 and Bank of N.S.W. v Commonwealth (herein Bank Nationalization) (1948) 76 C.L.R. 1, both decisions of the High Court. (Bank Nationalization was appealed to the Privy Council, but solely on an issue not relevant to the corporations power). However, in Bank Nationalization the discussion was strictly obiter, because of the four Justices who referred to the question, Latham C.J., Rich and Williams JJ. held expressly that 51(xx) was irrelevant to that case since they regarded banks as being dealt with exclusively by 51(xiii) and hence not included within 'financial corporations' under (xx), and Stark, J. was inclined to the same view though not so definite. Dixon and McTiernan JJ. did not deal with (xx). Moreover, the four Justices mentioned undertook no independent examination of (xx), but purported to rely on what was decided in Moorehead, and did not even undertake any detailed examination of that case. Fullagar J. made some comments on (xx) in a single-judge decision, Associated Dominions Assce. v Balmford (1953) 89 C.L.R. at 86-7, but these also were very cautious and unnecessary to the decision. Hence we are in substance, so far as authority is concerned, cast back on Moorehead.

2. The construction of 51(xx) should be reconsidered by the High Court in the forthcoming restrictive trade practices case, Concrete Pipes, on appeal from the Industrial Court. The latter court, following Moorehead, held that (xx) does not enable the Commonwealth to regulate the external conduct of the named corporations, such as entering into restrictive trade agreements with other traders. If the Commonwealth is to succeed on the appeal, it will have to induce the High Court to overrule Moorehead, and this could not be done without modifying considerably the construction of (xx) which a strong majority of the Court (Griffith C.J., Barton, O'Connor and Higgins JJ.) then adopted. It would obviously be convenient if we could wait until that case is argued and decided, but I gather that the Committee is anxious to explore the corporations power to some extent before then, and of course there is always the possibility that the case will not proceed. It may also help towards

the understanding of that case, if decided and whatever the decision, if some analysis of Moorehead and of the alternative possible interpretations of (xx) is undertaken now.

3. No interpretation of (xx) adopted in Moorehead would serve the purposes of the Commonwealth in relation to restrictive trade practices, and also the purposes of the Committee. The majority opinions differed somewhat between themselves (though I think the extent of that difference has been exaggerated), but they all agree on one point which is decisive for the restrictive trade practices case; (xx) does not enable the Commonwealth to regulate directly the external relations of the named corporations with the general community. Whatever power it does give is in some way related to the corporate capacity and structure of the named corporations; in so far as it extends to capacity, relations with the outside world will be affected because transactions beyond capacity may become void or voidable, but the Trade Practices Act does not try to exploit that possibility. On the other hand, the dissent of Isaacs J. in Moorehead rested on the view that (xx) empowers only the regulation of the external conduct of corporations, and does not extend at all to matters of capacity and internal organization; if that were now adopted, the Commonwealth would succeed in Concrete Pipes, but the corporations power would become almost useless for the purposes of the Committee. It is far from certain that the High Court as at present constituted will depart from a version of the Moorehead construction of the corporations power. However, I should think that in any event the least probable course for it to take would be to adopt the Isaacs dissent in that case, because it is such an eccentric view of the power. One must ask why the Founders should have put this power in at all, and for the reasons given by Higgins J. in Moorehead (pp. 409-10), it seems so extremely unlikely that they wanted to give the Commonwealth power to create a special law of contract, torts, property, crime etc. for activities in which foreign, financial or trading corporations happened to be engaged. Clearly they must have thought it important that there could be a national law in relation to these bodies for reasons connected with their being corporations, and because they were foreign, trading or financial. Thinking along these lines will probably be congenial to the present High Court, since it accords with the way in which (following the pioneer work of Sir Owen Dixon) they have treated another puzzling

section, namely 92. Such thinking leads naturally to a view that the placitum is intended to give some control over the internal structure of the corporations mentioned, and over the aspects of their relations with the general community especially connected with their being foreign, trading or financial in their activities. The latter aspect of the matter could result in the High Court overruling Moorehead on the question of monopolies control legislation, because against the background of later 19th century experience, especially in the U.S.A., it would be reasonable to treat monopolisation and trade restriction as special vices of trading and financial corporations and therefore within the scope of the power, but this line of reasoning (unlike that of Isaacs J.) would also leave ample room for a construction of the power helpful to the Committee in the handling of its problems. Hence I am inclined to think that the Concrete Pipes case will produce a result no worse, from the point of view of the Committee, than Moorehead, and possibly a little better.

4. It would be particularly helpful to the Committee if the High Court could be persuaded now to overrule the unanimous view of the Court in Moorehead that the corporations power does not permit the Commonwealth to provide for the incorporation of trading and financial concerns. Such a power would be by far the most convenient starting point for a uniform Commonwealth law concerning the aspects of corporate activity with which the Committee is concerned. I have always thought myself that the Moorehead decision on this point was at best questionable, and probably wrong. I think the Court put far too much weight on the expression 'formed within the Commonwealth'; it seems to me intended only to contrast certain 'Australian' corporations with all 'foreign' corporations, and to be quite consistent with the view (which Griffith C.J. admitted at p. 348 was otherwise tenable) that power to create such corporations would be a natural concomitant of a general power with respect to them. Similarly they over-emphasized the mere fact of life that foreign corporations must initially have been 'formed' under some other law. However, it may be too much to hope that the present High Court would overrule the one thing on which all agreed in Moorehead, especially since it was accepted as correct by the four Justices abovementioned who dealt with (xx) in Bank Nationalization, and by Fullagar J. in the insurance case. Hence though I hope that the argument will be put in Concrete Pipes, I would expect at



the most two of the present Justices to be prepared for such a heroic degree of overruling.

5. However, even if the present High Court adheres in substance to the Moorehead majority interpretation of (xx) this could still leave that power of some importance for the purposes of the Committee. The main difficulty in following the majority opinions lies in the circumstance that Barton J. hardly bothered to express any positive opinion on the actual scope of (xx), though he did express a general agreement with the opinion of Griffith C.J., while Griffith C.J., although speaking a little plainer than Barton J., was also very cautious. The only certain things one can say about their two opinions is that they held (xx) did not authorise laws governing the formation of trading and financial corporations, nor laws governing their external conduct. On the other hand, O'Connor and Higgins JJ. adopted a reasonably clear positive construction of (xx) and although there are differences of emphasis as between them, there is a core of agreement. It is expressed by O'Connor J. as follows (8 C.L.R. at 373-4):

In the light of the circumstances it may fairly be taken that the framers of the Constitution intended by the sub-section under consideration to confer on the Parliament of the Commonwealth just that power which was wanting in the legislative bodies then existing in Australia - the power of making a uniform law for regulating the conditions under which foreign corporations, and trading or financial corporations created under the laws of any State, would be recognized as legal entities throughout Australia. As part of that power there would be necessarily implied the authority to impose on those corporations all such conditions on admission to recognition as would be appropriate or plainly adapted to the object of the subsection and not forbidden by the Constitution. (See the judgments of this Court in the Jumbunna Case (1)). Recognition of a corporation as a legal entity involves a recognition of its right to exercise throughout Australia its corporate functions in accordance with the law of its being, that is, the law by which the foreign or State law gave it existence as a legal body. Recognition may be absolute

or on conditions. It is unnecessary here, even if it were possible, to make a comprehensive statement of the matters which might be the subject of such conditions, but it may be stated generally that Parliament is empowered to enact any law it deems necessary for regulating the recognition throughout Australia of the corporations described in the section and may, as part of such law, impose any conditions it thinks fit, so long as those laws and the conditions embodied in them have relation only to the circumstances under which the corporation will be granted recognition as a legal entity in Australia. It may, for instance, prohibit altogether the recognition of corporations whose constitutions do not provide certain safeguards and securities for payment of their creditors. It may impose conditions on recognition to attain the same ends. As a preliminary to recognition it may insist upon compliance with any conditions it deems expedient for safeguarding those dealing with the corporation. In the effecting of objects within these limits it must have the right to encroach on State powers to such an extent as it may deem necessary.

Higgins J. says (at pp. 412-3):

But there is ample scope provided for the Federal Parliament by this sub-section. It can regulate such companies as to their status, and as to the powers which they may exercise within Australia, and as to the conditions under which they shall be permitted to carry on business. It is well established that each country has a right to prevent a foreign corporation from carrying on business within its limits, either absolutely, or except upon certain conditions: Hooper v California (1); and this principle seems to be at the basis of sub-sec.(xx). The Federal Parliament can, in my opinion prescribe what capital must be paid up, probably even how it must have been paid up (in cash or for value, and how the value is to be ascertained), what returns must be made, what publicity must be given, what

auditing must be done, what securities must be deposited.

The Federal Parliament controls as it were the entrance gates, the tickets of admission, the right to do business and to continue to do business in Australia; the State Parliaments dictate what acts may be done, or may not be done, within the enclosure, prescribe laws with respect to the contracts and business within the scope of the permitted powers.

It should be added that O'Connor J. expressly recognises (at p. 373) that the federal power must extend to the State in which one of the affected corporations is formed.

6. It is self-evident that such a power (noting particularly the underlined passages) would enable the Commonwealth to go some distance towards the objectives of the Committee. There would be some technical awkwardness in having to express the desired regulations in the form of conditions of a licence to carry on business, and in the construction of appropriate sanctions, but I have no doubt that these problems (largely drafting in nature) could be overcome. Hence the next question is - whether the opinions of Griffith C.3. and Barton J. can be regarded as giving any support to the O'Connor-Higgins theory. In my view they can. Griffith C.3. says at p. 354:

I think that pl. xx. empowers the Commonwealth to prohibit a trading or financial corporation formed within the Commonwealth from entering into any field of operation, but does not empower the Commonwealth to control the operations of a corporation which lawfully enters upon a field of operation, the control of which is exclusively reserved to the States.

A preceding passage suggests that the 'prohibition' must be expressed in terms of denial of capacity. As to Barton J., we have to make an inference from something he says in the course of discussing the argument that the impugned legislation is at least valid under the incidental power (xxxix), which is a very contingent sort of proposition; however, for what it is worth, he says at p. 355: 'The primary object of the legislation' - (sc., for it to be valid) - 'must be, not the interference

with the forbidden subject of State trade, but the control of the corporations the subject of the grant'. Assuming that these two Justices were in substance agreed, the result is not far removed from the more carefully stated view of O'Connor and Higgins JJ. If the corporations in question can be prohibited from engaging in specified areas of trade then it is likely that the legislature can at least lay down conditions of trading which concern not their external trading activities but their internal structure, including the matters referred to by the last-named Justices. Hence my conclusion on this part of the matter is that the Commonwealth could as authority now stands require the named types of corporation to adopt procedures designed to protect share and debenture holders and creditors, as a condition of being allowed to carry on business at all. (It is suggested by Rich and Williams JJ. in Bank Nationalization at p. 255 that the corporations in question cannot be directly regulated by Commonwealth law in the sense mentioned, but can only be required to adopt the specified procedures under the terms of their incorporating foreign or state law. There is no support for this view in any other judgments, and no logical basis for it.)

7. However, even if so construed (xx) allows the Commonwealth to act only in respect of foreign, trading and financial companies. There is no difficulty in identifying a foreign company, but the precise limits of the expressions 'trading' and 'financial' are disputable. We have from Bank Nationalization that 'financial' does not include banks, but this is unimportant in view of the very wide scope given the banking power (xiii) in State Banking (74 C.L.R. 31) and Bank Nationalization. Otherwise we have only a short passage in the opinion of Isaacs J. in Moorehead at p. 393. He said that a 'purely manufacturing' company was not included. Later he went further and excluded 'domestic corporations' constituted for 'municipal, mining, manufacturing, religious, scholastic, charitable, scientific and literary purposes', and 'possibly others more nearly approximating a character of trading'. This still leaves in doubt manufacturing corporations which also trade, and it is difficult to imagine a manufacturer who does not at least sell his own products; and it says nothing specific about financial corporations. Nor is it certain that the Concrete Pipes case will deal fully with this problem, though it was briefly mentioned in the Industrial Court. My tentative view is as follows.

(a) The present High Court is unlikely to give the relevant expressions so wide a meaning as to include all the corporations which the Committee would like to see covered, that is all that are non-governmental and non-'charitable' (in the widest sense). The Court is pretty sure to say that some significant narrowing of the field of 'economic' corporations must have been intended. The dicta of Isaacs J. are likely to be persuasive.

(b) 'Trading corporation' is therefore likely to be confined to corporations whose main business is trading as distinct from extracting, making, processing etc. The pure type of trading corporation would be one which buys goods and then sells them, and the borderline cases would be corporations which carry out a limited degree of processing before selling, such as a car concern which buys knocked down whole vehicles, assembles and then sells. Probably most mining companies would be excluded. This is a pessimistic view, and a Court which favoured expansive or contemporary interpretation of a Constitution would certainly reject it on the ground that today trading is in the forefront of all economic enterprise. However, it accords with the evident determination of the present Court, as shown in Second Airlines (113 C.L.R. 54) and Second Margarine (114 C.L.R. 283), to maintain a rigid distinction between production and trading.

(c) 'Financial' gives less trouble. It would certainly include unit and mutual trusts, fringe banking ('merchant banking'), and in general companies which take money from the public in order to lend it to others or buy securities in other companies.

8. Finally, it has to be noted that under the present interpretation of s. 92, that section could be an obstacle to the exercise by the Commonwealth of whatever powers it gets under (xx), and the difficulty could be greater if the power takes the shape adumbrated in para. 6 above. This is because the assumption of that sort of approach is that the Commonwealth would have to prohibit the conduct of business throughout Australia by the designated corporations unless they complied with specified requirements as to the raising of capital, and issue of shares, debentures, floating charges, mortgages etc. in order to be valid for businesses of an interstate character, the requirements would have to be prima facie regulatory and objective in

character; they would have to exclude the exercise of discretionary powers by administrative officers, and be such as not to cast an undue burden on the interstate trade in question. An unexplored problem under s. 92 is that created by Commonwealth regulatory laws tending to make trading conditions more onerous for interstate business than are State laws applicable to comparable business of a purely intrastate character. On the other hand, in so far as the corporations regulated by the Commonwealth under s. 92 are purely intrastate, s. 92 would not apply - though I would expect a rush to make business interstate, a sort of border-hopping, in order to attract whatever protection s. 92 might give. The relation of s. 92 to (xx) has never been considered. The present construction of s. 92 is cogently dealt with in Howard, Australian Federal Constitutional Law p. 203 ff.

#### Cooperative Regulation by Commonwealth and States

1. In my opinions on the possibility of direct Commonwealth control in this matter under the Corporations, Interstate Trade, Postal and Tax powers of the Commonwealth, I have drawn attention to a number of difficulties and doubts concerning the application of those powers, and the unlikelihood that the High Court would permit a direct attack on the problem in the way made possible in the USA by the interpretation of the interstate commerce power of that country. There is always a strong initial objection to the Commonwealth trying to deal with what socially and economically are fairly large and distinct commercial operations by the use of powers which only peripherally or indirectly affect such operations; there is the constant danger of successful judicial challenge to particular controls, the inhibitions to firm administrative action which such dangers create, the administrative complexities made necessary by the form of the constitutional power in question, and the strong incentive to the persons and corporations threatened by the control to seek changes in their form of organization which will take them beyond the scope of the Commonwealth powers. For example, it is pointed out that the corporations power may not be available to control the securities activities of mining companies, even if the scope of the power in other respects becomes wider because of the forthcoming High Court decision in Concrete Pipes. Some concerns which in a corporate form might be caught under the corporations power might find it

worth their while to abandon the corporate form and instead use partnership forms; there are other incentives to such a course. The postal power can be evaded by using other forms of communication, which may be quite sufficient for a good many purposes of a locally based securities trade in State capital cities, and a fully effective use of this power may require a degree of interference with first class mails which would be very offensive to generally accepted political and popular ideas on that subject. Similar difficulties could well attend an attempt to use the interstate trade power in its Australian interpretation, since its scope might well extend only to control of actual transmission of buying and selling orders etc.

2. Action by the States is obviously free of many, though not all, of the difficulties which face the Commonwealth. Generally speaking, the States under their general residue of powers - s. 107 - can deal directly with every phase of a securities trading operation within the State, and also with all the aspects of interstate trading (however conceived) in the same field in so far as it involves activities within the borders of the State concerned. It must never be forgotten that the States have concurrent power over interstate trade, and their legislation affecting that field can be invalidated, generally speaking, only for three reasons: firstly, Commonwealth law operating in the same field and overriding State law under s. 109; secondly, State law attempting to operate extraterritorially; thirdly, because of the application of s. 92. Neglecting these difficulties for the minute, it would be open to the States to institute the full range of controls over securities trading and traders made familiar by North American example, and all the further kinds of control which I have heard suggested, and even if some particular kinds of control ran into legal difficulties, it is probable that the greater part of the control system would remain unaffected. Returning to the three main possible difficulties mentioned, the first two (inconsistency with Commonwealth law and extraterritoriality) could both be dealt with by an appropriate Commonwealth policy and consequent legislation. The third, s. 92, applies equally to State and Commonwealth action and hence constitutes no reason in itself for preferring one to the other.

