WHITHER CO-OPERATIVE FEDERALISM? -
AN ANALYSIS OF THE COMMONWEALTH GOVERNMENT'S PLAN
FOR REFORM OF COMPANIES, SECURITIES AND
FUTURES LEGISLATION

by

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On 17 and 18 September, 1987, the Commonwealth Attorney-General issued Press releases announcing the Government's intention to enact unilateral companies, securities and futures legislation. Such legislation would replace the present legislative arrangements based on the philosophy of co-operative federalism.

The purposes of this paper are firstly to examine the political environment in which the announcements took place and then to comprehensively describe the terms of the announcements and critically evaluate them.

It is concluded that the benign political climate which preceded the initial announcements was in the Attorney's view, a necessary pre-condition for change in the jurisdictional framework of companies law. However, having set such a pre-condition, the terms of the Attorney's announcement were not adequate to ensure the widest possible support. Opposition from all states except N.S.W. has therefore prompted an ill-advised "compromise" announcement of 28 October 1987.
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ABSTRACT:

On 17 and 18 September, 1987, the Commonwealth Attorney-General issued Press releases announcing the Government's intention to enact unilateral companies, securities and futures legislation. Such legislation would replace the present legislative arrangements based on the philosophy of co-operative federalism.

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2. THE POLITICAL ENVIRONMENT

Three factors are largely responsible for the favourable political environment which preceded the announcement. Firstly, a successful business-government interface strategy employed by Attorney-General Bowen. Secondly, the dissatisfaction of significant sections of the community with the present co-operative scheme legislation and administration. Thirdly, the "Byers opinion" and its juxtaposition with the report in April 1987 of the Senate Standing Committee on Constitutional and Legal Affairs.

(a) Business - Government Interface Strategy

The initial groundwork for Commonwealth legislative control was laid in 1974 by the report of the Senate Select Committee on Securities and Exchange under the (final) chairmanship of the Tasmanian Liberal Senator, Peter Rae. Notwithstanding this background, the Whitlam Labor Government, faced with business, professional and State Governments' opposition together with public service delay, failed to enact into law its Corporations and Securities Industry Bill 1975 and the National Companies Bill 1976.

The issue of unilateral Commonwealth companies and securities law disappeared from the political agenda with the Formal Agreement between the Commonwealth and all the States on 22 December 1978. The co-operative scheme legislation which we have today is the product of this agreement. It was enacted with the support of the business and professional advising
communities and represented, at the time, a significant achievement in uniform law-making in Australia.

The first effective shots to challenge this scheme and move companies and securities law under the Commonwealth's wing were fired in 1984 by the then Attorney-General, Gareth Evans, Q.C. and Ralph Jacobi, M.H.R. for Hawker. In April, 1984 Evans flagged the possibility of a reference to the Senate Standing Committee on Constitutional and Legal Affairs on the effectiveness of the scheme legislation and the possibility of unilateral Commonwealth legislation\(^5\). Jacobi, in June 1984, won Labor Caucus approval in principle, for the establishment of a Joint Standing Committee on Business Affairs. This committee was to have a wide brief to review Commonwealth legislation and administrative practices against certain criteria e.g.'s the burden of regulation and the extent of compliance with international obligations. In particular, however, the committee was to be given power to recommend the enactment of laws by the Commonwealth Parliament concerning business and industry.

The Jacobi proposal never eventuated, falling victim to the cross-currents of political life. These included cross-party negotiation on a reference to the Senate Standing Committee along the lines of Evan's earlier suggestion; the intrusion of the 1984 elections; and the apparent initial unwillingness of Evans post-election successor as Attorney-General, Lionel Bowen, to involve any committee at all in this matter. Bowen was reported to want to move straight into draft Commonwealth legislation\(^6\). In May 1985, the Attorney appeared to change
tack. Building on the statement of his predecessor that the co-operative scheme ".... is an almost wholly unsatisfactory way of responding to the very real needs of the Australian business community" the Attorney expressed interest in unilateral Commonwealth company and securities legislation ".... if the business community wanted it". The business-government interface strategy was put into place.

