SOUTH AUSTRALIA

FIFTY-THIRD REPORT

of the

LAW REFORM COMMITTEE

of

SOUTH AUSTRALIA

to

THE ATTORNEY-GENERAL

RELATING TO THE PROJECTED SECURITIES INDUSTRY BILL, 1980 OF THE COMMONWEALTH PARLIAMENT

1979

The Law Reform Committee of South Australia was established by Proclamation which appeared in the *South Australian Government Gazette* of 19th September, 1968. The Members are:

THE HONOURABLE MR. JUSTICE ZELLING, C.B.E., *Chairman.*
THE HONOURABLE MR. JUSTICE WHITE, Deputy Chairman.
THE HONOURABLE MR. JUSTICE LEGOE, Deputy Chairman.
D. W. BOLLEN, Q.C.
M. F. GRAY, S.G.
J. F. KEELER.
D. F. WICKS.

The Secretary of the Committee is Miss J. L. Hill, c/o Supreme Court, Victoria Square, Adelaide, South Australia 5000.

FIFTY-THIRD REPORT OF THE LAW REFORM COMMITTEE OF SOUTH AUSTRALIA RELATING TO THE PROJECTED SECURITIES INDUSTRY BILL, 1980 OF THE COMMONWEALTH PARLIAMENT

To:

The Honourable K. T. Griffin, M.L.C.,
Attorney-General for South Australia.

Sir,

You have referred to us for consideration the draft of the Securities Industry Bill, 1980 and of the associated legislation. We have already reported to your predecessor in our Forty-Ninth Report on the Company Takeovers Bill at an earlier stage and we do not consider it necessary to add to what we said on that subject in that report.

As far as the Securities Industry Bill is concerned, it is in some respects a bad bill. Few dispute that the securities industry requires regulation. A careful and well reasoned plea for that to be done is contained in the book "An Introduction to the Securities Industry Acts" by Professors Baxt and Ford and Mr. G. J. Samuel. Nothing however in that carefully planned and thoughtful text requires the treatment which is accorded to the subject by this bill. The ordinary rights of persons in the industry and of those who have dealings in securities are left very largely at the mercy of executive discretion. The ordinary onus of proof in some of the proposed criminal offences is reversed. Many of the functions assigned to the Ministerial Council contravene the ordinary rules of law as to division of powers. Restraints are placed on the press. Generally the rights of the citizen are subordinate to administrative direction and not to the rule of law. The bill ought to be completely redrawn with these considerations in mind. The only apt comment on the present bill is that which Tacitus addressed to our remote forebears:

> "idque apud imperitos humanitas vocabatur, cum pars servitutis esset."

Taking the bill section by section our comments are as follows:—

Division 1.

Sections 1 and 2:

No comment.

Section 3:

It would appear that this bill is intended to be enacted, so far as the Commonwealth is concerned, under Section 122 of the Constitution and not under the companies power in Section 51. The Commonwealth in relation to the agreement referred to in Section 4 is, it would seem, operating under its normal powers, and in particular those contained in Sections 51 and 61 of the Constitution. Accordingly whether it is possible for the Commonwealth in right of a territory to enter into or implement the underlying agreement might raise interesting constitutional problems. It is outside our purview to do more than raise the point. The only trouble from the State's point of view would be if some constitutional problem were thought to affect adversely the basic agreement. We do no more than refer to the problem.

The Committee is also very doubtful whether a State bill in similar terms would survive a challenge based on Section 92 of the Commonwealth Constitution. Such a challenge might in any event compel those seeking to uphold the validity of the bill to rely on the sufficiency of the underlying agreement which underlines the problem we have adverted to above.

Section 4:

"Arbitrage transaction". Does this definition when referring to "in the ordinary course of trading on a stock market" refer to the stock market's ordinary course of trading or that of the relevant parties to the transaction? This may be of some importance in that "business of dealing" as referred to for example in subsection (2) clearly refers to the individual's course of trading and not to the trading of the exchange.

In any case this is the sort of transaction which means that a person may make profits from inside knowledge and in the Committee's view it ought to be discouraged not regulated. The Committee were further of the opinion that the words "or at as nearly the same time as practicable" needed clarification for practical use.

Definition of "banker's books". Under subclause *(c)* does this include securities lodged with the bank for safe custody? The certificate of deposit is not a security: see the definition of "securities" infra, but nothing is said as to documents which the bank holds in its possession simply to the order of a customer.