3. Assuming no constitutional change and no references under s.51(xxxvii) in these matters, the above situation obviously

calls for Commonwealth-State cooperation in the field. In addition to the usual reason for Commonwealth participation - financial aid - it may be found at least convenient and perhaps necessary to supplement State laws with Commonwealth laws dealing with interstate and foreign transactions and having the effect of invalidating for all Australian purposes attempts at evading the State controls by overseas domiciling of companies and similar methods. There may also need to be a central administrative body to coordinate the State operations, and Canberra may be the most convenient location for this.

4. In evidence to the Senate Committee on the off-shore oil and gas legislation, I suggested that cooperative federalism is not necessarily a good thing, and can lead to unsatisfactory legal and political consequences. Attached hereto is a copy of a supplementary paper which I prepared for that Committee which gives a very brief account of some particular cases of cooperation. At the time that paper was written, no details of the Commonwealth-State agreement on literary censorship had become available, but the agreement has since been published, and it turned out to be as objectionable as I had feared. The general topic is further discussed, and the literary censorship agreement examined in more detail, in my Deakin Memorial Lecture for 1970, a copy of which is attached. Generally speaking, the dangers in such arrangements are: dispersion of responsibility for government action among so many officials, Ministries and Parliaments that in no place can there be a satisfactory survey of and accounting for the operation as a whole, even at the level of getting comprehensive answers to parliamentary questions; danger that the need for facing and solving specific problems of legal uniformity will be avoided and an attempt made to achieve needed uniformity by administrative policies which ignore or even flout the legal requirements of the various jurisdictions concerned. These dangers can be ameliorated, although probably not completely eliminated, by careful attention to the demarking of areas of Commonwealth and State responsibility and arrangements for all the administrative authorities concerned to supply full information to all the governments and parliaments concerned, and by seeing to it that substantial uniformity of the relevant laws is in fact achieved before cooperative administration is embarked on at all.



5. In the area with which we are concerned, there has already been a reasonably successful exercise in procuring substantial uniformity of State and Commonwealth law, with the result that the relevant administrative authorities have become accustomed to a common set of principles and procedures; however, there has been a regrettable tendency for the time lag between changes (usually originated by Victoria, and in one important recent case by NSW) in the various States to become longer. Given this history, it should not be too difficult to make satisfactory arrangements on the matters mentioned above a condition of the operation of any cooperative scheme.

In the attached papers, one point is mentioned which is particularly relevant to the present subject. It is pointed out that where a particular social control is in any event best insulated from rather than made subject to the control of parliaments and central executive governments, then the 'responsible government' objections to cooperative federalism become much less relevant. In the present case, one would contemplate that given a completely uniform set of Commonwealth and State laws designed to impose a considerable degree of control over securities dealers and dealings, the day to day administration of the system would be vested in a special-ised Commission structure exercising fairly wide quasi-judicial powers, and jointly empowered by State and Commonwealth Acts, with some form of appeal to the Courts on those of its decisions which are governed by what the High Court would regard as justifiable standards. It would probably be highly undesirable to have the Commission's regular activities subject to either Ministerial or parliamentary interference or discussion. The governments and parliaments would be concerned only with hearing periodical reports from the Commission, with such amendments to relevant law as it might suggest, and would consider suggestions for changed or new general principles which might emanate from Members or from the executive governments. The need for continued Commonwealth-State agreement on specific amendments to the system would be a limiting factor in the working of the system and one would hope that after some experience the States might be prepared to make references under s. 51(xxxvii) so that the supervision and amendment function of the legislatures could be exercised from the one place, namely the Commonwealth Parliament. However, in my view experience

has not shown that periodic bursts of unilateral State activity in these matters, caused by some immediate commercial scandal, produce particularly satisfactory results. Hence I would support a cooperative arrangement in this field, notwithstanding the responsible government objections to all such schemes, as being a lesser evil than continued absence of comprehensive, uniform national policy and action.

Geoffrey Sawyer

#### LEGAL OPINION A-4

I should emphasise that I am no expert on either the law or practice relating to securities, stock exchanges, company affairs or the activities of stock brokers. I have assumed, however, that many practices which caused concern in the United States and gave rise to the legislation governing the creation of the Securities and Exchange Commission are evident in Australia and that your Committee may wish to recommend that the Commonwealth take action either alone or jointly with the States along lines which are broadly similar, though perhaps not identical, to that taken by the American Congress.

I shall first deal with the relevant powers of the Commonwealth on the basis that the Commonwealth Parliament may wish to be the sole authority controlling this matter. Despite your invitation to advise on the corporations power contained in section 51(xx) of the Constitution, I think that little is to be gained by this, having regard to the present general uncertainty in this area and the hope that we will soon receive an authoritative exposition by the High Court in the Concrete Pipes case.

As the Committee is no doubt aware, the Commonwealth Parliament can make laws only in respect of such subjects as are expressly or by necessary implication referred to in the Constitution as being within Commonwealth legislative power. The relevant powers for present purposes are those in respect to trade and commerce with other countries and among the States (s. 51 (i)), taxation but not so as to discriminate between States or parts of States (s. 51 (ii)), postal, telegraphic, telephonic and other like services (s. 51 (v)), banking other than State banking, also State banking extending beyond limits of the State concerned ... (s. 51 (xiii)), insurance, other than State insurance, also State insurance extending beyond the limits of the State concerned (s. 51 (xiv)), and foreign corporations, and trading or financial corporations formed within the limits of the Commonwealth (s. 51 (xx)). The limitations on Commonwealth power which are relevant are those contained in

s. 51 (ii) itself, the requirement in s. 99 that the Commonwealth shall not, by any law or regulation of trade, commerce or revenue, give preference to one State or any part thereof over another State or any part thereof, the provision in s. 92 that trade, commerce and intercourse among the States ... shall be absolutely free, the doctrine of the separation of powers under which no body other than a court may exercise the judicial power of the Commonwealth and under which there may be limits on the power of the Commonwealth Parliament to delegate legislative power.

For present purposes, I do not propose to consider the Territories power in s. 122. So far as the Committee is concerned, Commonwealth legislative power is plenary in the Territories although limited by some specific restrictions such as s. 116 of the Constitution. There should be little difficulty in enacting for each of the Territories any scheme the Parliament desires to deal with the matters which the Committee is considering. While a law for the government of a Territory under s. 122 may have operation within the area of the States, it would not be possible to use s. 122 as a lever for enforcing any comprehensive form of national control in the securities field.

Before dealing with each of the relevant powers, it might be useful to set out generally some of the principles of interpretation that have been applied by the High Court.

The process of determining whether a law is one 'with respect to' a subject of Commonwealth power is known in constitutional legal jargon as 'characterisation'. The method of the High Court over the years has been first to interpret the meaning of the subject-matter and secondly to determine whether the law can be described as one with respect to that subject. In most cases involving interpretation, the second step has been the most difficult and has given rise to the most dispute. Nevertheless in recent years certain relatively clear lines of approach have emerged.

Except where the defence power is involved, the Court has emphasised that if a law operates directly within the subject-matter of the power, the motive or policy of Parliament is irrelevant. In the State Banking case (1947) 74 C.L.R. 31 at 79, Sir Owen Dixon said -

Speaking generally, once it appears that a federal law has an actual and immediate operation within a field assigned to the Commonwealth as a subject of legislative power, that is enough. It will be held to fall within the power unless some further reason appears for excluding it. That it discloses another purpose and that the purpose lies outside the area of federal power are considerations which will not in such a case suffice to invalidate the law.

If Parliament has legislative authority to make laws with respect to an activity (such as commerce with other countries or banking), a law will be regarded as operating upon the subject-matter and directly within the field of the power if it prohibits anyone engaging in the activity. The difficulties that have arisen have been in cases where the Commonwealth has forbidden a person to engage in the activity except on certain conditions or has limited the right to engage in the activity to persons with prescribed qualifications. The problem arises because the conditions or qualifications may reflect a legislative policy which has little to do with the subject-matter of the power.

In 1931, it was held that under the commerce power the Commonwealth could provide for preference in employment to members of a trade union in the loading and unloading of ships engaged in inter-State and overseas trade. The Court held that the law was a law with respect to trade and commerce with other countries and among the States, because it regulated the choice of persons who could engage in work forming part of that trade and commerce, even though the criterion adopted reflected a policy of the legislature that was concerned with industrial relations, which, prima facie, was not regarded as relevant to commerce. (Huddart Parker v The Commonwealth (1931) 44 C.L.R. 492; Victorian Stevedoring Company Pty Ltd v. Dignan (1931) 46 C.L.R. 73.)

These cases were relied on by members of the Court in 1966 in The Herald and Weekly Times Limited v The Commonwealth (1966) 115 C.L.R. 418. In that case, the challenge was made to section 81 of the Broadcasting and Television Act 1942-1965 which empowered the Minister to grant to a company a licence for a commercial television station upon such conditions as he

determined. It was argued that the validity of this section must depend upon the nature of the conditions and whether they were relevant to the conduct of television services. The Court unanimously held the section to be valid. Kitto J. said (at p. 434):

A law which qualifies an existing statutory power to relax a prohibition is necessarily a law with respect to the subject of the prohibition. Even if the qualification gives it the additional character of a law upon some other topic - even, indeed, if that other topic be not a subject of federal legislative power - it is still a law with respect to the subject of the prohibition, and is valid if that subject be within federal power.

Four other judges agreed with this statement.

If, however, the law purports to regulate activities which do not themselves form part of the subject-matter of the power, then the only way the Act could be characterised as a law with respect to that subject-matter is by showing that it is somehow relevant to the subject-matter or provides an appropriate means for achieving some end or object contained within the power. This distinction can be illustrated by reference to Commonwealth control of air navigation. A law prohibiting overseas air navigation, licensing it on conditions or setting out qualifications for those who may engage in such navigation would be a law with respect to overseas trade and commerce. It would seem from the cases quoted above that the fact that the conditions or qualifications were in pursuance of a policy which was not particularly relevant to trade would not affect the validity of the law. The position is different, however, where the Commonwealth purports to regulate or license intra-State air navigation. Here the law does not operate directly on the subject-matter. For it to be regarded as a law within section 51 (i) of the Constitution, it must be shown that the regulation of intra-State air navigation has a close connection or relevance to inter-State or overseas trade or that it is an appropriate means for furthering inter-State or overseas trade. Provisions of the Air Navigation Regulations have been upheld which enable the Director-General of Civil Aviation to license aircraft and operators in intra-State air navigation. The regulations provide that the Director-General, in determining

whether a licence should be issued, shall have regard only to matters relating to safety, regularity and efficiency of air navigation. The regulations were upheld as valid because it could be readily seen that the safety of aircraft flying overseas and inter-State was directly affected by aircraft flying intra-State. If, however, the Commonwealth purported to impose conditions or qualifications which involved other policies (for example, that pilots should be members of trade unions), the Court would hold that there was no sufficient relevance to the subject-matter in section 51(i) to enable the law to be characterised as a law with respect to that subject-matter. This matter could be summed up by saying that, where the law directly operates on persons who do not engage in, or activities that do not form part of, say, inter-State trade, the evident purposes and objectives of the Parliament are relevant to characterisation, but this is not so where the law directly controls persons or activities within the power.

In my view, it follows from the above authorities that it is possible for the Commonwealth to exercise some control over policies which are normally the concern of the States by indirect means. The Commonwealth Parliament has on some occasions done this. For example, section 122 of the Broadcasting and Television Act prohibits a person from broadcasting or televising a talk on a medical subject unless it has been approved by the Director-General of Health or on appeal by the Minister. Section 103 of the Act provides that a licensee shall broadcast or televise matters of a religious nature during such periods as the Board determines and, if the Board so directs, without charge. Section 115 prohibits a television station from televising any sporting event or entertainment in a place to which a charge is made for admission if the images of the event or entertainment originate from the use of equipment outside that place. All these provisions are aimed at preventing services over which the Commonwealth has control from being used for purposes which the Parliament finds objectionable or to further the purposes which it favours. There are provisions in the Post and Telegraph Act making it an offence for a person to send by post indecent, obscene, blasphemous, libellous or grossly offensive articles (section 107); similarly, section 118 of the Broadcasting and Television Act prohibits the broadcasting and televising of blasphemous, indecent or obscene matter.

This is, of course, the technique which was used by the drafters of the securities legislation in the United States.

In effect, brokers, exchanges and others were forbidden to engage in inter-State trade or use the postal service unless various conditions were complied with, such as registration. I propose, therefore, to examine among other things whether a similar technique would be successful in Australia in an attempt to regulate the securities market.

A short summary of my conclusions regarding the various powers of the Commonwealth insofar as they may assist in the regulation of the securities business is as follows:

(1) The commerce power in section 51(i) would have only limited operation.

(2) Section 92 would prevent the conferring of administrative discretions on a tribunal to control inter-State commerce in securities.

(3) Indirect control of stock exchanges, brokers and companies could be achieved by use of the power in respect of postal, telegraphic, telephonic and other like services.

(4) Insofar as this form of indirect control was used, section 92 would not affect the regulation of intra-State commerce, which would constitute most of the business of which regulation was desired.

(5) Some indirect control could also be achieved by the taxation of exchanges, brokers and companies coupled with an exemption from taxation on compliance with prescribed rules.

(6) I am doubtful whether the banking power could be used to control merchant bankers.

(7) I do not think that the under-writing of a share issue would be regarded as 'insurance' within the meaning of the insurance power. In any case, control based on this power could be avoided.

(8) If the indirect form of control suggested in (3) and (5) above was used, section 109 of the Constitution would not enable a Commonwealth law to exclude the operation of State laws directly regulating the activities concerned.



## The Commerce Power

Much of the buying and selling of securities in Australia no doubt take place in the course of intra-State trade and the Commonwealth has, therefore, no general power directly to proscribe or regulate those transactions. A transaction which takes place within, say, the Sydney Stock Exchange is probably an intra-State transaction even though the company whose securities are involved has its principal office in Victoria, or a party to the transaction is resident in Victoria. So, prima facie, a Commonwealth law requiring registration of the broker, the security or the exchange could not validly operate to prohibit or regulate that transaction on the grounds that registration or other requirements have not been complied with. It is clear, however, that the actual transport of securities, and the communication between brokers or between principals and brokers across State lines are acts of inter-State commerce which may, for the purposes of section 51(i), be prohibited or regulated by the Commonwealth Parliament. A law under which transactions in inter-State commerce are prohibited unless the broker or security is licensed would, in my view, be a law with respect to trade and commerce among the States. The conditions of registration or of continued registration could relate to disclosure of information or abstaining from engaging in various forms of conduct. Having regard to the principles dealt with above, there seems no reason why the conditions of registration could not relate to a broker's entire business whether intra-State or inter-State. The person or the company which is the object of the legislation could, however, avoid the Commonwealth law by restricting all his or its operations to purely intra-State trade. This may not be practical; I do not know. A bigger hurdle perhaps from the Commonwealth's point of view is section 92 of the Constitution.

## Section 92

This section binds both the Commonwealth and the States (James v The Commonwealth (1936) 55 C.L.R. 1). The Privy Council held in the Bank Nationalisation case ((1949) 79 C.L.R. 497) that the Commonwealth may 'regulate' but not 'prohibit' an individual from engaging in inter-State trade. For the purpose of explaining what 'regulate' means in this context, the Courts have resorted to the notion of the 'orderly community'. The individual can be controlled to the extent necessary in an orderly community.

[The freedom which is postulated by s. 92 for inter-State trade commerce and intercourse is freedom enjoyed in an ordered society where the relations between man and man and government and man are determined by law. (Hughes and Vale Pty Ltd v New South Wales [No. 2] (1955) 93 C.L.R. 127 at 159.)

This is a vague concept which gives rise to much subjective judgment. Some things, however, are reasonably clear:

(a) A law which prohibits all persons or all persons save a Commonwealth authority from engaging in inter-State trade is inconsistent with section 92 (the Bank Nationalisation case).

(b) A law prohibiting inter-State trade subject to obtaining a licence from an authority who has an uncontrolled discretion to grant or refuse the licence is not 'regulatory' (Hughes and Vale Pty Ltd v New South Wales [No. 1] (1954) 93

(c) A law prohibiting inter-State trade unless a licence is obtained from an authority is invalid unless the issue of the licence is mandatory upon the performance of conditions that can be described as 'regulatory'. The conditions must be 'defined with sufficient particularity, precision or intelligibility' and 'an attempt to maintain any wide area of discretionary control could not be expected to succeed'. (Hughes and Vale Pty Ltd v New South Wales [No. 2] at 165, 166.)

(d) Generally speaking, a law prescribing how trade is to be carried on (for example, the rules of the road) is consistent with section 92 provided that the rules are reasonable and not a disguise or device for prohibiting trade (for example, a ridiculously low speed limit).

(e) Section 92 applies to all laws of the Commonwealth no matter what head of power is involved, for example, banking (Bank Nationalisation case) or defence (Gratwick v Johnson (1945) 70 C.L.R. 1).

(f) As section 92 applies equally to the States, this is not an area in which a lack of Commonwealth power to deal with a problem can be supplemented by a State reference under section 51 (xxxvii) of the Constitution, or by the passing of complementary legislation by the States.

It follows that any attempt to confer discretionary power on an authority is likely to conflict with section 92 where inter-State trade is involved. If the registration of prospectuses, brokers, securities, underwriters or exchanges is desired, the registration must be mandatory upon compliance with objective rules and deregistration can only occur for breach of such rules.