The Attorney's strategy was no doubt in part a product of lessons learned from the Whitlam Government's failure to successfully implement reform in these areas. It was also, no doubt, a reflection of the Attorney's personal style. It resurfaced again in October 1985 when the co-operative scheme was "on trial" following improvements in ministerial control, efficiency and the use of resources which were approved by the July 1985 meeting of the Ministerial Council. At this time business and professional dissatisfaction was reported as having lessened. The attorney went public with his request for an indication of the latest business thinking on the issue.

The strategy was aired yet again in February 1987 immediately following the public release of the opinion of Sir Maurice Byers QC which had been commissioned by the Attorney-General's Department following a request for legal advice from the Senate Standing Committee on Constitutional and Legal Affairs. The Standing Committee in April 1986 had been empowered to investigate the role of the Commonwealth Parliament in relation to the Ministerial Council, the N.C.S.C. and the co-operative scheme legislation. More will be said on the Byers opinion and
the Committee's findings later in this article. For the present it is sufficient to note that in the light of the Byers opinion expressing support for the validity of Commonwealth unilateral legislation in the companies and securities fields, the Attorney again asked for business endorsement before proceeding down the thorny path which confronts most reformers.

The business-government interface strategy is one predicated on Government assuming a reactive, facilitative role. No ideology or centralist tendencies are obvious. No benefits to the Commonwealth Government are mentioned. It is an approach which more reformist lawyers would shun. It is an approach which obviously cannot be taken on more than a select few occasions if a Government has any pretensions of being a leader rather than a follower in public policy formulation and implementation. It was, however, an approach which proved effective in creating a favourable political climate. When business was asked to respond, the big business community unhesitatingly gave the Government the green light to proceed with unilateral legislation.

(b) Dissatisfaction with the Co-Operative Scheme

(i) Professional and "Big Business" Concerns

Readers of the Law Institute Journal who practice in the company area may recall an item which appeared in the May 1985 issue in which the Institute was reported as having written to the Victorian Attorney-General about concerns
raised by company practitioners with the co-operative system. These concerns centred on delay, differing interpretations and a high level of amendment to scheme legislation.

The Confederation of Australian Industry (C.A.I.) in its submission to the Senate Standing Committee on Constitutional and Legal Affairs specifically referred to the Institute’s letter in response to the Committee’s invitation to provide specific examples of administrative inconsistencies. The Confederation went on to decry the co-operative scheme’s lack of uniform administration which it believed could never be successfully attained in a system where the N.C.S.C. has, subject to the Ministerial Council, authority over the State C.A.C.'s but those Commissions "do not depend on the co-operative scheme, or the N.C.S.C. for their employment, appointment, resources, assessment, promotion, recognition, reward, sanction, censure or removal.11"

This lack of uniformity in administration was again echoed in the C.A.I.'s submission to the Trade and National Economic Management Advisory Committee of the Constitutional Commission.12. It was supported in its position by a submission from the Law Society of New South Wales. The C.A.I.'s views on the issue were so strong that it had made an earlier direct submission to Government which asserted that the scheme had "failed".
That "big business" umbrella organisations were united on this matter was highlighted by a submission from the Business Council of Australia (B.C.A.) to the Senate Standing Committee, which set out in some detail its concerns about administrative inconsistency and delay principally caused by the minute checking of prospectuses. Indeed the B.C.A. appears to have taken a higher public profile in its criticisms of the scheme than the C.A.I., and like the C.A.I. had no doubt made its views well known in direct submissions to the Government.

In contrast to the above, the Institute of Directors submitted to the Senate Standing Committee its support for the co-operative scheme. No alternative view from small business, however, has appeared on the public record to the writer's knowledge. A Government committed to a strategy based on interface with business therefore received majority expressions of discontent. This discontent dovetailed neatly with criticisms of another kind that were being aired in the Parliament itself.