Definition of "business rules". As we pointed out in the Forty-Ninth Report of the Committee in a similar connexion, this means that stock exchanges become law making bodies for the ordinary citizen. We can understand why this is so in relation to listing rules because people who want to get on to the official list of a stock exchange must comply with the rules of that stock exchange. We see no reason why people's ordinary business should be governed by the rules of some Stock Exchange. We think that law making powers should remain with Parliament.

Definition of "exempt dealer". First there does not seem to be any particular reason why the Commonwealth and State Banks should be in any preferential position in this matter. Secondly the list of exceptions should include the trustee of a settlement inter vivos, a trustee for infants, a committee for lunatics, a trustee for aged and infirm persons and a trustee for persons out of the jurisdiction. The list of exemptions should also include a person who is an attorney acting under his power of attorney for other persons.

The Committee feels that the present definition does not differentiate sufficiently between the person who is really carrying on the business and the person who is only winding one up or who is acting as a trustee in the true sense. The Committee thinks that one practical way of meeting the difficulty might be to provide for clearances to be obtained from the Commissioner of Corporate Affairs in plain cases of the kind that we have enumerated above. The Committee also point out that the words "another person appointed" may not necessarily include a liquidator or an official manager.

In the light of the varied interpretation it has received in other contexts the Committee is not convinced that the phrase "carrying

on business" is adequate to distinguish a dealer who should properly be registered from a person who is simply an investor with a portfolio of shares—especially a trustee who by law has stringent duties of managing his portfolio.

We do not think that a person could properly be advised to seek a licence until the grant of probate had been made or resealed as the case may be. In these circumstances we believe that the period of six months from death is too short for the purpose.

Definition of "officer". To include every employee of the body corporate is to spread the net far too wide. The list should be restricted to director, secretary or manager.

Subsection (2). This is far too short. The period given is six months from the date of death. In that time presumably the personal representative has to get his grant, comply with succession and estate duty requirements to the extent to which those are still necessary, get in his assets, and deal with them, all within the period of six months after the date of death, not even six months after the date of grant or reseal.

Subsection (8). We have already criticized the wide terms in which "relation" is stated in our previous report and we will not repeat what we there said, although we are still of the same opinion that the net is cast far too wide. Should not the relation be to a particular security in respect of which this bill operates?

Section 5:

Subsection (2). What is an implied informal power?

Subsection (3). Unenforceable understandings and unenforceable practices and indeed understandings in practices as such are far too widely expressed for anybody to be able to advise a client with certainty on this subsection.

Subsection (4) *(c)*. An informal obligation would seem to be a contradiction in terms.

Subsection (5). This is cast so widely that anybody trying to advise on subsection (4) subclause *(e)* must be left in great doubt as to what is actually intended.

Subsection (7). Why should there be a distinction between a person carrying on the business of moneylending and a casual moneylender? In any event the first of these is becoming a rara avis on recent decisions. Should not subsection (7) appear in the bill immmediately following subsection (1) as it is really an exemption or exception to that subsection? The Committee feels that any transaction which is really for the realization of a security ought to be exempt.

Subsection (9) *(a)*. Does "remoteness" mean that it offends against one or more of the rules against perpetuities or that there are intervening prior rights or interests or does it mean something else?

Section 6:

Subsection (1) *(b)*. What are implied informal understandings? What is a substantial influence on the voting power?

Subsections *(c)*, *(e)* and *(f)*. It is wrong to strike at people's future intentions. Because a person proposes to do something today it does not follow that he will ultimately do so, or that he will even get as far as what is known in the criminal law as an attempt. Unless he

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is either doing the prohibited act or attempting to do it, he should not be within this legislation. Reference may also be made to Section 141(2). If it is an offence to attempt to do some of the things referred to in this vague way in Section 6 the law of attempt is going to be stretched far beyond its proper concept.

Part II.

Division 1.

This is said by note 40 *(b)* sent with the bill, to be modelled on Sections 109-116 of the United Kingdom Companies Act 1967, 1967 Chapter 81. A perusal of those sections shows that they are very much more limited than the powers sought to be obtained by this Securities Industry bill. In any event operations in such matters, as in much else in the United Kingdom at all levels, are governed very largely by what is done and what is not done, and regrettably there are no similar conventions in Australia. Irrespective of this last however, the fact is that Sections 109 to 116 of the United Kingdom legislation do not justify what is in the bill now before us.