The question of what rules are permissible is more difficult to deal with in the abstract. If an offence which is created either directly or as a breach of condition relates to the traditional notion of honest dealing, it would, in my view, be regarded as regulating trade. Clearly the Commonwealth or a State may prevent fraudulent dealings in inter-State trade. I am also of the view that a Commonwealth law could consistently with section 92 require such disclosure of information as is necessary for a purchaser to know what he is buying.

(O'Sullivan v Miracle Foods (S.A.) Pty Ltd (1966) 115 C.L.R. 185).

It may be, however, that some of the regulations and controls which it is desired to impose in relation to companies, brokers or stock exchanges may go beyond both traditional conceptions of fraud or dishonest dealing, and beyond mere disclosure of information. The position here in relation to section 92 is more doubtful. The present Chief Justice has taken a rather narrow view of what the legislatures may do in this field. His Honour's position is summed up in the following statement from Harper v Victoria (1966) 114 C.L.R. 361 at 375:

But limitations on the activities of inter-State traders are not compatible with that freedom upon which the Constitution insists merely because they appear reasonable in the interests of the public as a whole or of the public regarded as consumers of goods, or as reasonable administrative expedients to ensure compliance with laws which might in their general provisions be thought to be no more than regulatory.

Nevertheless it seems to me that the rest of the Court has not followed this rather strict view and some judges have been prepared to allow the legislatures of the States and the Commonwealth to proscribe certain practices as unfair trading practices even though they might not be fraudulent or deceptive in the strict legal sense. In Re Readers Digest Association Pty Ltd (1969) A.L.J.R. 417, both Taylor J. and Menzies J. emphasised that the legislatures had authority to proscribe certain practices considered as objectionable or undesirable; in that case, it was the practice of giving rebates. It is difficult to give any general opinion on the scope of section 92 in the absence of some concrete proposal.

One difficulty the Commonwealth would face which a State would not, if it relied on the commerce power, is that the legislation would of necessity discriminate between inter-State and intra-State trade. It might be argued that this discrimination takes place only because of the limits of Commonwealth power under section 51(i) and not because of any motive or purpose of the legislature to act to the detriment of inter-State trade. Nevertheless, there is considerable emphasis in some of the cases upholding the validity of State legislation on the fact that the legislation was non-discriminatory. In the Airlines Nationalisation case (1946) 71 C.L.R. 29, Dixon J. gave as one of the reasons for his decision that the nationalisation of inter-State airlines was invalid the fact that the prohibition on the airline business was imposed only in relation to inter-State trade and therefore deferred from the Post Office which undertook an exclusive function independently of State boundaries. I have always found this argument difficult to understand in the light of the limitations on Commonwealth power in section 51(i) and I doubt whether judges today would rely merely on discrimination to hold a Commonwealth law controlling the securities market invalid under section 92.

My conclusion on this aspect is that the Commonwealth could do a great deal to regulate the securities market, so far as inter-State trade is concerned, consistently with section 92, but controls involving administrative discretion would infringe that section. It is therefore desirable from the Commonwealth's point of view to be able to rely, if possible, on other heads of power which would enable the Parliament to regulate intra-State trade, which presumably forms the bulk of business and which does not come within the protection afforded by section 92.

## The Postal Power

Section 51(v) of the Constitution confers power on the Commonwealth Parliament to make laws with respect to postal, telegraphic, telephonic, and other like services. It has been held that the 'like services' includes radio broadcasting (The King v Brislan; Ex parte Williams (1935) 54 C.L.R. 262) and television (Jones v The Commonwealth (1965) 112 C.L.R. 206). In Brislan's case, it was held that the essential common feature which broadcasting had with telephony and telegraphy was that they both involved an apparatus for transmitting messages to a distance. The power, therefore, would extend to telex services provided, say, between stock brokers' offices and the stock exchange.

Section 51(v) is not limited to inter-State and overseas communications as is section 51(i); however, section 92 would still be applicable to any law made under that power, but only insofar as the law affected inter-State communication.

It will be recalled that in The Herald and Weekly Times Limited v The Commonwealth (supra) it was held that the Commonwealth Parliament had plenary power to determine who may conduct these services and on what conditions. The fact that the conditions may give the law an additional character upon some other topic which is outside federal legislative power is irrelevant. From the Committee's point of view, however, the lever for securings regulation of securities business would, in many cases, need to be control not over the person who conducts the service (which is the Commonwealth) but rather over the users of the service. That is, of course, apart from special services which may in fact be conducted by private persons between, say, stock exchanges and brokers' offices.

Part of the constitutional basis for the American legislation has been the denial of the mail service to various persons unless they conform to the federal Act. In my view, the principles enunciated above would also apply to enable the Commonwealth to determine who may use these services and on what conditions. For example, I see no reason why a Commonwealth law would not be within section 51(v) if it provided that prospectuses or company securities should not be sent through the mails unless registered and approved by a Commonwealth authority. Similarly, it would seem to me consistent with the principles laid down by the High Court to deny use of a telephone service to a broker who was not registered and approved by such an authority. In principle, there is, in my view, no

relevant difference between such provisions and those provisions of the Post and Telegraph Act and the Broadcasting and Television Act that I have referred to earlier in this opinion. These provisions would, of course, be subject to express limitations in the Constitution, such as section 92. However, section 92 would only be concerned with inter-State communications and I presume that it would be impossible for any business to be conducted purely on the basis of inter-State transactions and communications.

The main distinction between the provisions of the Post and Telegraph Act and the Broadcasting and Television Act to which I have referred and the type of controls which might be envisaged by your Committee would be that it would require the creation of a Commonwealth authority similar to the Securities and Exchange Commission in the United States. I am assuming that such a Commission would act both as a receiver of information and would exercise discretion in the registering of, say, exchanges, brokers, underwriters and securities. Despite some doubts as to whether the creation of such a body could be valid in a law which depended for its constitutional basis on section 51(v), I am of the opinion that it would be valid. In Huddart Parker v The Commonwealth, for example, the criterion for performing the work was being a member of the Waterside Workers' Federation. The criterion for conducting a television service under section 81 is the approval of the Minister. I do not see why a specially created Commonwealth body could not be substituted in the place of a trade union or a Commonwealth Minister.

#### The Taxation Power

Another means by which the Commonwealth Parliament may be able to achieve indirectly what it could not achieve directly is through the taxation power. It is obvious that many provisions in taxation legislation have as their purpose not the collection of revenue - or at any rate not that alone - but rather influencing human conduct. Thus, a protective tariff may have the aim of enhancing the Australian manufacturing industry, even though manufacture does not come directly within any Commonwealth power. In the early days of federation, Commonwealth attempts to control industrial relations by means of the taxation power failed. In The King v Barger (1908) 6 C.L.R. 41, the Commonwealth imposed an excise tax upon various manufactured goods and granted an exemption from that tax where the goods were manufactured by a person who provided specified

conditions of employment and remuneration of his employees. This Act was held (by Griffith C.J., Barton and O'Connor JJ.; Isaacs and Higgins JJ. dissenting) to be not a law with respect to taxation but a law regulating industrial conditions. Although this case has not been directly overruled, much of the reasoning of the majority depended upon rules of construction which were overthrown in the Engineers' case ((1920) 28 C.L.R. 129) and have not been followed since.

In Fairfax v The Commissioner of Taxation ((1965) 114 C.L.R. 1), the Income Tax Assessment Act was amended to deny to superannuation funds their previous general exemption from income tax unless the Commissioner was satisfied that the assets of the funds included a prescribed percentage of public securities. The securities involved included Commonwealth securities, State securities or securities issued in respect of a loan to a water, gas or electricity company. It was argued, on the basis of Barger's case, that this was not a law with respect to taxation but a law to compel superannuation funds to invest in these securities. The Act, however, was held valid by a unanimous High Court. The reasoning of the judges differs somewhat. Of the five judges, two (Kitto and Taylor JJ.) clearly considered Barger's case to be wrong and Barwick C.J. said that, while it was possible that a law increasing or decreasing the extent of an existing exemption from liability to pay a tax might be held not to be a law with respect to taxation, he could not readily envisage such a case.

This case seems rather analogous to the Herald and Weekly Times case. In the latter case, it was said that if a prohibition is within power, then the conditions on lifting the prohibition are prima facie irrelevant to validity. Similarly, it could be argued that if a tax is within power then the conditions of exemption from that tax do not take it outside the taxation power. Difficulties, however, might arise if the conditions of exemption involve elements more suitable to the creation of an offence such as 'knowingly' or 'wilfully' doing something, and these states of mind might be important in any scheme of regulation that the Committee or the Parliament had in mind. However, in Fairfax's case, similar elements were involved. For example, the Act provided that the Commissioner should disregard any failure of the assets to include the prescribed securities if either the trustee had made a genuine and bona fide attempt to satisfy the provision, that the failure was by reason of temporary delay and that, in all the circumstances, it would be reasonable to disregard the failure,

or where the Commissioner was satisfied that the inclusion in the assets of the prescribed securities would be likely to endanger the financial stability of the fund. Nevertheless, the validity of the provisions was upheld. All the judges emphasised that the motive or purpose of Parliament was irrelevant in determining whether the law was one with respect to taxation.

Although the matter is not free from doubt, in my opinion, the Parliament could achieve a considerable regulation of the securities market by means of imposing taxation upon brokers, exchanges, companies, promoters and others, subject to an exemption being granted where registration or other conditions are complied with. To some extent, of course, the controls desired will be continuing ones and in those circumstances it would be necessary to have some sort of periodical taxation. As a practical matter, it may not be possible to achieve all that the Parliament may desire by means of a tax subject to an exemption upon compliance with rules. However, I see little difficulty in, for example, a tax upon stock exchanges coupled with an exemption for stock exchanges that have particular rules. Similarly, if it is possible as a practical matter, I would think that constitutionally a special tax could be levied upon stock brokers who allowed their customers a marginal credit above a prescribed amount. It would be prudent not to include any element in an exemption clause that resembled the notion of mens rea in criminal law.

### The Banking Power

It is possible that the Commonwealth could be assisted in the regulation of some aspects of the securities business by the banking power in section 51(xiii) of the Constitution. Your letter in particular asks whether the banking power could be used in relation to trading in securities on 'margin' or credit.

It is quite clear that the mere creation of credit does not amount to 'banking' within the meaning of the Constitution (Bank Nationalisation case (1948) 76 C.L.R. 1 at 194 per Latham C.J.). In the same case, Dixon J. (at p.335) said that:

Whatever may be the indispensable characteristics of banking, it seems probable that, for the purpose of par. (xiii), they should be sought rather in the relations between banks and those who use them than in a more



abstract consideration of the true economic nature of the contribution made by banking to the monetary system and public finance of a country by banks.

Nevertheless, it may be that the activities of what are called 'merchant bankers' might come within the banking power. The term 'merchant banking' does not seem to have any precise connotation either in law or in commercial circles. At times the activities of such bankers seem similar to those conducted by underwriters and what are sometimes called issue houses. They are mainly distinguished from other banks by the fact that they do not open accounts for any member of the public who chooses to apply and do not issue cheque books.

The question of the meaning of 'banking' for purposes of the Constitution has not received very much judicial pronouncement. There have however been a number of decisions in England and Australia as to what is a banking business for the purposes of other legislation.

In Paget's Law of Banking, it is stated that:

It is therefore a fair deduction that no one and no body, corporate or otherwise, can be a 'banker' who does not:

1. take current accounts;
2. pay cheques drawn on himself;
3. collect cheques for his customers.

It is perhaps fair to say that the acceptance of deposits not withdrawable by cheque will not by itself constitute the recipient a banker.

(6th Edition, page 8.)

The latest English authorities seem to have emphasised a similar view, namely the importance of the keeping of cheque accounts in the concept of a banking business. In the United Dominions' Trust Limited v Kirkwood ((1966) 1 All E.R. 968), the Court of Appeal said that old cases, including an Australian case which I refer to below, must be approached with caution because they were decided before cheques became the

common method of payment.

In the Commissioners of the State Savings Bank of Victoria v Permewan Wright and Company Limited ((1915) 19 C.L.R. 457), it was held that the Commissioners of the State Savings Bank of Victoria were 'bankers' within the meaning of the Bills of Exchange Act. The issue was whether a person's business, to constitute 'banking' must include the honouring of cheques drawn upon him by his customers. The majority of the High Court held that the essential characteristics of the business of banking were the collection of money by receiving deposits upon loan repayable when and as expressly or impliedly agreed upon and the utilisation of the money so collected by lending it again in such sums as are required. On this test the Commissioners of the Savings Bank were 'bankers'.

This decision was applied quite recently by the High Court in Australian Independent Distributors Limited v Winter ((1965) 112 C.L.R. 443) where it was held that a co-operative society was not carrying on 'the business of banking' in contravention of either a South Australian Act or the Banking Act of the Commonwealth. The three judges who constituted the Court unanimously accepted the view expressed in the Permewan case and decided that the society was not engaged in the business of banking because, although it received money on deposit capable of being drawn against by the depositor, it did not engage in the business of lending the money.

In the United Dominions' Trust case, the Court of Appeal felt that cases such as Permewan and other cases of similar vintage were not reliable authority for determining the meaning of the concept of banking today. But this case has been followed in Australia, and in any case, it has been said on many occasions that the meaning of the terms in the Constitution must be taken as at 1900.

It should be emphasised that the High Court in Permewan and the Australian Independent Distributors case was not concerned with the meaning of the term in the Constitution. On one interpretation of the definition of banking given in Permewan, the Commonwealth Parliament would have wide powers over many financial institutions. It may be also, on that interpretation, that many of these financial concerns have been operating in breach of the Banking Act since its enactment in 1945. A further problem would arise as to how to determine the

distinction between a bank within paragraph (xiii) of section 51 of the Constitution and 'financial corporations' in paragraph (xx).

Nevertheless I do not believe that the High Court would hold that the provision of cheque books and cheque accounts was an essential quality of banking. Paragraph (xiii), for example, excludes State banking from the Commonwealth power except insofar as it extends beyond the limits of a State. In 1900 it would appear that the only State banks then operating were in fact savings banks.

A High Court minded to give the banking power a somewhat limited meaning might accept the definition in the Permewan case and apply a restricted interpretation to the word 'deposit'. In the United Dominions' Trust Limited v Kirkwood, Diplock L.J. regarded the distinguishing feature of banking business as the acceptance from customers of loans of money on 'deposit', that is to say, 'loans for an indefinite period upon running account, repayable as to the whole or any part thereof upon demand by the customer either without notice or upon an agreed period of notice.' ([1966] 2 W.L.R. at 1107.) If the High Court accepted this view, it could regard it as consistent with the principles laid down in the Permewan case. I assume that much of the borrowing of merchant banks would not come within this concept.

What the High Court would do in these circumstances is difficult to say. The question of the meaning of 'banking' for the purposes of the Constitution has an importance which transcends the matters being considered by your Committee. It raises, for example, the issue of the extent to which the Commonwealth may control credit created outside the normal banking system by means of hire-purchase transactions and other forms of consumer credit. I am disposed to think that the High Court would not hold that a business which borrows money for the purpose of lending it is for that reason alone engaged in banking. The notion of 'deposit' referred to by Devlin L.J., in my view, is more consistent with common usage in relation to banking.

#### The Insurance Power

I have considered the relevance of the insurance power in paragraph (xiv) of section 51 in relation to the control of underwriters of securities. I doubt whether in a practical sense much help could be obtained by your Committee from this

power.

Historically, underwriting was a term synonymous with insurance which primarily connotes the act of providing against loss or damage which may be caused by a contingent event. The meaning of the term 'insurance' has not been examined in any great detail by the High Court. The main distinction between the traditional form of underwriting of a share issue and other forms of insurance is that in the former case the underwriter's obligation is to make a purchase. The term 'underwriting' is still used in relation to marine insurance, but is of course basically different from underwriting in relation to share issues.

I am inclined to think that the Court would take the view that insurance in the strict sense differs from a case where a person agrees to purchase something at a stated price if others do not buy it. This is the essential nature of underwriting in relation to a share issue.

In any case, even if underwriting of shares in the normal sense came within the power, Commonwealth control could be evaded. It seems that 'underwriting' as understood in company affairs today goes beyond the traditional form of underwriting that is, agreeing to take shares if the public does not. Much so-called underwriting in England and America today consists, I understand, in a corporation or a group of investors making initially an outright purchase of the share issue and not merely a conditional one. This form of 'underwriting' has no relation to the concept of insurance as the High Court would interpret that expression in the Constitution. No doubt if Commonwealth control depended upon there being a conditional purchase, this would influence commercial activity and the trend could be away from traditional underwriting.

### Inconsistency

Section 109 of the Constitution provides:

When the law of a State is inconsistent with a law of the Commonwealth, the latter shall prevail and the former shall, to the extent of the inconsistency, be invalid.

Section 109 operates to render unenforceable State laws which (a) cannot be obeyed consistently with obeying a Commonwealth law; (b) modify any right or privilege granted by

a Commonwealth law; or (c) are in an area where the Commonwealth law evinces an intention to 'cover the field'. Under this latter doctrine, the intention to 'cover the field' is an intention that the Commonwealth law shall be the only and exclusive law in the particular field.

If a Commonwealth law, therefore, regulates a particular subject-matter, it is generally speaking open to the Commonwealth to exclude, from the area so regulated, State laws. This has been done for example in the fields of bankruptcy and matrimonial causes.