**(ii) Parliamentary Concerns**

Parliamentary concerns about co-operative scheme legislation and amendments have been many and varied. The complexity of the law has been an oft repeated criticism. The control over the scheme by the
Ministerial Council, however, resulted in two fundamental concerns being frequently aired across the whole political spectrum.

The first fundamental concern is summed up by the phrase "rubber stamp". The Liberal Senator and former Commonwealth Attorney-General, Peter Durack, Q.C. has stated "... the reality is that this Parliament is asked first to rubber stamp decisions of the Ministerial Council ..."15. It should be appreciated that it is the Federal Parliament as an institution which is argued to have no substantive role to play. The Commonwealth Government, being one of eight votes on the Council and the contributor of one-half of the funding to the N.C.S.C. is, of course, a key participant in Ministerial Council deliberations.

The "rubber stamp" concern is the product of the tangled web of the Commonwealth Parliament's right to amend scheme bills submitted by the Government. The Government's role is reasonably clearly set out in clauses 8 and 46 of the 1978 Agreement. Clause 46 deals with amending scheme legislation, whereas clause 8 deals with the "initial" scheme legislation. Clause 46 is, therefore, of most immediate interest. It provides that the Commonwealth Government will not submit to the Parliament any Bill nor make any regulation unless the measure has been approved by the Ministerial Council. The Agreement does not however bind the Parliament nor
does it expressly prohibit the Parliament from amending a scheme Bill.

In such a situation, divergent views have developed. The Labor Government has opined that the Parliament cannot amend the bills. The Liberal Opposition has claimed the opposite. As a matter of strict law, it seems that the Commonwealth Parliament could amend such bills and thereby bind the States. The political reality, however, is that to do this is fundamentally inconsistent with the co-operative federalist nature of the scheme. Unless Ministerial Council approval was obtained before final passing by the Commonwealth Parliament - and such a course is not without its political risks in addition to its time consuming nature - the Parliament might throw off its garb of "rubber stamp", only to have it replaced by "centralist wrecker". Dissenting States would probably give immediate notice of withdrawal from the scheme and enact their own legislation. The fundamental goal of uniformity would be destroyed.

The second fundamental parliamentary concern is that of lack of accountability or responsibility. The N.C.S.C. is accountable to the Ministerial Council but as it represents eight governments, no one Minister is responsible to a single Parliament. Responsibility being diffused, accountability is argued to be lessened.
The accountability/responsibility concern is no doubt eminently reasonable to those Federal Parliamentarians familiar with the democratic principles that underpin the Westminster System. It has less appeal to the business community. Moreover, submissions by the States to the Senate Standing Committee on Constitutional and Legal Affairs pointed to the fiscal accountability of the N.C.S.C. and the State C.A.C.'s and parliamentary annual reporting practices 17.

With such opposing viewpoints, the outcome is very much a matter of adherence to strict principle on the one hand, or pragmatism on the other. It is no small surprise to discover that the Federal Parliamentarians who comprised the Senate Standing Committee, opted for the former. What is perhaps surprising is that the Committee consisting of both Labor and Liberal Senators, was unanimous in reaching all of its conclusions including that "it is the Committee's view that parliamentary review and ministerial accountability are fundamental to the Australian democratic system." 18. The Committee later in its report labelled the failure of the scheme to accommodate parliamentary accountability and ministerial responsibility as "the central difficulty of the scheme" 19. (emphasis added). It accordingly recommended "that the Commonwealth Parliament should enact comprehensive legislation covering the field currently regulated by the co-operative scheme" 20.
The Senate Standing Committee on Constitutional and Legal Affairs in its reference previously noted, sought advice from the Attorney-General's Department as to the scope of the Commonwealth's unilateral law-making powers in the areas of companies, securities and futures legislation. In response, the Department on 9 January 1987, provided the Committee with an opinion from Sir Maurice Byers Q.C. a former Commonwealth Solicitor General.