Some difficulties, however, could arise where the Commonwealth does not directly regulate an activity but does so indirectly using the methods suggested above in relation to the postal, telegraphic and telephonic power and the taxation power. I do not think that a law which prevented a person using the telephone service unless he complied with a condition would be inconsistent with a State law which prevented him from complying with that condition or which required him to comply with further rules. For example, if a Commonwealth law provided that a stockbroker could not use the telephone service unless he registered with a federal body, such a law would not, in my opinion, be inconsistent with a State law which made it an offence for brokers to carry on business unless registered by a State body. A Commonwealth law which tried to exclude the State law would not, in my opinion, be a law with respect to telephonic services.

Similarly, a tax placed upon brokers who traded on margin or credit beyond that laid down in the taxing Act would not, I think, be inconsistent with the State law which had different rules relating to margin or credit. A Commonwealth law which attempted to exclude such State laws would not be laws with respect to taxation. On the other hand, a federal law which, for example, dealt with investments by banks or insurance companies could exclude State laws dealing generally with investment insofar as they applied to banks or insurance companies.

#### Joint Commonwealth-State Control

Your letter states that the Committee would like to have examples of State co-operation in establishing national bodies. Statutory corporations and other bodies have been set up from time to time as vehicles of joint Commonwealth-State

control. Such bodies have included the Australian Aluminium Production Commission, the Hide and Leather Industries Board, the River Murray Commission and the Joint Coal Board.

The Hide and Leather Industries Board was a good example of joint Commonwealth-State control in a commercial sphere. The Board was established under the Hide and Leather Industries Act 1948 of the Commonwealth and that Act vested in the Board hides in the Territories and also controlled the export of hides and leather. Section 32 of the Act provided that it was the declared intention of the Parliament that 'the operation of any provision of a law of a State which confers any power, right or function, or imposed any obligation, liability or duty which is also conferred or imposed by this Act or which can operate without prejudice to the operation of this Act shall not be prevented or limited by reason of the provisions made by this Act.' Each of the States enacted a Hide and Leather Industries Act which vested hides in their States in the Commonwealth Board. An exception was made in the case of hides, the subject of inter-State commerce. In Wilcox Mofflin Ltd v New South Wales ((1952) 85 C.L.R. 489), the legislative scheme was held not to infringe section 92 of the Constitution.

In this and other cases, the Commonwealth has assumed that it can authorise a State to confer powers and impose duties within the State constitutional area upon Commonwealth officials or bodies created by Commonwealth law. This aspect was not dealt with in the Wilcox Mofflin case; however, there have been no judicial pronouncements against such provisions. My own view is that the High Court would uphold the validity of these arrangements.

In the case of the Hide and Leather Industries Board, the Commonwealth Minister appointed the members but, in the case of some of them, the appropriate Minister of each State was given power to nominate for appointment to the Board. Similarly, in the case of the Australian Aluminium Production Commission, the members of the Commission were appointed by the Governor-General, but those representative of the State were nominated by the Governor of the State. In the case of the Joint Coal Board and the River Murray Waters Commission, appointments are made directly by the Governments concerned. As you state in your letter, arrangements such as these have been criticised on the ground that they make the operation of responsible government more difficult. The problem with this form of

'co-operative federalism' is that the political controls of the body may be weaker than where the existence and functions of the body are entirely the creation of one Government and Parliament. I am not aware, however, whether, as a practical matter, any specific problems have arisen in relation to any of these joint bodies.

The Trade Practices Act probably provides the best model for a Security and Exchange Commission which would receive powers under State law. Section 8 of the Act makes provision for complementary State legislation to confer functions and powers on the Tribunal. All the members of the Tribunal, however, are appointed by the Governor-General. So far as I am aware, no State has yet passed any complementary legislation under this section. However, Tasmania has, by legislation, referred power to the Commonwealth to deal with restrictive trade practices within that State. Such references of power are provided for in section 51(xxxvii) of the Constitution. This reference of power is specifically dealt with in section 7A of the Trade Practices Act.

#### Separation of Powers

It is not possible to deal shortly in the abstract with the limitations on Commonwealth legislative power arising from the doctrine of the separation of legislative, executive and judicial powers. Some of the relevant principles are, however, as follows:

(a) Any function coming within the notion of the judicial power of the Commonwealth can be conferred only upon a State court or a Federal court consisting of a judge or judges appointed by the Governor-General for life, subject to removal only in accordance with the provisions of section 72 of the Constitution. (Waterside Workers' Federation v J.W. Alexander Limited (1918) 25 C.L.R. 434.)

(b) A court may not be given non-judicial functions except insofar as they may be incidental to the exercise of its judicial power (the Boilermakers' case (1957) 95 C.L.R. 529).

(c) A final and conclusive determination of law made in the course of settling a controversy as to existing rights is part of the notion of the judicial power of the

Commonwealth.

(d) The enforcement of a judicial order in the form, for example, of granting an injunction is part of the judicial power of the Commonwealth.

(e) It follows that the functions referred to in (c) and (d) can only be exercised by courts.

(f) The creation of rights and duties in accordance with broad industrial or economic standards is a non-judicial matter and can only be conferred upon administrative tribunals. Thus it has been held that the Trade Practices Tribunal may determine whether various agreements or practices are contrary to the 'public interest' in accordance with the broad criteria set out in section 50 of the Act. (The Queen v The Trade Practices Tribunal; Ex Tasmanian Breweries Pty Ltd (1970) 44 A.L.J.R. 126.)

(g) The extent to which an administrative tribunal may make conclusive determinations of fact as distinct from law in the course of settling a controversy about existing rights and duties is doubtful.

(h) An administrative tribunal could not be given power to make conclusive determinations of fact or law regarding any issue which goes to constitutional power, for example, whether a particular transaction occurred in the course of inter-State trade.

The Security and Exchange Commission could, therefore, be given broad powers of discretion as to whether a person or body may be registered or licensed under federal law, but it could not be given powers to determine conclusively whether there had been a breach of law or to punish for such a breach. The enforcement of any administrative orders made by such a Commission would have to be done through judicial tribunals. If the Administrative Law Committee proposes the setting up of a special administrative law court and if such a court is created, it would be a very suitable tribunal to deal with judicial matters relating to any proposed regulation of the securities business.

If regulation of the securities business takes place in a context of joint Commonwealth-State legislation, there are considerable constitutional difficulties in a State conferring



jurisdiction on a federal court. It has been said that federal courts can only exercise the judicial power of the Commonwealth. This, however, is a matter on which there is some disagreement. In any case, the Commonwealth has assumed that it can authorise the States to confer jurisdiction on a federal court by providing in section 8(5) of the Trade Practices Act that the Act shall not exclude the operation of a complementary State law which confers jurisdiction on the Commonwealth Industrial Court.

So far as delegation of legislative power is concerned, the courts have declared that the Commonwealth has very broad powers in this area and I do not think that any possible limitations would be a serious hindrance to bringing into effect any scheme that the Committee desired.

### Conclusion

In my opinion, the Commonwealth can go a long way in regulating the issue of, and trading in, securities by the indirect means mentioned above. Unless the corporations power is given a broad interpretation in the Concrete Pipes case, I do not think that the Commonwealth power to directly control the business outside the Territories would be sufficient for any purposes the Committee might have in mind. The most serious restriction, therefore, on a Commonwealth control of securities exchange would be the difficulty of excluding State law from the area. There would be little difficulty in a joint Commonwealth-State scheme which operated under both Commonwealth and State legislation.

Leslie Zines

## LEGAL OPINION B-1

I am asked to comment generally on the implications of the Concrete Pipes Case (1971) in relation to the corporations power of s. 51(20) of the Constitution and Commonwealth regulation of the securities industry, and also to answer certain specific questions. The following opinion is based on a copy of transcripts of the judgements. These may be subject to minor correction before publication but it is unlikely that any alteration of substance will be made. Since the page numbering starts anew with each judgement I refer to the pages of particular judgements when I make a citation, abbreviating transcript to T/S. Thus Barwick C.J. T/S 5 means page 5 of the transcript of the judgement of Barwick C.J.

### General Observations

The general approach of the court to S. 51(20) is cautiously encouraging for the Commonwealth. It is encouraging in that the Corporations Case, Huddart, Parker & Co. Pty Ltd v Moorehead (1909) 8 C.L.R. 330, which has kept s. 51(20) in a state of restrictive obscurity for over sixty years, has been unanimously overruled as depending on reasoning which has been untenable since the Engineers' Case (1920) 28 C.L.R. 129. The ground has therefore been cleared for a reinterpretation of s. 51(20) in accordance with the well-known principle of the Engineers' Case that Commonwealth legislative powers are to be given their widest, as opposed to their narrowest, reasonable interpretation. The judgements in Concrete Pipes however, on this aspect of the case, do little more than clear the ground. The court has deliberately given very few indications of what the new approach means in particular contexts. I deal with such indications as are given in my answers to the particular questions formulated by the Committee.

The uncertainty to which this absence of guidelines gives rise should not in my opinion be overrated. The position in effect is that the present law extends an invitation to the Commonwealth to make a reasonably optimistic exploration of its powers under s. 51(20). The need for technical caution arises not from this aspect of Concrete Pipes but from the attitude revealed by the majority of the court to the drafting of statutes

I deal with this matter in detail below. Suffice it to say here that the court divided 5:2 on the validity of the Trade Practices Act as drafted although the whole court agreed that the general substance of the Act was within power. The majority held it invalid for reasons which seem to me to require the draftsman in future to exercise almost pedantic care if legislation is not to shuttle to and fro between Parliament and the High Court on issues of self-expression.

I turn to the particular questions posed by the committee. It will be observed that for the views of the majority I place chief reliance on the judgements of Barwick C.J. and Menzies J. This is because on the substantive issues the rest of the court for the most part expressed agreement with them, especially with the Chief Justice, and were content to leave it at that. On the drafting point the views of the dissenters, McTiernan and Gibbs J.J., are set out in the judgement of Gibbs J.

1. Will the power now support Commonwealth laws with respect to the incorporation or liquidation of companies?

In the Corporations Case Isaacs J., in dissent, was prepared to give s. 51(20) a wider scope than any other member of the court but even he did not extend it to incorporation or liquidation: 8 C.L.R. 393, 394, 396. This reading of s. 51(20) is supported both by the words of the section, which seem to assume the anterior creation of corporations, under some other power or law, upon which the power operates, and by dicta in the Bank Nationalization Case (1948) 76 C.L.R. 202, 255, 304. There is nothing in the Concrete Pipes Case to disturb this position. The only necessary modification of what Isaacs J. said is that whereas, with characteristic over-statement, he asserted that the 'creation of corporations ... was left entirely to the States' ;8 C.L.R. 394i, it is clear that the Commonwealth can create and legislate for corporations ancillary to powers other than s. 51(20): Concrete Pipes, Barwick C.J. T/S 13, citing the Territories power, s. 122, the trade and commerce power, s.51(1), and Australian National Airways Pty. Ltd. v Commonwealth (1945) 71C L.R 29. [The Chief Justice actually cites a later stage of that litigation at 71 C.L.R. 115, but this is a slip.] Menzies J. makes the same point at T/S 20.

Strictly in terms of s. 51(20) the answer to the question appears therefore to be no, but the reference to liquidation raises a point which may be of interest to the committee. Section 51(17) gives the Commonwealth legislative power over 'Bankruptcy and insolvency'. In the classic initial commentary on the Constitution, Quick and Garran, The Annotated Constitution of the Australian Commonwealth (1901), p. 587, it is said: 'The winding up of corporations unable to pay their debts is an important branch of insolvency jurisdiction. An insolvency law would also include all ancillary provisions necessary to prevent it from being defeated.' Prima facie this is right, which raises the possibility that the Commonwealth might under s. 51(17) remove the States from the field of winding up of insolvent companies, which are the ones which matter. Present Commonwealth legislation under s. 51(17), the Bankruptcy Act, 1966, in s. 7(2)(a) expressly excludes corporations from its operation. In s. 7(2)(b) it excludes also partnerships, associations and companies 'registered under a law of the Commonwealth or of a State or Territory which provides for the winding-up of' such partnerships, associations and companies. In the case of companies the relation between these two subsections is not as clear as it might be because the definition section of the Act, s. 5(1) defines corporation to include company, which leaves uncertain the application of the Act to companies incorporated under a law which does not provide for their winding up, but as this reference is tangential to the committee's main inquiry I will not pursue it unless the committee wants me to.

2. Can the Commonwealth provide for the recognition throughout the Commonwealth of companies incorporated in a State or a Territory?

There are references to recognition in this context in both the Corporations Case [8 C.L.R. 371, 400] and the Concrete Pipes Case [Menzies J. T/S 20]. Each of them assumes that what is meant is self-evident, but it is not. Three meanings suggest themselves. The first, by analogy with the power of s. 51(25) to legislate for the recognition of the laws etc., of the States, is evidentiary. The question here is whether the Commonwealth can legislate to ensure that the status of incorporation conferred on a company by one jurisdiction is accepted as a valid act of that jurisdiction with a minimum of proof in all the other relevant jurisdictions. A law of this description has no

substantive effect outside the incorporating jurisdiction. There is no reason to doubt that such a law is within s. 51(20), but this is of minimal importance because it is probably within the scope of s. 51(25) also. Even without legislation under either of those heads the same result is achieved by the full faith and credit clause of s. 118 as interpreted in Permanent Trustee Co. (Canberra) Ltd. v Finlayson (1968) 43 A.L.J.R. 42, 44.

The second possible meaning is that a company incorporated under the laws of one jurisdiction can operate in the other relevant jurisdictions to the full extent of the powers conferred upon it by its law of incorporation without being either incorporated or registered as a foreign company under the laws of those other jurisdictions. In substance this amounts to incorporation in the other jurisdictions otherwise than under their own laws. The conclusion reached in the answer to question (1) above was that under s. 51(20) the Commonwealth has no power to make laws with respect to incorporation. It follows that the Commonwealth cannot under s. 51(20) enact a law imposing recognition of this description on the States. Such a law could be enacted under s. 122 with respect to the Territories but this would still not affect the States because it would not be necessary for its full effectuation that it should do so. The rule that a Territorial law may have extra-territorial operation to the extent that its full effectuation requires it to be found in Lamshed v Lake (1958) 99 C.L.R. 132. Finally, it is highly improbable that the full faith and credit clause of s. 118 would in the present High Court be given an interpretation supporting the imposition of substantive recognition of companies on States.

The third possible meaning is recognition for a particular purpose other than the two already discussed. Legislation to this effect is in principle within the power of the Commonwealth if the purpose in question is incidental to one or more of the legislative powers of the Commonwealth other than s. 51(20) itself. For example, pursuant to company taxation it would be incidental to the tax power of s. 51(20) to provide for some form of substantive recognition of companies in jurisdictions other than the jurisdiction of incorporation. By definition this basis of extra-territorial recognition does not involve the interpretation of s. 51(20).

3. What types of corporations can be regarded as covered by the words 'trading or financial corporations'?

This is still very much at large. The only judicial attention which has been paid to the question is a passage in the judgement of Isaacs J. in the Corporations Case at 8 C.L.R. 393 in which he was arguing that the very words of s. 51(20) sufficiently limited its scope in the interests of the States without need for the additional implied limitation adopted by the majority. Since on all other aspects of s. 51(20) Isaacs J. took a wider view than the rest of the court it may be safely assumed that his brethren agreed with him on the meaning of 'trading or financial corporations'. It should be borne in mind also that although the Corporations Case was overruled in Concrete Pipes this was only as to the decision on ss. 5 and 8 of the Australian Industries Preservation Act, and reasoning based on the theory of State reserved powers. It does not follow that the present High Court disagrees with the 1909 court on every other point of interpretation of s. 51(20). The passage in question is as follows.

Next, it is clear that the power is to operate only on corporations of a certain kind, namely, foreign, trading, and financial corporations. For instance, a purely manufacturing company is not a trading corporation; and it is always a preliminary question whether a given company is a trading or financial corporation or a foreign corporation. This leaves entirely outside the range of federal power, as being in themselves objects of the power, all those domestic corporations, for instance, which are constituted for municipal, mining, manufacturing, religious, scholastic, charitable, scientific, and literary purposes, and possibly others more nearly approximating a character of trading; a strong circumstance to show how and to what extent the autonomy of the States was intended to be safeguarded.

There can be no doubt that this statement of the law remains correct in its application to municipal corporations and the several categories which fall within the general equitable concept of charity, at all events so long as they confine themselves to non-trading activities. The references to mining and manufacturing companies are dubious because neither mining nor

manufacturing is normally, if ever, carried on as an end in itself. Both are done as a preliminary to trade. It is hard to believe that the present High Court would go out of its way to draw an artificial distinction between a company which mined or manufactured with a view to trade, presumably by another company to which it handed over the product of its activities, and a company which mined or manufactured and traded in its products itself. Although the whole court in Concrete Pipes declined to make any detailed comment on the ambit of s. 51(20), and said nothing at all on the present point, there are at least three reasons for expecting the present court to be flexible on the meaning of trading or financial corporations.

First, there is the decision in Concrete Pipes itself. However hedged about the judgements may be with cautions for the future, the fact is that the court unanimously overruled the Corporations Case and indicated a general intention of applying to s. 51(20), as to all other Commonwealth legislative powers, the principle of the Engineers' Case (1920) 28 C.L.R. 129 that it should receive its widest, as opposed to its narrowest, reasonable interpretation. Barwick C.J. in particular specifically makes this point at T/S 13 and at T/S 16, where he remarks that the power should not, notwithstanding his cautions in general terms, 'be approached in any narrow or pedantic manner'. See also Menzies J. at T/S 20. Secondly, it is well-established that, as I have put it elsewhere, 'the words of the Constitution are not to be read as if they bore for ever the precise meanings they had in 1901 [or 1909, the date of the Corporations Case], but on the contrary are to be adapted to new conditions and concepts'. [(1970) 4 Federal Law Review 32, and see footnotes 4 and 99 for authority.] The multiplicity and complexity of commercial corporate activities has vastly increased since 1909. There is no reason to doubt that this development will be reflected in the High Court's interpretation of 'trading or financial corporations'. Thirdly, on the particular point of trading corporations, I referred the committee in my previous opinion to the extended meaning now given to trade and commerce for the purposes of s. 51(1). This too is likely to be reflected in the interpretation of s. 51(20). There is indeed an express reference to the Bank Nationalization Case (1948) 76 C.L.R. 1 by the Chief Justice at T/S 14 [although here again he gives an incorrect citation] to make the point that trade is not limited to dealing in goods.

The meaning of financial corporation is equally open to interpretation in accordance with current usage. Quick and Garran, op. cit. p. 607, took it in the obvious sense of a corporate financial institution not amounting to a bank. They cited as examples 'companies which receive deposits of money for investment and make advances on the security of land, such as land-mortgage companies and building societies'. In other words, probably anything colloquially referred to nowadays as a finance or investment company.

In this question the committee also makes specific reference to the following:

A non-profit-making stock exchange

To fall within s. 51(20) any stock exchange in question would have to be in some corporate form. Assuming that it is, the question is whether its character as non-profit-making removes it from the category of trading or financial. No confident answer can be given. There is no compelling reason for reading the profit motive into the concept of financial or trading operations. It can be argued that a trading company is none the less a trading company because it operates in effect as a co-operative, distributing any annual surplus of income over expenditure among its customers for that year in proportion to their purchases. By analogy the non-profit-making provision of services, which is, I take it, the function of a stock exchange, might make a corporate stock exchange a trading corporation. Since the Bank Nationalization Case there can be no question that the provision of services is capable of amounting to trade. The argument might well be strengthened by the consideration that, as with banks, the stock exchanges are essential to modern trading and financial activities. Nevertheless it would be unsafe to assume that this line of thought will appeal to the High Court. The general considerations mentioned above which give ground for anticipating a reasonably wide reading of s. 51(20) do not necessarily help on the present point. It can be argued instead that although the activities of a non-profit-making corporation may be incidental to trade and finance, which in the case of a stock exchange they undoubtedly are, this does not make the corporation itself a trading or financial corporation; in other words, that although its activities would be within the reach of s. 51(20) if the corporation were within the section, its activities do not of themselves bring the corporation within the power. But on the present law regulation of this kind would be worth trying.



A mining company carrying on exploration mining and sale of the results

For the reasons given above it is my opinion that this class of company is a trading corporation.

Investment companies such as mutual funds

For the reasons given above it is my opinion that this class of company is a financial corporation.

Merchant banks

My understanding of the term merchant bank is such that these institutions would be within the banking power of s. 51(13) in any event. If some of them are not, there seems to be no reason to doubt the correctness of Quick and Garran's view that the inclusion of financial corporations in s. 51(20) complements s. 51(13) in this respect, especially since it was held by some members of the court in the Bank Nationalization Case (1948) 76 C.L.R. 204, 256 [cf. 304] that s. 51(13) and (2) are mutually exclusive.

4. Laws with respect to the activities of corporations

The High Court in the Concrete Pipes Case has been quite remarkably reticent about what amounts to a law with respect to the corporations specified in s. 51(20). There is general agreement that it is not enough merely to make a law on any subject matter and address it to such corporations. Some limitations of subject matter are therefore to be anticipated, but what they may be is not clear. The nearest approach to an explicit statement of the range of this aspect of s. 51(20) is the following passage in the judgment of the Chief Justice at T/S 15-16:- 'No doubt, laws which may be validly made under s. 51(xx) will cover a wide range of the activities of foreign corporations and trading and financial corporations: perhaps in the case of foreign corporations even a wider range than that in the case of other corporations: but in any case, not necessarily limited to trading activities'. The last six words of this dictum are particularly significant in the present context because as I understand the matter the committee is less interested in the direct regulation of the trading activities of corporations, which was the subject matter of both the Corporations Case and Concrete Pipes, than in controlling the manipulation of information which affects the value of securities issued by corporations. Nevertheless dicta concerned

primarily with the former enable some inferences to be drawn about the latter.

The terms in which the Corporations Case has been overruled seem to make it clear that the Commonwealth now has a very wide power to impose conditions and restrictions on the manner in which a corporation may conduct its trading activities. Every member of the present High Court seems to agree with the Chief Justice when he says at T/S 14 that the reason why laws dealing with restraint of trade by corporations are within s. 51(20) is that they deal with 'the very heart of the purpose for which the corporation was formed, for whether a trading or financial corporation, by assumption, its purpose is to trade'. If this is the reason, it follows that any correctly drafted law regulating the manner in which a corporation trades, including flat prohibition of undesired practices, is within power; or at all events, any law which the Commonwealth is at all likely to consider enacting. This means for a start that any corporation whose actual trading purpose is or includes investment is potentially subject to very close regulation of the manner in which it attracts funds and employs them.

From this one proceeds to the manipulation of information by companies whose trading purpose is not investment. Perhaps, in view of the wide range of powers normally specified in memoranda of association, one should say manipulation of information in respect of trading purposes other than investment. The significant point about Concrete Pipes here is that in the process of refuting the reasoning of the majority in the Corporations Case the court laid emphasis on confining its reading of s. 51(20) to the actual words of the section and not reading in words which are not there as a means of limiting its operation. As an instance, the Chief Justice at T/S 17 said:- 'The Constitution itself provides the criterion of validity: the law must be with respect to a topic of granted power. For my part the formula [i.e.s. 51(20)] requires no explanation: in any case, it is the text and no commentary upon it however helpful may displace it. The constitutional formula requires a substantial connection between the topic and the law'. A reluctance to read words in appears clearly also in the judgement of Menzies J. at T/S 16-20. If this approach is taken at its face value, a law on the subject of information by a corporation on its own activities or state of business health seems to be squarely within the concept of a law with respect to a

corporation. This may well be what Barwick C.J. had in mind in the comment 'not necessarily limited to trading activities' quoted above. The only obvious restriction on power is that the Commonwealth could not under s. 51(20) directly alter a corporation's constitution because this would enter the field of incorporation (see question 1 above). [Cf. Bank Nationalization Case (1948) 76 C.L.R. 255-6.]

These considerations suggest some of the answers to the specific points raised under question 4:

(i) Clearance of a prospectus before issue of securities

For the reasons given above it is my opinion that such laws are within s. 51(20).

(ii) Filing of accounts, statements of material events and disclosure of business information relevant to value of securities already issued

All these matters seem to me to have the requisite substantial connection with the subject of corporations and therefore to be within s. 51(20). If the condition of substantial connection with corporations is fulfilled, it is clearly not relevant since Concrete Pipes that the law has also a substantial connection with something else, in this case the securities market. [Barwick C.J. at T/S 14, 17: 'amongst other things'; Menzies J. at T/S 18; Walsh J. at T/S 4; Gibbs J. at T/S 3.] This is in accord with current general principles of constitutional interpretation although it remains uncertain when the court will and when it will not allow the use of one power in s. 51 to overcome an express limitation on another. [Cf. Menzies J. at T/S 13-14.] The present question is not affected by this consideration.

(iii) Trading on inside information

I do not feel confident of the answer to this one. The difficulty is that the activity sought to be regulated is the investment actions of individuals with a view to private profit, not the actions of a corporation with respect to its own trading or its business procedures. It would not be difficult for

the High Court to decide that the situation was nevertheless sufficiently closely related to corporate affairs to be at least incidental to s. 51(20), but there is no certainty that the court will take this view. Something might depend on the form of the legislation. If the use of inside information for private profit were made a breach of duty to any corporation employing the relevant individual, the connection with corporations would be strengthened. Along these lines I certainly think that regulation would be worth trying. The present law is at least no more clearly against it than for it. The emphatic rejection by the whole court in Concrete Pipes of the relevance of any intrusive effect of Commonwealth laws on State legislative power tends in its favour.

(iv) Creating a false market

Similar considerations apply here as under (iii) above. If the person creating the false market had no connection with any corporation, other than trading in its securities, reliance could be placed only on the High Court's regarding the false market phenomenon as substantially connected with the corporation whose securities were affected. My guess is that the chances are against this.

5. Unofficial inter-company market

I am not sure of the full meaning of this term. On the specific question asked, whether disclosure can be required to a government body of details of borrowings and lendings by a company, my opinion is that such a law is within s. 51(20). I arrive at it by reference to the general observations I make in answer to question 4. A law of this description seems to me to have a substantial connection with corporations. Any law which regulates, even by mere disclosure, the commercial activities of companies within s. 51(20) appears now to be within the section. If this answer requires more detailed elaboration I request the committee to explain more fully the connotation of unofficial inter-company market.

## 6. Indirect regulation of unincorporated persons and institutions

I refer again to the general considerations mentioned in the answer to question 4. In my opinion a law directing s. 51(20) corporations not to employ unsatisfactorily qualified specialists is within s. 51(20), as having a substantial connection with those corporations, provided that it is limited to employment of such people for the purposes of the corporations' trading activities or internal regulation. This seems to meet the case in mind. The situation with respect to seeking or maintaining listing on unlicensed stock markets or exchanges, or markets or exchanges which do not comply with regulations, is of a different factual order but I think equally within s. 51(20). The purpose of an original issue of securities is normally either to raise capital for trading operations or, if bonus issues are in question, to effect a rearrangement of the capital structure of a company. It seems to me that this is a process so integral to the modern trading or financial corporation as to bring the circumstances under which its securities are offered for sale, including the market or exchanges on which the corporation seeks or permits its securities to be offered for sale, within s. 51(20). Trading in securities after original issue is a step further removed but it seems to me that the fate of its securities continues to be a matter with which a corporation has a substantial connection.

Sanctions such as fines could be imposed on s. 51(20) corporations for failure to comply with laws on the foregoing subjects and on unsatisfactorily qualified specialists for aiding and abetting the commission of such offences by corporations. In my opinion it is very doubtful that sanctions could be imposed directly on individuals for failure to be licensed. The licensing requirement being indirect, sanction for its breach has to be indirect, although in practical terms prosecution for aiding and abetting is pretty direct and the ambit of liability is almost as wide as if the individual had committed the offence himself.

### Drafting

Much space in the majority judgements in Concrete Pipes is taken up with explaining why the relevant sections of the Trade Practices Act were invalid although their subject matter was capable of being a law within inter alia s. 51(20).

To my mind it all amounts to very little. The drafting faults found are easily cured, so easily indeed that I am entirely persuaded by the dissenting judgement (on this point) of Gibbs J. that the sections should not have been invalidated in the first place. It is not possible to follow a drafting point without some reference to the details of the Act involved, but I will put it as briefly as I can.

The Committee will be aware that one of the main purposes of the Trade Practices Act was the control of what in the Act were called examinable agreements. These were commercial agreements embodying certain practices regarded as undesirably restrictive of trade. The detailed specification of such agreements was in s. 35 of the Act. For the present purpose the important point about s. 35 is that it was drafted in general terms apart from the characteristics which made the agreements examinable. If there were a head of power under which the Commonwealth could legislate with respect to 'restrictive trade practices', s. 35 would have been valid as it stood, assuming that the characteristics of the agreements specified did not take them outside the constitutional meaning of restrictive trade practice. Since there is no such head of Commonwealth legislative power, it followed that s. 35 was invalid unless the agreements were required to have some further characteristic or characteristics which brought them within a power which the Commonwealth does have; for example, that they be pursuant to interstate trade, s. 51(1), or be made by a corporation within the meaning of s. 51(20).

The draftsman anticipated this need and tried to meet it in s. 7 of the Act. He failed because he attempted to preserve the last ounce of generality in the application of the Act whilst at the same time keeping it within power. From the Commonwealth's point of view this is unfortunate because it discourages efforts to find formulae for the use of legislative power to its fullest extent. If the fate of the Trade Practices Act is any guide, the majority of the present court takes a restrictively technical view of the drafting of statutes, which puts a premium on the draftsman's erring on the safe side. This must inevitably affect his advice to Parliament, which in turn has political effects. This point is of all the more significance in that there was no room in Concrete Pipes for arguing that Parliament had failed to make its intention clear. As Gibbs J. demonstrates at T/S 6-7, the intention of Parliament

as expressed in s. 7 was perfectly clear. It was to achieve the widest possible range of valid application of the Act.

In s. 7 the draftsman's primary purpose was to cut down the generality of s. 35 by referring the agreements therein specified to one or more heads of legislative power. These he specified in separate subsections. If he had stopped there, covering the heads of power with some such general expression as that the restrictions of s. 35 were restrictions of any of the following kinds but no others, the Act would have been valid. In particular he drafted s. 7 to read that the restrictions of s. 35 'included' restrictions with the ensuing additional characteristics specified in s. 7, or any of them, as opposed to being limited to them, and further underlined the attempt to achieve all possible generality by adding in s. 7(4) that none of the foregoing should be construed as limiting the operation of the Act. This last provision in particular left it open to a literal-minded court to decide that the draftsman had expressly defeated his own object, which the majority of the court duly did.

My conclusion is that if the committee wishes to recommend legislation relating to any of the substantive matters referred to in this opinion, or other matters, it would do well (1) not to attempt to give the legislation an outer penumbra of vagueness of application in the hope that the High Court will complete the process of precise definition, and (2) to rely as little as possible on the use of particular formulae in one section of an Act to cut down general words in another section which in itself is expressed in terms which go beyond power. These precautions may add to the bulk of legislation. Within one Act they may result in particular applications being spelt out in numerous separate sections, so that if any one goes beyond power the court will have the least difficulty in severing that one from the rest. Beyond this it would be advisable to resort to a series of separate Acts in some instances, particularly where there is real doubt as to the scope of s. 51(20). The intellectual vulnerability of an unduly literal approach to statutory interpretation, of which advantage can be taken by the draftsman, is that the court will not take note of the relation of one statute to another if the two are separated with reasonable care. The outstanding instance is the income tax legislation upheld in South Australia v Commonwealth (1942) 65 C.L.R. 373.

There are two other points of relevance in Concrete Pipes. The first is that little aid can be expected by the Commonwealth from s. 15A of the Acts Interpretation Act by way of reading a statute down to its constitutional limits. Secondly there are passages in the judgment of Walsh J. at T/S 5, 9-12, which may suggest that the difficulties of combining a law to be obeyed by corporations with a law as to a given subject matter are greater than I have concluded above. I have decided that they may be disregarded, first because it is not clear that he actually did intend to say any more than the Chief Justice and Menzies J. on the point [cf. at T/S 13], and secondly, because if he did his wider doubts are not reflected in the other judgments.

Colin Howard



LEGAL OPINION B-2

1. At the outset it is well to appreciate the precise and limited opinion of Strickland v Rocla Concrete Pipes Ltd (1971) 45 A.L.J.R. (putting aside what might be called the decision in Rocla, viz., that the form of the Trade Practices Act did not measure up to the High Court's understanding of a law with respect to Constitution s. 51(xx) corporations).

2. (1) Rocla declared that the following law would be a 51(xx) law: 'Any foreign corporation, or trading or financial corporation formed within the Commonwealth, which, either as principal or agent, makes or enters into any contract, or engages or continues in any combination - (a) with intent to restrain trade or commerce within the Commonwealth to the detriment of the public ... is guilty of an offence'.

(2) That is to say, a law that is expressly and directly directed to 51(xx) corporations and commands them not to enter into agreements in restraint of trade is a 51(xx) law.

(3) The law thus does not merely regulate the sheer trading of the 51(xx) corporations. It goes further. The law regulates the making of restrictive agreements in connection with that trading; the law regulates something which is incidental to the sheer making and selling of concrete pipes, sc., agreements in restraint of trade.

3. (1) Besides the particular example of a 51(xx) law suggested by Rocla, various Justices also indicated a criterion of a valid 51(xx) law, even if only tentative at this stage.

(2) Barwick C.J., referred to 'laws regulating and controlling amongst other things the trading activities

of foreign corporations and trading and financial corporations formed within the limits of the Commonwealth ... (these laws are) laws with respect to such corporations. They (deal) with the very heart of the purpose for which the corporation was formed'.

(3) Menzies J., spoke of 'a law relating to the trading of trading corporations formed within Australia. Prima facie such a law is within power ...' a law 'governing the conduct of its business by a trading corporation formed within the limits of the Commonwealth is within the power' in s. 51(xx) of the Constitution.

(4) Gibbs J., (a dissenter, but only on the form of the Act, not on the power in 51(xx)), said that s. 51(xx) extends 'to empower the Parliament to govern and regulate the trading activities of corporations ... for the purpose of preserving competition in trade'.