The background to this development is worth recounting. The Department had earlier submitted to the Committee a proposal for a split scheme under which the Commonwealth would regulate the takeovers, securities and futures law, but companies would be regulated under the co-operative scheme. The Committee viewed this proposal as resting on a number of assumptions, the foremost being that the Commonwealth lacked the constitutional power to comprehensively legislate for the entire scheme area. The rendering of the Byers opinion demolished this assumption thereby, in the Committee's view, fatally wounding the split scheme proposal. It was finally rejected by the Committee for a number of other reasons including implied acceptance of the notion of one national market place for companies as well as securities law; legislative fragmentation being inconsistent with administrative efficiency; and the failure of a split scheme to overcome the lack of parliamentary
accountability and ministerial responsibility inherent in the co-operative scheme.

A further interesting background point is the choice by the Department of Sir Maurice Byers Q.C. to give the opinion. As Sir Maurice makes clear in his opinion of 22 December 1986, he had on 3 January 1974, in his capacity as Solicitor-General, given an opinion on the meaning of the corporation's power, Section 51(xx), of the Commonwealth Constitution. Section 51(xx) gives the Commonwealth Government power to make law with respect to "foreign corporations and trading and financial corporations formed within the limits of the Commonwealth. Sir Maurice's opinion had, in part, rejected a significant part of the reasoning of Isaacs J. in *Huddart Parker & Moorhead*. The opinion was, therefore, favourable towards an expansive interpretation of the Commonwealth's law-making powers under Section 51(xx). This fact is sure to have been known to the Department at the time of making a choice of the barrister from whom to secure an opinion for provision to the Committee. The trend in High Court decisions on Section 51(xx) since 1974 would have provided little evidence to suggest that Sir Maurice's opinion would have to be altered to accommodate more recent thinking.

The Byers opinion was sufficient for the Senate Committee. It did not seek a second opinion. The detailed grounds on which Sir Maurice based his opinion will be discussed later in this article. For present purposes it is sufficient to note that in the area of conventional company law matters, Sir Maurice opined that Section 51(xx) "... extends to embrace any conventional
Companies Act" (matter), subject to a reservation about Division 8 of Part 1V of the present Code. Such matters from incorporation, internal management, equity and loan finance, accounts and audit through to responses to financial difficulties, including liquidation, were said to be within the subject of the power. Such conclusions logically follow, said Sir Maurice, because S.51(xx) is a placitum about "persons" but only those "persons" fitting the descriptions of foreign, financial or trading corporations. Sir Maurice rejected arguments that mining or manufacturing corporations could not be trading corporations but conceded that recreational, scientific, educational or charitable companies might not have trade as a significant part of their overall activities and hence might not be able to be characterized as "trading corporations". Other heads of power would be utilizable in certain company situations e.g. S.51(i) - interstate and overseas trade and commerce; and S.51(v) - post, telegraph, etc; S.51 (xiii) and (xiv) - the banking and insurance powers. Of course, S.5(xvii) - bankruptcy and insolvency, would enable winding up laws to be made for every type of company.

Focusing on the securities industry Sir Maurice opined that S.51(xx) extended to allow "fair market" legislation regulating the manner in which shares of the enumerated corporations might be sold, including by whom and what conditions. S.51(i) transactions in the securities market would, he thought, provide the basis for validating the licencing system, fidelity funds and stock exchange as the means by which interstate commerce in securities is regulated. S.92 of the constitution
although uncertain in its interpretation, would not invalidate what he saw as non-discriminatory reasonable regulation. Of course S.51(xx) corporations acting as brokers or principals would be directly regulatable as would transactions in international or overseas commerce, or transactions utilizing the postal, etc. system.

When moving from shares and other securities of companies to futures contracts, Sir Maurice was able to replicate his reasons in the paragraph immediately above, save for the opening reference to S.51(xx). S.51(i) would therefore be the constitutional mainstay for regulation of this area.