4. Then, the criterion of a 51(xx) law looks for a law which turns to 51(xx) corporations - and proceeds to regulate 'the trading activities', the 'trade', or the 'business' of these corporations.

5. (1) In the particular context of Rocla and in the particular context of Huddart Parker & Co. Pty Ltd v Moorehead (1909) 8 C.L.R. 330, the criterion of a 51(xx) law given in para. 4 above meant that a law which penalized agreements in restraint of trade made by 51(xx) corporations was a law which regulated the trading activities, the trade or the business of these corporations.

(2) That is to say, the making of a restrictive trade agreement (associated with the manufacturing-distributing of concrete pipes in Rocla or with the selling of coal in Huddart Parker) was a 'trading activity'.

(3) Barwick C.J., in Rocla suggested why the making of restrictive trade agreements were considered to be 'trading activities' or the 'business' of 51(xx)

corporations: they are 'activities in trade with which the law has been familiar for centuries'.

#### Applications of Rocla

6. (1) On the incorporation or liquidation of companies at large Rocla has nothing to say: se pares. 1-5 above.

(2) On the incorporation (and presumably liquidation) of companies in specific areas Barwick C.J., in Rocla reminds us that Federal Parliament can incorporate government enterprises in overseas or inter-State trade; that Parliament can incorporate federal industrial organizations; and that Parliament can incorporate generally in its territories. See s. 51(i), s. 51(xxxv) and s. 122 of the Constitution.

7. Earlier cases have persistently denied that s. 51(xx) authorizes Federal Parliament to incorporate or liquidate the three kinds of corporations enumerated in that grant.

See Insurance Commissioner v Associated Dominions Assurance Society Pty Ltd (1953) 89 C.L.R. 78, at pp.86, 89; Bank of New South Wales v The Commonwealth (1948) 76 C.L.R. 1, at pp.202, 255, 304; Isaacs J., in Huddart Parker above, at pp.393, 394 (Isaacs was not one of the Justices in Huddart Parker who were criticized by Rocla).

8. I do not think that s. 51(xx) will extend in time to permit incorporation or, what is related, liquidation. Foreign corporations, one of the classes in 51(xx), must be incorporated abroad. The other two corporations in 51(xx) are bodies 'formed' within the limits of the Commonwealth.

9. (1) Internal management of the prescribed corporations was not considered by Rocla.

(2) But the authorities in para. 7 above leave the internal management of these corporations to the States.

(3) Now that the Court has conceded a large corporate power to the Commonwealth by resuscitating 51(xx), the Court may well leave with the other parties to the Federation, the States, the creation and internal management of 51(xx) corporations.

Thus, the Court may (if only sub-consciously) preserve in this area a 'dual federalism', per Kitto J., in Airlines of New South Wales Pty Ltd v State of New South Wales (No. 2) (1965) 113 C.L.R. 54, at p.115. Even State of Victoria v The Commonwealth (Pay-roll Tax) (1971) 122 C.L.R. 353 insisted on the essential federal nature of the Constitution.

10. (1) The 'statutory recognition of corporations falling within the terms of the paragraph (viz., s. 51(xx)) and the fixing of the conditions upon which they might enter trade' ... this restriction of the power in s. 51(xx) by Huddart Parker was stigmatized by Barwick C.J., in Rocla as an 'emasculatation' of the power - not as a distortion or as something beyond the power.

(2) McTiernan J., during argument in Rocla thought that O'Connor J., in Huddart Parker gave a satisfactory explanation of the origin of s. 51(xx) - namely, to authorize the central legislature to make laws allowing recognition of, and imposing conditions of recognition on, 51(xx) corporations.

(3) Owen J., during argument in Rocla thought that O'Connor's view of s. 51(xx) - see sub-para. (2) above - was a narrow construction of 51(xx).

(4) Remember the criterion in Rocla looks to a law that governs and regulates the trading activities of 51(xx) corporations: see para. 4 above. The imposition of rules of recognition so that 51(xx) corporations can carry on their trade or their business in Australia seems to meet the criterion.

11. Federal surveillance of share-dealings is not mentioned by Rocla, either in argument or in judgement.

12. So far as a concrete pipes manufacturing company (as in Rocla) or a coal merchant company (as in Huddart Parker) has share-dealings with its own shareholders, these would be matters of internal management. As such the dealings would remain under State control. See para. 9 above.

13. So far as a concrete pipes manufacturing company or a coal merchant company has (projected) share-dealings with outsiders - say, by way of invitations or prospectuses - the following law is available.

(1) Rocla validated, not a law on the bare trade of selling concrete pipes or the bare trade of selling coal, but Rocla validated a law on something incidental to that trade of selling. See para. 2(3) above. Rocla validated a federal law which regulated something associated with trade, something 'in trade (accurately, something merely connected with trade) with which the law has been familiar for centuries'. See para. 5(3) above.

Then, Parliament could make a 51(xx) law on something incidental to the trading of 51(xx) corporations, something in trade with which the law is well familiar - dealing in shares by 51(xx) corporations with prospective shareholders.

(2) Generally, Rocla promised a liberal understanding of the corporations power. Barwick C.J., warned that 'this power should (not) be approached in any narrow or pedantic manner'. Menzies J., insisted that 'grants of power (to the Federal Parliament) should be construed broadly not narrowly'.

(3) In the result, it seems that Federal Parliament could act the surveillant of proposed share-dealings between 51(xx) corporations and outsiders.

14. (1) Trading corporations within s. 51(xx) certainly include manufacturing companies qua distributors, as in Rocla itself.

(2) 'Trade' in s. 51(i) and in s. 92 of the Constitution is an indication of 'trading' corporations in s. 51(xx) of the same document.

Trade in s. 51(i) and/or in s. 92 extends to buying and selling of tangibles or intangibles, transport, news media enterprises, broadcasting, television, public utilities (gas or electricity), the transmission of intelligence ... See The Commonwealth v

Bank of New South Wales (1949) 79 C.L.R. 497, at pp.632-633; Bank of New South Wales v The Commonwealth (1948) 76 C.L.R. 1, at pp.284, 306, 381-382; Australian National Airways Pty Ltd v The Commonwealth (1945) 71 C.L.R. 29, at pp.56-57, 71, 76, 82-83, 106-107; W. & A. McArthur Ltd v State of Queensland (1920) 28 C.L.R. 530, at pp.546-548.

Particularly notice the wide view taken of the meaning of trade in the Banking Case above, 79 C.L.R. at p.632 and 76 C.L.R. at pp.381-382, and in A.N.A. above, at p.82.

(3) There is even a suggestion by Latham C.J., and Dixon J., in A.N.A. above, at pp.56 and 83, that a profit element need not be shown.

15. (1) From the examples just given and because of the amplitude of the notion of trade, a trading corporation within s. 51(xx) would include a mining exploration company or a merchant bank which sells, or does trade in, its 'intelligence' (see para. 14(2) above).

(2) A non profit corporation, otherwise within s. 51(xx), might be argued to be within the corporations power. See para. 14(3) above. However, the dicta are slight, and I would not lean too heavily on them.

Of course, a non profit association which is unincorporated, a mere association, is not within s. 51(xx).

16. (1) Non corporate persons are not within the literal terms of s. 51(xx), any more than non aliens are with-in the literal terms of s. 51(xix) - these two powers on persons were yoked together by some of the Justices in Rocla.

(2) During argument in Rocla Menzies J., certainly indicated that he would oppose the inclusion in a power on persons parties who were not among the prescribed persons.

During argument in Rocla Barwick C.J., almost as clearly indicated that he would allow the corporations power to extend to non corporate persons. Barwick instanced a law on receiving as a law making effective legislation on larceny.

(3) Under its powers not specifically directed at persons - and aided by its incidental powers - Federal Parliament can reach into matters literally not within the main grant. Thus, assisted by its power incidental to the taxation grant Parliament has required the registration of tax agents, Stuckey v Iliff (1960) 105 C.L.R. 164. Or, assisted by its power incidental to the industrial arbitration power Parliament has incorporated organizations, Jumbunna Coal (1908) 6 C.L.R. 309.

The incidental power makes effective the main legislation, Re Dymond (1959) 101 C.L.R. 11, at p. 21; Grannall v Marrickville Margarine Pty Ltd (1955) 93 C.L.R. 55, at p.77.

(4) Then, it is quite arguable that legislation based on 51(xx) with its incidental power can extend to brokers or accountants in order to make effective Parliament's acknowledged regulation of 51(xx) corporations.

17. A federal law which relies on multiple heads of power

(1) must itself disclose a standard or criterion which the Court can seize to characterize the law as a law, for example, with respect to (a) inter-State dealings in shares, (b) territorial dealings in shares, (c) dealings in shares by 51(xx) corporations, and so on, Pidoto v State of Victoria (1943) 68 C.L.R. 87, at pp.109-111; and

(2) the law must itself declare that the several sub-sections (a) (b) (c) and so on shall be construed distributively as between themselves to the intent that as each case (transaction, dealing) arises, otherwise within the law, that sub-section shall be applied that is relevant to the case; compare Gibbs J., in Rocla.

P.H. Lane

## LEGAL OPINION B-3

The following opinion is divided into three parts: Part I, General Comments on Concrete Pipes; Part II, Specific questions; Part III, Severability.

### Part I: General Comments on Concrete Pipes

1. The most obvious feature of the seven opinions in the Concrete Pipes Case,<sup>1</sup> was the determination of all the Justices to confine their authoritative decision to the validity of the Trade Practices Act 1965-9, in relation to restrictive trade agreements made by foreign corporation or trading or financial corporation formed within the Commonwealth. It is open to argument that the decision is authoritative only as to agreements made between two or more of the corporations just mentioned, since the appellants were in fact corporate, and does not decide anything as to the validity of such an Act in its relation to agreements made between corporations and individuals. However, Barwick C.J., McTiernan J., Windeyer J. and Owen J. and probably Gibbs J., could be taken as holding that the Commonwealth can at least require the relevant corporations to register restrictive agreements, and can prohibit such corporations under penalty from entering into such agreements, whether other parties to such agreements are corporate or not, even though the decision tells nothing as to the possible consequences for the non-corporate parties or as to the competence of the Commonwealth Parliament to deal with such consequences; see especially Menzies J. at p.12 and Walsh J. at p.14. This, however, is the full extent of the authoritative decision, and the whole court agreed that it should not attempt to establish the outer limits of s. 51(xx), nor even give much in the way of constructive guidance as to the way in which the court now proposes to handle this section.

*1. Not reported. Page references are to the separately numbered pages of each judgment in the typescript copy.*



2. I have attached to this opinion excerpts from the judgments from which some wider implications may be drawn; they may not be exhaustive, but I think that they are the principal passages of possible relevance to the questions put to me on behalf of the Committee. The general conclusions which I draw from these passages is that the court has been particularly careful to avoid giving the slightest clue to the key question underlying the Committee's questions (1), (2), part of (3), (4) and (5). That question is whether s.51(xx) would now authorise Commonwealth laws concerning what for convenience I call the 'interior' affairs of the relevant corporations, such as the matters dealt with in the State Companies Acts.

The question whether s.51(xx) allows the Commonwealth to provide for the incorporation of such companies may be isolated as a special problem both of interpretation and of history, because in Moorehead<sup>2</sup> the court was unanimous that s.51(xx) did not authorise incorporation of financial or trading companies. In Concrete Pipes all the opinions carefully avoid dealing with the question, and the circumstance that Barwick C.J. (at p.13) enumerates sources of Commonwealth power to incorporate without including s.51(xx) provides a fairly strong basis for assuming that the Chief Justice (and consequently McTiernan J.) accepts this part of the Moorehead finding; perhaps Menzies J. does too (see p.20). It has always been my view that the reasoning on this point in Moorehead was fallacious, but it was the sort of reasoning likely to find favour with the present High Court, and as a matter of judicial psychology I should think it quite likely that the present Court would unanimously follow Moorehead on the point; perhaps McTiernan and Gibbs JJ. could be persuaded in the other direction.

4. However, it by no means follows necessarily that the Commonwealth could not pick up corporations once incorporated under State laws or other Commonwealth powers and superimpose extensive regulations as to their corporate structure and 'internal' behaviour, including the relations between shareholders, directors, debenture holders etc. One of the fallacious assumptions of all the judgments in

Moorehead was that lack of power to incorporate necessarily implied lack of power to control 'interior' organisation after incorporation.

5. The following factors support the view that even if stopping short at incorporation the power in s.51(xx) extends to 'interior' organisation.

(a) The whole Court agrees in disregarding the history of the provision (which, if examined, undoubtedly leads to a very narrow interpretation) and also in disregarding the doctrine of implied prohibitions applied in Moorehead; they require simply that the challenged law should be a law 'with respect to' the named corporations. It cannot be denied that a law regulating 'interior' organisation comes within this description or classification.

(b) Although only McTiernan J. specifically agrees with the formulation of Barwick C.J. as to the positive content of s.51(xx), none of the others specifically disagree.<sup>3</sup> The Barwick statement (pp.15-16) 'no doubt laws which may be validly made under s.51 (xx) will cover a wide range of the activities of foreign corporations and trading and financial corporations: perhaps in the case of foreign corporations even a wider range than that in the case of other corporations: but in any case not necessarily limited to trading activities' is consistent with 'interior' regulation; note also his immediately following reference to avoiding narrow or pedantic constructions.

(c) At least in the case of foreign corporations, the foregoing passage from Barwick C.J. supports the view that there is no semantic basis for restricting the range of the power to 'exterior' activities, as there might be with the other two classes of corporation.

3. Menzies and Windeyer make no reference to Barwick C.J.'s opinion; Owen J. agrees only on severability, and Walsh J. on not following Moorehead.

(d) At least in the case of 'financial' corporations, such semantic basis as the phrase itself provides for a restricted meaning leads to a wider inference than the expression 'trading'; it is surely 'the very heart' (Barwick C.J. at p.14) of financial corporation activity that the 'internal' structure of the corporation should be such as to provide satisfactory assurances of solvency and honest dealing in the 'external' activities of the corporation. This may not cover the whole range of 'interior' questions but would go a considerable distance.

6. The factors telling against an interpretation covering 'interior' organisation are as follows:

(a) The frequent references in all the judgments to the trading relations of the relevant corporations with the community as the chief element attracting validity.

(b) The favourable references by Barwick C.J. (p.12) to the opinion of Isaacs J. in Moorehead; Isaacs regarded s.51(xx) as solely applicable to 'external relation' questions. Similarly, Gibbs J. (p.4) quotes without disapproval the Isaacs view. (On the other hand, notice the specific refusal of Menzies J. to consider such aspects of the judgment - p.19).

(c) The explicit warning by Barwick C.J. (p.15) that there are limits to the operation of s.51(xx) and that in particular it does not follow that 'any law which is addressed specifically to such corporations or some of them' is valid.

7. The conclusion I have come to is that the future course of High Court decision on these questions is unpredictable. The judgments in Concrete Pipes give, so far as measurable, an equal degree of discouragement and encouragement from the point of view of extension of Commonwealth power in the directions indicated by the questions put to me. My own view is that the logic of Concrete Pipes require extension of Commonwealth competence

over the whole range of 'interior' matters. I would advise a Commonwealth Parliamentary draftsman instructed to prepare a Commonwealth Companies Act to arrange the drafting so as to leave open the possibility of severing any provisions of the Act dealing with the incorporation of companies, so that the remainder can operate on relevant corporations on the assumption that they have been incorporated under other laws. Otherwise, it can only be said that the Commonwealth now has a basis for successfully arguing the validity of a Commonwealth Companies Act, but no guarantee that this argument will prevail.

## Part II: Specific questions

1. Will the power now support Commonwealth laws with respect to the incorporation or liquidation of companies?

Probably not as to incorporation; as to liquidation see (4).

2. Can the Commonwealth provide for the recognition throughout the Commonwealth of Companies incorporated in a State or Territory?

Doubtful, since it cannot be assumed that any of the views in Moorehead have been accepted; Menzies J. appears to reject it specifically (p.20).

3. What types of corporations can be regarded as covered by the words 'trading or financial corporations'?

Concrete Pipes gives little guidance. The judgments do not even hint at either acceptance or rejection of the restrictive views expressed on the point by Isaacs J. in Moorehead. The course of the argument in Concrete Pipes suggested some willingness to include all corporations which have a purpose of making profits from dealings with goods, or with money and credits, as either trading or financial. Following this hint and the generally expansive mood of the decision, I would say that profit-making purpose is the chief criterion. Hence a non-profit making stock exchange would not be covered, because the corporation is in itself neither financial nor trading and the brokers are not incorporated. The postulated mining and investment companies would be covered. The 'merchant bank' is in my view a bank within s.51(xiii) and hence (under

Bank Nationalisation<sup>4</sup>) not covered by s.51(xx), but certainly in so far as not covered by s.51(xiii) it would be covered by s.51(xx).

#### 4. Laws with respect to the activities of corporations

These questions all depend on the key question of the power to regulate the 'internal' affairs of corporations, or of some classes of corporations, dealt with in Part I of this opinion. As there explained, I think the questions at present unanswerable and would recommend that any Commonwealth authority should assume answers in favour of Commonwealth power, pending clarifying litigation.

#### 5. Will the power support laws with respect to the unofficial inter-company market requiring, for example, disclosure to a government body of details of borrowings and lendings by a company?

The question as phrased is obscure. If it means to refer to dealings between distinct and separate corporations -foreign, financial or trading - then the answer is yes. For the purpose of this opinion, such dealings are 'external' to the corporation and quite clearly come within the direct scope of the decision in Concrete Pipes; they are forms of trading between corporations of the relevant type, and the case does not even involve the difficulties, mentioned by Menzies J. as to transactions where individuals are party principals.

#### 6. Control of the company's servants and agents

See the answer to (4). Leaving aside the individual persons mentioned, laws for this purpose addressed to the corporations and referring only to their 'external' activities - eg seeking to buy shares etc. in other corporations - would be valid under Concrete Pipes; query where the laws deal with 'internal' shareholder-debenture holder-director relations. If the law is valid as to the corporation, then the difficulties mentioned by Menzies J. in Concrete Pipes (p.12) would arise if an attempt was made to impose a sanction on the individual or non-corporate body mentioned. The incidental criminal power

as established by Kidman<sup>5</sup> may extend only to individual etc. acts which could be treated as incitement, conspiracy etc., but the Commonwealth could at least attempt to reach the individuals etc. by making knowing participation in an activity forbidden to the corporation itself an offence.

### Part III: Severability

1. In my view the dissenting opinion of Gibbs J. on this point in Concrete Pipes is preferable to the majority view, but I do not think that the majority view creates any major problems for the draftsmen. The Trade Practices Act presented a severability problem somewhere between the severability provisions of Bank Nationalisation on the one hand and Pidoto on the other, and it has to be remembered that this had to be dealt with before the trends of interpretation demonstrated in Payroll Tax<sup>6</sup> and the present case had become at all prominent, and when accordingly the draftsmen had to clutch at constitutional straws. It was for that reason that the Act attempted to combine (by the joint effect of s.15A of the Acts Interpretation Act and s.7 of the Trade Practices Act) the effect of some five separate Acts. If the draftsmen and the Government had dished up to Parliament instead five or six separate Acts, in the manner of the long succession of Sales Tax and Sales Tax Assessment Acts, it is likely enough that they would have experienced a party and House revolt against them. Moreover, it was only after the High Court decision to overrule Moorehead that the Trade Practices Act could be seen to involve such subtle problems of severance.

2. The two main difficulties are as follows. Firstly, the catch-all provision of s.7(4) was interpreted by the majority as creating a situation, like that of Pidoto, where the Court is left without any objective guide to the basis for distributive severance. (The Court should instead have applied s.15A to s.7 and struck out the catch-all phrase.) Secondly, the majority thought, with more justification, that the various operative phrases of ss.35, 36, 37 and 43 might have to be given different meanings in accordance with the head of power in relation to which they were to be applied; this would be an unusual

5.20 C.L.R. 425

6. 45 A.L.J.R. 251

type of distributive severance, though I can see no theoretical objection to it and in all probability no such variation in meaning need necessarily have arisen. However, accepting that the majority was worried by these features of the legislation, it will be easy enough to overcome them. The first difficulty will be sufficiently dealt with by restricting the possible constitutional bases of operation to the cases of obvious importance -behaviour of corporations, interstate and foreign trade, state-territory and territory-territory trade. The second difficulty will require either several Acts, which will still look pretty cumbrous, or at least separate Parts in the one Act. Owing to the nature of the difficulty, it will not be sufficient to have one Part containing the substantive machinery and then a number of separate parts setting out the three areas of application and incorporating the substantive Part into each of them, since the majority may still object that they cannot vary the meaning of the operational phrases in the substantive Part if this is needed to ensure the valid application of that Part to different areas of application. Hence on the contrary it will be necessary to repeat the substantive provisions three times and furthermore to add an internal interpretation clause to the effect that the meaning of the substantive provisions is to accord with constitutional requirements in relation to each area of application, and that the three sets of substantive provisions are to be read accordingly and if necessary with varying meanings notwithstanding that they are verbally identical.

3. A special difficulty arises in relation to the corporations power basis, because of the difficulty about corporation-individual transactions raised by Menzies J. (p.20) and mentioned by Walsh J. (p.14). In view of the statistics as to the parties to restrictive trade agreements, I would be inclined to play safe for the present by confining the s.51(xx) basis to agreements between corporations. Time enough later to attempt reaching individuals and firms if there is a rush to de-incorporate.

4. An attempt at applying s.51(xx) to 'internal' organisation, as in a Companies Act, will not raise comparable difficulties, since the major provisions will rest solely on s.51(xx) and there would be little point in relying on ss.51(i) and 122 as well until s.51(xx) has been tested,

when the appropriate severability problem will also be clearer. The incidental applications to individuals of some proposed laws under this head as under question (6) above can easily be set out in separate sections which can be 'blue-pencilled' in their entirety if invalid, so that distributive severability will not arise.

Geoffrey Sawer



## APPENDIX

### Excerpts from the Concrete Pipes Case

#### Barwick C.J.

Mr. Justice Isaacs dissented and adopted an approach to the construction of the Constitution conformable to the subsequent decision of the Court in the Engineers Case. He thought ss.5(1) and 8(1) to be valid because he construed the power of the Parliament as large enough to include the regulation of the conduct of foreign and trading or financial corporations formed within the limits of the Commonwealth in their transactions with or as affecting the Australian public.<sup>1</sup>

The Court in the course of its judgment, decided that the expression in paragraph (xx) 'formed within the Commonwealth' was apt to include only corporations formed according to the laws of the States. But in this it seems to me their Honours were clearly wrong. There are powers granted to the Commonwealth as well as those left in residue to the States to which the formation within the Commonwealth of trading corporations might be referable. There is s.122 granting legislative power with respect to the Territories. Section 51(1) for instance has been found a source of power to create a trading corporation. See Australian National Airways Pty Ltd v The Commonwealth and Others 71 C.L.R. 115. Corporations formed under any power by the Commonwealth or under Commonwealth legislation are clearly corporations formed within the limits of the Commonwealth. Had their Honours of the majority in Huddart Parker v Moorehead (*supra*) included these corporations in, rather than excluded them from, the ambit of paragraph (xx) some of the difficulties which arise from their interpretation of paragraph (xx) might have become apparent.<sup>2</sup>

I have set out s.5(1) and s.8(1) of the Australian Industries Preservation Act. They were clearly laws regulating and controlling amongst other things the trading activities of foreign corporations and trading and financial corporations

1. P.12

2. p.13

formed within the limits of the Commonwealth. In my opinion such laws were laws with respect to such corporations. They dealt with the very heart of the purpose for which the corporation was formed, for whether a trading or financial corporation, by assumption, its purpose is to trade, trade for constitutional purposes not being limited to dealings in goods. cf. Bank of New South Wales v The Commonwealth and Others 79 C.L.R. 1. If the corporation is exercising its powers it will be carrying out trading operations and in that pursuit making agreements with others in matters of trade. Agreements to restrict trade or endeavouring to monopolise it are activities in trade with which the law has been familiar for centuries. Sections 5(1) and 8(1) in controlling such activities are in my opinion clearly laws with respect to the topic of s.51(xx). I would conclude therefore that s.5(1) and s.8(1) were valid and that the Court's decision to the contrary in Huddart Parker v Moorehead (supra) should be overruled.<sup>3</sup>

It does not follow either as a logical proposition, or if in this instance there be a difference, as a legal proposition, from the validity of those sections, that any law which in the range of its command or prohibition includes foreign corporations or trading or financial corporations formed within the limits of the Commonwealth is necessarily a law with respect to the subject matter of s.51(xx). Nor does it follow that any law which is addressed specifically to such corporations or some of them is such a law. Sections 5(1) and 8(1), in my opinion, were valid because they were regulating and controlling the trading activities of trading corporations and thus within the scope of s.51(xx). But the decision as to the validity of particular laws yet to be enacted must remain for the Court when called upon to pass upon them. No doubt, laws which may be validly made under s.51(xx) will cover a wide range of the activities of foreign corporations and trading and financial corporations: perhaps in the case of foreign corporations even a wider range than that in the case of other corporations: but in any case, not necessarily limited to trading activities. I must not be taken as suggesting that the question whether a particular law is a law within the scope of this power should be approached in any narrow or pedantic manner.<sup>4</sup>

3. pp.14-15

4. PP.15-16

The constitutional formula requires a substantial connection between the topic and the law. What will suffice in any particular instance to require an affirmative answer to the question whether it is a law with respect to the subject matter necessarily involves a matter of degree co-related to the nature of the power and to the provisions of the Act as they would operate in the area in which it is held they were intended to operate. As I have indicated, I have myself no difficulty whatever in saying that ss.5(1) and 8(1) were laws with respect to amongst other things trading corporations formed within the limits of the Commonwealth.<sup>5</sup>

A law requiring the registration of trading agreements restrictive of trade to which a foreign corporation or a trading or financial corporation formed within the limits of the Commonwealth is a party, and requiring the corporation to give particulars of such an agreement under penalty of a fine for failing to do so, appears to me clearly to be a law with respect to corporations of the kind described. As I have said, the making of such an agreement in the course of trade is truly a trading activity. Such a law is a law regulating and controlling the trading activities of such corporations. It would in my opinion clearly be within the legislative power of the Parliament granted by s.51(xx): as also would be the other substantive provisions of the Act if enacted with respect to foreign corporations and trading and financial corporations formed within the limits of the Commonwealth.<sup>6</sup>

McTiernan J.

I agree in the judgment of the Chief Justice, so far as it relates to the decision in Huddart, Parker & Co. Proprietary Limited v Moorehead 8 C.L.R. 330 and to the scope of s.51(xx) of the Constitution.<sup>7</sup>

Menzies J.

It was virtually conceded that s.43 could impose no obligation arising out of an agreement between individuals relating solely to intrastate trade. What power, it may be asked, would support the application of s.43 to an individual so contracting with a company? Does s.15A enable the

5. P.17

6. PP. 17-18

7. P.1

provisions of the Act to apply to agreements so far as one party is concerned but not another? Difficulties of this sort cannot be conclusive but the host of difficulties that would arise, were s.15A to be applied in accordance With the submission of the Attorney-General, lends support to a conclusion, formed on the more fundamental grounds that I have already stated, that the Attorney-General is claiming too wide an operation for s.15A.<sup>8</sup>

Is any law commencing 'Every alien shall ...' a valid law? I do not think it is necessary here to determine whether the Attorney-General's affirmative submission is correct because all we are here concerned with is a law relating to the trading of trading corporations formed within Australia. Prima facie such a law is within power.<sup>9</sup>

Legislation with respect to corporations may also be legislation with respect to trade. A law with respect to corporations is within the power of Parliament notwithstanding that it is also a law with respect to trade, notwithstanding the limited power in relation to trade conferred upon Parliament by s.51(i).<sup>10</sup>

I am not prepared to attempt to define the limits of the power conferred by s.51(xx). I content myself with saying that a law such as s.5 of the Australian Industries Preservation Act governing the conduct of its business by a trading corporation formed within the limits of the Commonwealth is within the power of the Parliament by virtue of s.51(xx).<sup>11</sup>

Further, it is hardly to be thought that a recognition of a corporation formed under the law of a State as a legal entity should be a matter for Commonwealth law. For instance, could Parliament by a law under s.51(xx) forbid the recognition in a State of a company incorporated in that State?<sup>12</sup>

8. P.12

9. P.14

10. P.18-19 11

11. P.19

12. P. 20

Owen J.

I agree that the decision in Huddart Parker & Co. Pty Ltd v Moorehead (1909) 8 C.L.R. 330 should be overruled and that laws such as were contained in ss.5(1) and (8) of the Australian Industries Preservation Act may be made by the Parliament under the powers conferred by s.51(xx) of the Constitution.<sup>13</sup>

Walsh J.

I agree also with the opinion expressed by the Chief Justice that we should not attempt to decide in these appeals the full ambit of the power conferred by s.51(xx) or to state definitive tests or criteria by which in every case the question may be determined whether a law is or is not a law with respect to the topic described in that paragraph.

Gibbs J.

In my opinion a law may be a law with respect to a foreign corporation or a trading or financial corporation formed within the limits of the Commonwealth notwithstanding that it affect the corporation in the conduct of its intra-State trade.<sup>15</sup>

Isaacs J., on the other hand, considered that the words of the paragraph should be given their ordinary and natural meaning, and that so read s.51(xx) 'entrusts to the Commonwealth Parliament the regulation of the conduct of the corporations in their transactions with or as affecting the public' (see p.395).<sup>16</sup>

We need not consider whether the exercise of the power could lead to the results which in Huddart, Parker & Co. Pty Ltd v Moorehead Higgins J. regarded as extraordinary and 'big with confusion' (see pp.409-410). However, it seems to me that it would be placing a quite unwarranted restriction on the words of the paragraph to read it as not extending to empower the Parliament to govern and regulate the trading activities of corporations of the kind mentioned in the paragraph, for the purpose of preserving competition in trade. In my opinion, therefore, a law of the kind suggested would be within the power of the Parliament.<sup>17</sup>

13. P.1

14. P.3

15. P.3

16. P.4

17. P.5

#### LEGAL OPINION B-4

Section 51 (xx.) of the Constitution confers power on the Commonwealth Parliament to make laws with respect to 'Foreign corporations, and trading or financial corporations formed within the limits of the Commonwealth'. By the Australian Industries Preservation Act 1906, the Commonwealth Parliament endeavoured to use this power in order to prohibit the corporations mentioned from entering into any contract or engaging in any combination with intent to restrain any trade or commerce within the Commonwealth or with intent to destroy or injure any Australian industry. A further provision purported to prohibit the corporations from monopolising any trade or commerce within the Commonwealth. The validity of these provisions could not rest upon the commerce power because they covered all trade and commerce within Australia and not merely inter-State or overseas trade. The High Court in Huddart Parker v Moorehead (1909) 8 C.L.R. 330 held by a majority (Griffith C.J., Barton, O'Connor and Higgins JJ.; Isaacs J. dissenting) that the provisions were not authorised by the corporations power. Although the reasoning of the majority judges varied somewhat, the underlying view seemed to be that paragraph (xx) was confined to the statutory recognition of corporations and the fixing of conditions upon which they might enter trade in Australia. Isaacs J. disagreed with this view. In his Honour's dissenting judgement, he maintained that the power entrusted to the Commonwealth Parliament was the regulation of the conduct of the corporations in their transactions with or affecting the public.

As a result of this case, the corporations power was not used or relied upon to any great extent by the Commonwealth until the passing of the Trade Practices Act 1965. Under the provisions of the latter Act, certain types of agreements entered into by the corporations of the type mentioned in paragraph (xx) of section 51 of the Constitution were required to be registered with the Trade Practices Commissioner. The High Court, by a majority (Barwick C.J., Menzies, Windeyer and Owen JJ.; McTiernan and Gibbs JJ. dissenting), held the Act

invalid mainly on technical and drafting grounds. All the judges of the Court held that the reasoning in Huddart Parker v Moorehead was wrong and that the provisions of the Australian Industries Preservation Act considered in that case had been valid. It was, therefore, made clear by a unanimous Court that the corporations power was sufficiently wide to enable the Commonwealth to govern and to regulate the trading activities of corporations of the kind mentioned in the corporations power for the purpose of preserving competition in trade. The importance of the case is that no regard need be had to the distinction between inter-State and overseas trade on the one hand and intra-State trade on the other - a distinction which section 51(i) of the Constitution requires.

None of the judges gave an inclusive and exclusive definition of this power, but Barwick C.J., in particular, threw some light on its scope.

In the course of his judgment, the Chief Justice said at p.490:

I have set out s. 5 (1) and s. 8 (1) of the Australian Industries Preservation Act. They were clearly laws regulating and controlling amongst other things the trading activities of foreign corporations and trading and financial corporations formed within the limits of the Commonwealth. In my opinion such laws were laws with respect to such corporations. They dealt with the very heart of the purpose for which the corporation was formed, for whether a trading or financial corporation, by assumption, its purpose is to trade, trade for constitutional purposes not being limited to dealings in goods, cf. Bank of New South Wales v The Commonwealth (1948), 79 C.L.R. 1. If the corporation is exercising its powers it will be carrying out trading operations and in that pursuit making agreements with others in matters of trade. Agreements to restrict trade or endeavouring to monopolize it are activities in trade with which the law has been familiar for centuries. Sections 5 (1) and 8 (1) in controlling such activities are in my opinion clearly laws with respect to the topic of s. 51(xx).



I would conclude therefore that s. 5 (1) and s. 8 (1) were valid and that the Court's decision to the contrary in Huddart Parker v Moorehead & Co. Pty Ltd (supra) should be overruled.

However, having regard to Sir Samuel Griffith's remark in Huddart Parker v Moorehead & Co. Pty Ltd (see p.345 of the report) and what was said in argument in these appeals I ought to observe that it does not follow either as a logical proposition, or if in this instance there be a difference, as a legal proposition, from the validity of those sections, that any law which in the range of its command or prohibition includes foreign corporations or trading or financial corporations formed within the limits of the Commonwealth is necessarily a law with respect to the subject matter of s. 51(xx). Nor does it follow that any law which is addressed specifically to such corporations or some of them is such a law. Sections 5 (1) and 8 (1), in my opinion, were valid because they were regulating and controlling the trading activities of trading corporations and thus within the scope of s. 51(xx). But the decision as to the validity of particular laws yet to be enacted must remain for the Court when called upon to pass upon them. No doubt, laws which may be validly made under s. 51(xx) will cover a wide range of the activities of foreign corporations and trading and financial corporations: perhaps in the case of foreign corporations even a wider range than that in the case of other corporations: but in any case, not necessarily limited to trading activities. I must not be taken as suggesting that the question whether a particular law is a law within the scope of this power should be approached in any narrow or pedantic manner.