3. **THE COMMONWEALTH ATTORNEY-GENERAL'S ANNOUNCEMENTS OF 17 & 18 SEPTEMBER 1987.**

(a) **Introduction**

The essentials of the Attorney's detailed announcement of 18 September 1987, which followed a briefer announcement on 17 September 1987, were that the Commonwealth will give notice of withdrawal from the co-operative scheme and will enact with effect from January 1989 unilateral legislation in the areas of companies, securities and futures. The legislative package would be administered by a new independent statutory body entitled the Australian Securities Commission.
The announcement was justified on what are now familiar grounds, having regard to the material canvassed in part 2 of this paper. Citing "inherent structural defects" (i.e. lack of clear and conventional lines of accountability and responsibility), and "jurisdictional, administrative and enforcement problems" (i.e. administrative inefficiencies and adverse court decisions based on jurisdictional technicalities), the Attorney asserted that the present scheme had "outlived" its usefulness. Support for this conclusion was attempted to be generated by referring to the report of the bipartisan Senate Committee together with "key business groups and other eminent observers".

(b) The Terms of the Announcement.

The terms of the announcement met in significant measure the concerns previously expressed by parliamentarians, lawyers and the business community. Unilateral Commonwealth legislation administered by the Australian Securities Commission, an independent body but generally accountable to the relevant Commonwealth Minister, would provide the necessary degree of parliamentary accountability and ministerial responsibility to satisfy the co-operative schemes critics on this point.

A commitment to simplify the relevant legislation together with the mooted possibility of greater reliance on private civil remedies to supplement public enforcement action would be thought likely to generally please the legal profession.
Business interests were very much to the fore. The proposals outlined, heavily favoured the goals of efficiency and deregulation so frequently espoused by business. The business community was invited to participate in a Consultative Group which would assist in the development of specific efficiency/deregulation proposals to be possibly included in later legislation.

The Consultative Group would be asked whether the existing company name and securities licencing systems should be deregulated. The Group would also be asked whether efficiency could be improved by removing pre-vetting of prospectuses and takeover documents and by simplifying prospectuses and trust deed content. The possible introduction of a new clearing house and scrip settlement system was also been mentioned as an area of enquiry as was the possibility of less onerous corporate regulation for small business.

While these matters were to be the subject of enquiry, the Attorney specifically undertook to give the highest priority to a national computer system and data base. Minimal disruption to business was also foreshadowed by preserving the incorporation of existing companies, presumably assuming that these are S.51 (xx) corporations or are otherwise within power. On this point, however, the Victorian Attorney-General, Jim Kennan was reported as saying that the Victorian Government would not co-operate if the Commonwealth Governments plans went ahead. This would involve, at a minimum, denial of access to the Victorian C.A.C.'s records. Presumably the Commonwealth
would seek to rely on S.51 (xxxi) of the Constitution to compulsorily acquire such property on just terms. Such acquisition can, however, only be for a purpose in respect of which the Parliament has power to make laws. This raises the question of the scope of S.51 (xx), the corporations power, which was discussed in the Byers opinion.

(c) **Analysis and Comment.**

The Attorney's announcement did nothing to gain positive support from the States. 'The resultant outcry by the Victorian Attorney-General, Jim Kennan, apparently speaking on behalf of all states other than N.S.W., was therefore entirely predictable.

The Victorian Attorney had publicly supported the introduction of a national scheme. It can reasonably be assumed that the N.S.W. Attorney-General held similar thoughts. It is clear, however, that the States had not collectively agreed to vacate this field. Predictably, Tasmania and Queensland favoured the status quo, and it would seem from the submission of the South Australian Government to the Senate Standing Committee that it was of a like mind. Despite earlier reports indicating Western Australia's support for change, the extremely strong negative reaction from the Western Australian Premier Mr Bourke to the Bowen announcement no doubt reflected that Governments more recent pre-announcement thinking. It would be surprising if such thinking had not reached Attorney Bowen's ears.
Despite such a situation, the announcement could only express the vague hope that the States would co-operate and mentioned that the A.S.C. while being based in Melbourne, would be accessible to local business communities.

The Attorney's press release was, moreover, entirely silent on the much publicised loss of $80m of state revenue if Commonwealth legislation replaced the co-operative scheme. While the issue involved in the Attorney's announcement is undoubtedly more important than "mere money" and while no amount of financial generosity will overcome opposition based on anti-labor or anti-centralist ideological grounds, the failure to mention dollars in the announcement was unusual to say the least. It underscores the point made earlier that the announcement did little to attempt to overcome or neutralise likely political opposition from the States.

The announcement, moreover, said nothing to placate uncertainties in the mind of N.C.S.C. and C.A.C. Commissioners and employees as to their future - whether they would have a position and on what conditions. A contractual fixed term appointment (e.g. under S.12 of the N.C.S.C. Act 1979) or appointment as a "permanent" public servant will no doubt alleviate immediate monetary concerns, but doubt must exist as to the continued ability of any given commissioner or employee to play a role in a chosen area of companies, securities and futures regulation46. The announcement left the issue largely unresolved despite stating that the A.S.C. will be based on the existing N.C.S.C.47 and will have the ability to employ its own
staff (free presumably of public service constraints). The
issue of self-funding for the new body was perhaps wisely
ignored in view of the mention earlier in this paper of the
scrutiny by the Consultative Group of the pre-vetting of
prospectuses and takeover documents.

Very little of substance was said in the announcement about the
A.S.C. It would have appropriate discretionary powers but that
the form of its hearings and its investigation powers were
issues on which Consultative Group advice would be sought.
When considered in conjunction with the possibility of greater
private civil remedies and concurrent jurisdiction for the
Federal Court on the one hand and State and Territory Supreme
Courts on the other, the Victorian Attorney publicly expressed
fears of less discretionary power and greater recourse to the
courts. It is arguable whether this is in fact the correct
conclusion to be drawn. The announcement certainly gave no joy
to the Victorian Attorney in his quest for specific reform
leading to greater Commission responsibility and a court role
confined to exercising traditional administrative law grounds
for review, rather than complete review on the merits.

While the announcement sought to lay the groundwork for
"efficiency reforms" on top of the obvious jurisdictional and
institutional reforms previously mentioned, it was very light
on what might be termed "substantive" reforms.

The announcement listed as grounds for review in association
with the Consultative Group, the "scope for simplifying and
rationalising the existing winding-up provisions in the light of the emerging proposals from the Australian Law Reform Commission's general reference on insolvency". It did not mention the possibility of reform in e.g.'s the area of directors duties, or takeovers law, or insider-trading. As to the latter point the announcement merely mentioned that shedding unnecessary functions would increase resources available to monitor markets, and effectively enforce them.

In the writer's view, it is regrettable that the announcement did not speak more extensively of "substantive" reform. Such reform may well have persuaded some of the States opposed to the Bowen plan to modify their stance. It will, however, take only one dissenting State to challenge the legislation in the High Court and Victoria, Queensland and Western Australia have already indicated they may do so. The prospects of success of such a challenge will depend on how well the thinking in the Byers mould stands up against opposing viewpoints perhaps best illustrated by Professor Lane. This argument must await discussion on a future occasion.
(d) Summary

When analyzed, it is not at all surprising that Attorney-General Bowen's announcements of 17 and 18 September 1987 aroused hostility. The announcement essentially sought to reinforce the support of Bowen sympathisers. It ignored a range of monetary and reform measures which would have prevented all states (except New South Wales) collectively expressing their disapproval of the Commonwealth's proposal. It is accepted that the very nature of the announcement would generate opposition from State Governments holding different ideological positions, but to have generated cross-party opposition at the States level indicates the political failure of the announcement.

4. THE COMPROMISE

On 28th October 1987, Attorney-General Bowen responded to the criticism described above by proposing a compromise. As reported, the proposal involved proprietary companies operating purely within a state being given a choice of state or federal regulatory cover.