His Honour went on to say that the limits of the power could only be ascertained authoritatively by a course of decision. It would seem to me from this judgment that the Commonwealth now has power to control and regulate the central activities of the corporations. This approach places emphasis, so far as Australian companies are concerned, on the adjectives -  
'trading'

and 'financial' - used to describe the domestic corporations, and differs from that of some of the judges in Huddart Parker who tended to emphasise the corporateness of the entities. On the earlier line of reasoning, the only controls or regulations which could be imposed were those which had regard to the peculiar nature of corporations as distinct from natural persons. Barwick C.J., in Strickland, however, concentrated on the outward activities and purposes of the corporations as did Isaacs J.

I propose now to consider some of the specific questions that you have raised.

#### Incorporation or liquidation of companies

All the judges in Huddart Parker v Moorehead agreed that section 51(xx) did not empower the Parliament to incorporate companies. This reasoning was based upon the fact that the power speaks of trading or financial corporations formed within the limits of the Commonwealth. They all, therefore, assumed that the power could not operate until the body had already been incorporated. Except in the case of foreign corporations, the judges assumed that the corporations would be created under State law. It is now clear that the Commonwealth may create corporations as incidental to its other heads of power (Australian National Airways Pty Ltd v The Commonwealth (1946) 71 C.L.R. 29). The Commonwealth has, under the banking power, created banking corporations and, under the commerce and territories powers, has created an airline and a shipping corporation to engage in inter-State and territorial trade. It can be argued that the wording of paragraph (xx) does not require one to conclude that the Commonwealth cannot create corporations under that power. It has been suggested, for example, that the words 'formed within the limits of the Commonwealth' could be treated merely as contrasting with 'foreign' and that a Companies Act would clearly be a law with respect to corporations. Nevertheless, there is nothing in the Strickland case which departs from the views expressed on this matter in Huddart Parker and all argument proceeded on the basis that that aspect of the earlier case was correctly decided. I would advise, therefore, that it is unlikely that the power would support Commonwealth laws with respect to incorporation or liquidation of companies. (I might mention that a different view has been taken by Mr John L. Taylor in an article published in 46 A.L.J. 5.)

## The types of corporations covered by the power

There have over the years been a lot of pronouncements on the meaning of the words 'trade' and 'commerce' for the purposes of section 51(i) and section 92. The two words have been regarded as synonymous. The most authoritative exposition is that by Dixon J. (as he then was) in the Bank Nationalisation case (1948) 76 C.L.R. 1 at 379-381. In that case, it was held that the inter-State transmission of credit by banks constituted inter-State trade and commerce. In the course of his judgment, his Honour said 'transportation, traffic, movement, transfer, interchange, communication, are words which perhaps together embrace an idea which is dominant in the conception of what the commerce clause requires.' It was also pointed out that the conception covers in the United States the business of press agencies and the transmission of all intelligence. This broad notion of what constitutes trade has blurred the distinction in the corporations power between trading and financial corporations. As the transmission of money or credit is an act of trade, it is hard to see that there would today be said to be any relevant distinction between the two types of corporations. This point was brought out by Barwick C.J. in Strickland when he said 'whether a trading or financial corporation, by assumption, its purpose is to trade, trade for constitutional purposes not being limited to dealings in goods'. However, it has also been made clear, particularly in cases involving section 92, that manufacturing, mining and agriculture do not come within the concept of trade. (Grannall v Marrickville Margarine Pty Ltd (1955) 93 C.L.R. 55.) In Huddart Parker, Isaacs J. stated that a purely manufacturing company was not a trading company. He listed among the companies that were outside the range of federal power all mining and manufacturing companies. In Strickland, none of the judges expounded on the meaning of 'trading or financial corporations'. In the course of argument, however, some of the judges did have difficulty in understanding this distinction made by Isaacs J. because it is clear that in probably all cases a company which has the object of manufacturing or mining would also have the object of selling what it produces or extracts and, insofar as it has that object, it would appear to be a trading corporation. In Strickland, this matter was not in issue because it was conceded that the defendants were trading corporations. In my view, the Court would hold that a company which had as one of its chief objects the sale of goods or services would be regarded as a trading company whether or not it had other objects related to mining

or manufacturing.

There is some doubt, however, whether a non-profit organisation could be said to be a trading corporation even though the activities in which it engages may be regarded as 'trade' for the purposes of section 51(i) and section 92. In the course of argument, it was pointed out that in the nineteenth century one meaning of a 'trading company' was one which was engaged in the making of commercial profit.

In answer to some of your specific questions, therefore, it follows that a mining company carrying on exploration and mining and selling the results would be a trading company because the sale of its results would come within the concept of trade. Similarly, the business of making investments or providing of financial advice and services would, in my view, constitute acts of trade and, therefore, a company which had these as its chief objects would be a trading company. Insofar as the investments were made from moneys deposited by the public as in the case of building society corporations, the body would also be a 'financial' corporation.

The specific meaning of 'financial corporation' is a difficult question. The Convention debates seem to indicate that the draftsmen had in mind land mortgage companies and building society companies rather than investment companies. However, I have not pursued the matter because, in my view, if, for example, an investment company is not a financial corporation, it is clearly a trading corporation.

#### Companies dealing in securities and investments

Insofar as a corporation has as one of its central purposes the dealing in investments or securities, the reasoning in Strickland will, I think, enable the Commonwealth to prescribe the sort of securities in which it may deal. Similarly, if its main purpose is the borrowing and investment of money, the Commonwealth could, in my view, regulate the conditions on which the money may be borrowed or securities given in respect of the loans. These activities would constitute the central objects of such companies. If one thing is clear from Strickland, it is that controls which deal with 'the very heart of the purpose for which the corporation was formed' are within the power. Any control of these central purposes designed to protect the public or to ensure that it had relevant information would, in my opinion, be valid. Control over

investment companies and financial institutions in this way would, of course, have an indirect control over other companies because a Commonwealth law could, I think, provide that an investment company shall not deal in shares of another company which did not, for example, have its prospectus registered on a federal registry or which did not file accounts or statements of material matters with a federal registrar. This type of control, however, would not extend to make it an offence for that company in whose shares the investment corporation was dealing to fail to register the prospectus, file the accounts, etc.

#### Direct control of the securities of trading companies

The question then arises whether the corporations power will enable the Commonwealth to deal directly with the issue of securities or the trading in securities on the basis that the securities are those of a trading or financial corporation. This issue differs from that involved in Strickland because, there, the Court was concerned with the exercise by the corporation of its main object and purpose. Here we are concerned with matters which are preparatory to the object, which is that of trade. While the borrowing of money by, for example, a manufacturing corporation is itself an act of trade, it is not an exercise of the prime purpose for which the corporation was formed. Similarly, while the issue of shares by a company to the public may be an act of trade, it is a prelude to the company exercising its main purposes. The matters you raise, therefore, in, for example, question (4) are not precisely analogous to the issues in Strickland and, no confident answer can be given to the questions raised. However, the Chief Justice did state that the corporations power will cover a wide range of activities 'but in any case not necessarily limited to trading activities'.

It is possible to argue that laws controlling the issue of prospectuses, shares and debentures are directed to matters that are preparatory to, and therefore incidental to, the principal activities of the company; that is to say, they are within the power because they concern matters that directly affect the activities of the company and are an appropriate means of achieving the purpose of the power, namely the control of the corporation's trading or financial operations.

In a sense this was true of the laws in Huddart Parker. The provisions of the Australian Industries Preservation Act dealt with in that case did not directly prohibit or control the trading itself but rather contracts, combinations and monopolies that affected such trade. A restrictive agreement between two competitive trading enterprises is not an act of that trade which lies within 'the heart of the purpose' for which the companies were formed. The agreement is about such trade and has the object of affecting it. It might be argued therefore that an invitation to the public to take up shares or lend money to the company so that it may carry out its purposes of trading is also valid on analogous reasoning. A similar argument would apply to loans and borrowing in the inter-company money market. In one respect, however, laws of the nature proposed in paragraphs (i) and (ii) of your question (4) differ from those in the Australian Industries Preservation Act. The object of your proposed controls would not be the regulation of the company's trade but rather the securities market. As I indicated in my earlier opinion, where it is necessary to rely upon the incidental area of a constitutional power in order to uphold the validity of a law, the policy or purpose of the law is relevant. The connection between laws controlling the issue of prospectuses and securities by companies and the central activities of the company might, therefore, be regarded as 'remote', 'indirect' or 'consequential' and therefore not ancillary to the main purpose of the power.

The matter, however, might be approached another way. The emphasis in Strickland was naturally upon the adjectives qualifying the corporations mentioned in paragraph (xx). Isaacs J. in Huddart Parker similarly regarded the appropriate test of whether a law came within the power as involving the distinction between the types of corporations mentioned in paragraph (xx) and corporations generally.

Just as their incorporation distinguishes them from natural individuals, so their trading or financial capacities distinguished them from other corporations, and it is as necessary to give effect to the words 'trading' and 'financial' as to the word 'corporations'. A power to alter their internal management would not give that effect, but would cross the line of demarcation between these and other corporations as plainly as a general criminal

law would obliterate the distinction between corporate bodies and ordinary individuals. ((1908) 8 C.L.R. 330 at 397-8.)

On this view, it would not be possible for the Commonwealth under the corporations power to control the issue of prospectuses, shares and debentures solely on the ground that such a law would be a law with respect to corporations and, therefore, if confined to trading and financial corporations, would come within paragraph (xx).

It is, however, possible that the present Court will not make the same distinctions as Isaacs J. made, even though they agreed with his actual decision in Huddart Parker. Some comfort may be obtained from the Chief Justice's statement in Strickland that the corporations power will cover a wide range of activities 'but in any case not necessarily limited to trading activities'. There seems to me to be no reason in principle why a law that had as its basis the peculiar characteristics of a corporation as distinct from a natural person would not be within power.

Some of the majority judges in Huddart Parker were of the view that the Commonwealth could impose conditions on corporations that related to such matters as 'safeguards and securities for payment of their creditors' (O'Connor J. at 373), 'conditions for safeguarding those dealing with the corporations' (O'Connor J. at 374), 'what capital must be paid up', 'what returns must be made, what publicity must be given, what auditing must be done, what securities must be deposited' (Higgins J. at 412-413). In my view, there is a strong case for saying that these matters and similar subjects are matters which the Commonwealth may still control except that it may do it directly rather than as 'conditions' of carrying on business.

My reasons for this view are as follows:

(a) The judges in Strickland for the most part considered that the decision in Huddart Parker was too restrictive - not that it went too far. In my view, laws of the nature you propose relating to such matters as prospectuses, the issue of securities and the filing of accounts, etc. would have been held valid by the majority of the judges in Huddart Parker, at any rate if they were expressed as conditions of carrying on

business. Strickland makes it clear that the power is not confined to the prescribing of conditions.

(b) Barwick: C.J. (with whom McTiernan J. agreed on this aspect) said that the power in paragraph (xx) was not necessarily confined to trading activities. Menzies J. expressly reserved the question whether Isaacs J. was correct in finding a limitation in paragraph (xx). In my opinion, his Honour was referring to the dichotomy Isaacs J. made between laws based on the corporate aspects of the company's affairs and those based on its trading or financial aspects.

(c) A criticism made of Huddart Parker is that the judges put words into the power which were not there, so as to confine it to the status or recognition of corporations or imposing conditions on their entry into trade. The power does not refer to status, recognition or conditions (see Gibb J. at 504). Neither, however, does it speak of the trading or financial operations of trading or financial corporations. To read these words into the power would be to commit the same error.

(d) The criticism made of Higgins J. in Huddart Parker is that he assumed that a law must be either a law with respect to corporations or trade but could not be both. 'A law with respect to corporations is within the power of Parliament notwithstanding that it is also a law with respect to trade ...' (Menzies J. at 498). It certainly does not follow from this that all laws controlling trading corporations under paragraph (xx) must be laws with respect to trade. Such a conclusion would be to miss the point of the criticism and to commit a reverse error.

(e) In the course of argument in Strickland, one gets the impression from some of the judges that there would be many laws not concerned with the trading or financial activities of the corporation but dealing with the special problem of controlling corporations, which the judges would be prepared to uphold. Some of the matters mentioned



in argument were the keeping of an office in Canberra, having an address for service, or the age qualifications for directors.

In my opinion, there is a good chance that the Court would not confine the corporations power to the control of the trading or financial operations of corporations but would regard the power as extending to control of matters peculiarly related to the activities of corporations generally. The issuing of prospectuses, shares and debentures comes within this description. I would therefore answer the questions raised in paragraphs (i) and (ii) of your question(4) in the affirmative. I also think, though with more hesitation, that your question (5) should be answered the same way.

#### Control of the company's employment of servants and agents

None of the judges in Strickland accepted the proposition that any law addressed to a corporation described in paragraph (xx) was necessarily a law with respect to those corporations. I do not think that a law generally controlling who a corporation may employ or on what conditions it may employ him would come within the power. I have suggested above, however, that a law controlling the issue of prospectuses and securities by a company comes within paragraph (xx). If I am correct in that view, it seems to me that a law controlling the employment of the persons of the sort you describe in question (6) could be valid if it were made clear that the regulations and standards laid down were directed to the control of prospectuses, securities, accounts, etc. Such a law would clearly be incidental to the prime controls and would be shown to be for the purpose of making them more effective. It follows that provision could be made for fines or penalties for breaches of the regulations.

#### The direct control of servants and agents of a corporation and other persons

This general matter is raised in paragraphs (iii) and (iv) of your question (4) and concerns the imposition of obligations directly on persons who are not corporations. In the course of argument in Strickland, some of the judges seemed divided on whether, or the extent to which, this could be done. In his judgment, Menzies J. (at 497) expressed doubt whether, under paragraph (xx), it would be possible to impose an obligation upon a non-corporate individual to register an

agreement between that individual and a corporation. On the other hand, Barwick C.J. in argument (transcript 505) seemed inclined to the view that if it were within power to require the agreement to be registered, you could require that the other party to the agreement should also register it in order to make the law more effective.

The major difference between the laws you propose and paragraphs (iii) and (iv) and that mentioned by the Chief Justice is that in the latter case it is the activities of the corporation that are of prime concern. In the former case the major purpose of the law relates to the securities market. The trading activities of the company may be affected by the securities market, but in my opinion the Court would say that this was only an indirect effect.

In the case of persons who are servants or agents of the company, it may be possible to approach the matter from another angle. Although most of the discussion on the corporations power has been concerned with the protection of other persons from company activities, it could I think be argued that the power also enables the Commonwealth to have laws protecting the company itself. Where a servant or agent of a person is employed in a fiduciary capacity - as in the case of a director of a company - he is, generally speaking, not permitted to obtain any profit or advantage from his position other than that agreed upon. If such an agent does obtain some improper benefit or profit from his position, various remedies are available to the company. The company can, for example, claim that the 'profit' is held by the agent as constructive trustee for itself as beneficiary. It is not relevant that the company has itself suffered no loss or damage. A law that makes it a criminal offence for a person to commit a breach of fiduciary duty he owed to the company might, in my opinion, be considered a law with respect to that corporation. It is, however, very doubtful whether there is any fiduciary duty on a director to refrain from using inside information to trade in the shares of the company except in special circumstances. The common law position on the use of inside information by directors in share trading activities is discussed by Mr. Afterman in his book 'Company Directors and Controllers' at pp.100-105. I am generally in agreement with what Mr. Afterman says and I would therefore answer your questions in paragraphs (iii) and (iv) in the negative.

## The recognition of corporations

I am inclined to doubt whether the Commonwealth can provide for the recognition throughout the Commonwealth of companies incorporated in a State or Territory. It might be argued that such a matter does relate to the corporate aspects of the company and therefore, in line with the views I have expressed above, your question should be answered 'yes'. Some judges, however, in the course of argument in Strickland, found difficulty with this because the question of recognition is intimately connected with incorporation insofar as the State of incorporation is concerned. Only if the power could be construed as limited to recognition in States other than the place of incorporation could it reasonably be regarded as extending to laws governing recognition. It is doubtful whether the Court would so read it. For example, Menzies J. at 499 said:

Further, it is hardly to be thought that the recognition of a corporation formed under the law of a State as a legal entity would be a matter for Commonwealth law. For instance, could Parliament by law under section 51(xx) forbid the recognition in a State of a company incorporated in that State?

## Conclusion

In expressing my views above, I have avoided, so far as I could, the insertion of too many doubts and hesitations knowing that you wish as far as possible to have firm expressions of opinion.

You will appreciate, however, that much of the advice I have given above is highly speculative. Once we leave the area of direct control of trading activities of a company, the Strickland case itself provides a little guidance. Strickland is the only relevant authority and the judges were silent and deliberately so on most of the specific matters you raise. While, therefore, it is not possible to give confident answers to many of your questions, it can in my view be said that where I have stated that the Commonwealth has power, the Commonwealth has, at the very least, good and respectable arguments in favour of that position.

Leslie Zines