It should be immediately noted that this proposal is not the split scheme proposal previously advocated by the Attorney-General's Department and comprehensively rejected by the Senate Standing Committee. Such a split scheme, loosely modelled on the U.S.A., would have involved Commonwealth legislation in the fields of takeovers, securities and futures and State legislation in the conventional companies act areas.
It should also be noted, and the Byers opinion confirmed, that the Commonwealth would not be able to regulate all types of Companies under S.51 (xx). Certain educational, charitable or scientific companies etc., which were incorporated with these objectives expressly stated\textsuperscript{53} and which did not afterwards engage in "substantial\textsuperscript{54}" trading or financial activities, would not be able to be regulated under S.51(xx) as this placitum has been interpreted by the High Court:

The compromise proposal put by the Attorney is, however, of an entirely different dimension to the relatively small number of charitable etc. companies which would be excluded from unilateral Commonwealth legislation. The Attorney's announcement would leave to the States the regulation of and revenue derived from the great numerical majority of companies which operate only within one state. If the major motivation for the compromise is to placate the States' monetary concerns, it seems an unnecessarily complex way to proceed. What is wrong with simple re-imbursement for some agreed period of the States effective revenue loss? Why establish a dual system with the inevitable extra-costs of a Commonwealth bureaucratic layer to be added to that of the States? In particular, why suggest a proposal which has a potentially troublesome "discriminator"? i.e. intra-state trade.
Consider an existing company. Will even one dollar of inter-state derived revenue disqualify it from the compromise? If not what arbitrary level of inter-state sales might be permissible? Are existing companies which operate in border regions to be disadvantaged simply because of the vagaries of geography? What of companies to be formed in the future? News reports of the compromise spoke of companies "remaining" under State regulation. Are companies to be incorporated in the future only able to be formed under Commonwealth law or can they be formed under State law providing their promoters declare that the corporations intention is to engage only in intra-state activity? What if that intention changes in the future?

The Federal opposition has responded to this last series of questions by proposing that the "discriminator" be stock exchange listing. Those companies with it would be regulated by Commonwealth legislation. Those without it by State law. Such a proposal appears to involve a clearer "discriminator". Two aspects of the proposal, however, call for comment. Firstly, the recommendation of the Senate Standing Committee on Constitutional and Legal Affairs in support of unilateral Commonwealth law was unanimous. Membership of the Committee included opposition members Senators Hill, Alston and Puplick as well as Labor members. The reported opposition split proposal therefore represents a considerable shift of position. The "elasticity" of political positions is, however, almost without bounds. Secondly, such a split proposal would apparently bring under Commonwealth control only those companies which were formed and listed under laws and regulations other than those of the Commonwealth. Comprehensive Commonwealth companies legislation
providing for incorporation does not appear to be countenanced under such a proposal.

5. **CONCLUSION**

At the time of writing the outcome of the compromise is uncertain. What does appear certain, however, is that every effort will be made to achieve bipartisan support on whatever final proposal may emerge. Whether this is achievable or not remains to be seen. If it is not, it is, in the writer's view, preferable to proceed with a suitably amended variant of the originally announced proposals for unilateral action. The inevitable High court challenge ought to be welcomed as at last presenting an opportunity to put the long standing uncertainties about the scope of S.51(xx) to rest. Whatever the outcome of any High Court challenge, however, the opportunity should be taken in the proposed 1988 referenda to amend S.51(xx) either along the lines suggested by the Constitutional Commissions Advisory Committee on Trade and National Economic Management, or with other suitable wording.
Endnotes.

3. Age and A F R 13/10/1987
4. A F R 29/10/1987
6. A F R 17/5/85
8. Age 15/5/85
9. Age 12/10/85
10. Age 17/2/87
11. Senate Standing Committee on Constitutional and Legal Affairs (SSCCLA) Report on The Role of Parliament in Relation to the National Companies Scheme at 40.
13. SSCCLA Report op. cit. at 41, 42.
14. ibid. at 29.
16. SSCCLA Report op. cit. at 31, 35.
17. ibid. at 26
18. ibid. at 28
19. ibid. at 62
20. ibid. at 74.
21. ibid. at 60.
22. ibid. at 61, 62
23. Appended to the SSCCLA Report; see also CCH Australian Company Law and Practice, para. 91-054 at 89212 et seq.
24. (1909) 8 C.L.R. 330 at 393-394.
25. Transfer of marketable securities including securities issued by a body corporate not being a company or by an unincorporated society or association

26. CCH op.cit. at 89214

27. ibid.

28. ibid. at 89213

29. ibid. at 89217.

30. ibid at 89218.

31. The following description and analysis is based on the full text of The News Release by Lionel Bowen Deputy Prime Minister and Attorney-General, dated Friday 18th September, 1987.

32. In the event of the abolition of the system of business name registration, any exclusivity in a company name would only arise from statutory Protection (e.g.'s Trade Marks Act 1955 C'wth. or S. 52 Trade Practices Act 1974 C'wth.) or via the tort of passing off. These measures protect the business's product whereas the business names registration system seeks to protect those who deal with the business.


34. The N.C.S.C. of course exercises its discretion under S.215C of the Companies Act and Codes, to allow a short form prospectus to regular public issuers.

35. The Final Report of the Committee of Enquiry into the Australian Financial System. (Campbell) considered but declined to recommend the abolition of prospectuses for finance companies. The Committee recommended their retention, subject to abridged prospectuses being available to all public borrowers (at 388). This recommendation would be further streamlined if pre-vetting by CAC's no longer occurred. Presumably some certification system by the issuers lawyers along similar general lines to that now operated by e.g. the Commonwealth Bank, when private trustee companies seek to borrow, is envisaged.


37. See generally the report of the Companies and Securities Law Review Committee on Forms of Legal Organization for Small Business Enterprises which in 1984 argued for the establishment of a new entity - the incorporated partnership company - which would be subject to less regulation.

38. A.F.R. 18/9/87
39. Given the proposed role of the Australian Securities Commission it might be asked whether use of the States records by a body other than the Commonwealth itself would be valid within S. 51 (xxxi). It would seem that neither the acquirer per se, nor the end user need be the Commonwealth itself see Lane P.H. The Australian Federal System 2nd ed. at 269-270.


41. SSCLA Report op.cit. at 29.

42. Business Daily 14/8/84

43. SSCLA Report op.cit. at

44. A.F.R. 17/5/85

45. A.F.R. 18/9/87

46. Note the appointment of Mr. K. McPherson on 27/9/87 as a new full-time Commissioner of the N.C.S.C. is only until the end of 1988. A.F.R. 28/9/87.

47. A.F.R. 28/9/87 reported that the Australian Securities Commission would be "one and the same body" as the N.C.S.C.

48. Age 19/9/87

49. A.F.R. 18/9/87; Age 6/10/87

50. Lane P.H. The Australian Federal System 2nd ed. at 153 - 190.

51. A.F.R. 29/10/87


53. Relying on S. 37(1A) of the Companies (Vic,) Code rather than not specifying objects and relying on S.67; For companies which have been incorporated but have not yet traded, the objects will be a relevant indicia as to whether or not the company is a trading corporation within S.51 (xx) see Fencott v Muller (1983) 57 A.L.J.R. 317.

55. In **Huddart Parker v Moorhead** (1909) 8 C.L.R. 330, the High Court was unanimous that the Commonwealth Government did **not** have the power to incorporate under S.51 (xii) of the Constitution.

56. The Committee recommended at 137 that in place of the existing **51(xx)** there be inserted three separate paragraphs:
   - corporations;
   - regulation of financial markets and all activities related thereto
   - business and financial activities and undertakings. (subject to proposed amendments to other placita.)
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