Section 8:

This means that the Commission can tie up the books of a business which is a going concern so that it would for all practical purposes come to a halt. Surely if drastic powers of this sort are contemplated they ought to be only obtainable on the order of a Court. Even the police cannot hold onto property seized indefinitely unless possession of the property is in fact necessary for the laying of a charge. All that is needed is time for the Commission to photostat the documents and return them. It is not necessary to keep the documents provided the photostats are made original evidence. The Court should have jurisdiction to supervise any action under Section 8. The matter should be capable of being brought before a Judge in Chambers in a summary way. In the case of both Section 8 (6) (iv) and Section 9 (4) *(d)* any person who has to write up books or audit them or otherwise deal with them should have absolute right of access to the books, and the same applies to anybody holding official office within Section 8(8).

Some of the problems connected with wide powers of search and seizure have recently been considered by the House of Lords in *Inland Revenue Commissioners v. Rossminster Ltd. and Others* (The "Times" Newspaper 14th December, 1979) and we refer in particular to the speeches of Lord Wilberforce and Viscount Dilhorne in this regard.

Section 9:

First, there is no right in the defendant to object that his books have nothing to do with any of the matters concerned in this Act. Secondly, the books may it seems be books other than that of the person struck at or sought to be struck at for breaches of the law. Thirdly, it violates the security of premises with no right in the citizen to tell the officer to get out and stay out because he has no business there. And finally, there ought to be a power reposed in the Courts that where Section 8 or 9 powers have been used without reasonable cause, that the Commonwealth or State or the Commission, as the case may be, ought to be liable for damages including exemplary damages. It is necessary for persons on whom such warrants are served to know exactly what it is that they have to comply with, what right the holder of the warrant has to be there, and how far he can go.

Section 10:

There is no warrant under subsection (4) for reversing the onus of proof. It is of course possible that the words "to the extent to which that person is able to comply" in subsection (1) produce the effect that the onus is not completely reversed, but this does not alter the impact of the comments which follow. Wherever a heavy penalty and in particular a term of imprisonment can be imposed, then the prosecutor should always bear the ordinary onus of proving the defendant's guilt beyond reasonable doubt. This comment applies to a number of sections under this Act. It is necessary to regulate the Securities Industry. It is not necessary to destroy persons' ordinary rights in the process.

Under subsection (3) this means that the only person who will get out under the subsection is one who has a lawyer at his elbow. The ordinary reasonable person who is going about his own business and does not either have a lawyer on his staff or one immediately available will not be able to claim the advantages of subsection (3). This comment also applies to a number of other such sections. Where a statement is involuntary it sould not be admissible in any proceedings, except proceedings for a prosecution against any of the provisions of this Act or for perjury and that comment applies equally to other sections throughout the Act.

Section 11:

Subsection (1) *(b)*. A legal practitioner should not be compelled to furnish in writing the name and address of the person to whom or by whom the communication was made. In particular he may not even know the present address of the person because his client may have changed it from the time when the instructions were given. Nevertheless it is a status offence and if he does not give the true address even though he does not know it, he commits an offence. This section should be read with Section 32 which is subject to exactly the same criticism.

Subsection (2). Why is subsection (2) restricted only to banking corporations or officials of banking corporations? No person should be required to produce a document unless it is in fact necessary to be produced for the purpose of investigating the affairs of a person or company. Further, we disagree with the "unless it appears to the Commission or authorized person" formula. We thought that Lord Atkin's comments in *Liversidge v. Anderson 1942 A.C. 206* had disposed of that type of section but it apparently is alive and well and living in Canberra. The Committee's view is that a general nexus is required in all seizure provisions from Section 8 through to Section 11 in which case subsection (2) would not be necessary.

Section 12:

There should be a general provision of secrecy in relation to Section 12. We do not think that Section 47 of the National Companies and Securities Commission Bill would suffice in this effect because of the exception "to the extent necessary to perform his official duties". In particular this comment applies to Section 12(2). That subsection might be reasonable in the case of dealers and stock exchanges. It is not reasonable in the case of ordinary citizens.

Section 13:

Why is the Commission to be given a general investigatory power with no limits on the investigation and no rights written in for the security of the ordinary person?

The Committee points out that this section in its present form could give a general right of phone tapping and could over-ride the specific provisions of Commonwealth legislation.

We think that in any event this section ought to be made subject expressly to Section 16.

Section 14:

Drastic orders of this sort ought to be made inter partes and not ex parte except where the party sought to be served cannot be found or the order sought is merely of an interim nature until the party can be served.

We point out that the power to declare a contract void or voidable is not stated to be subject to any legal limitations and goes much further than the limited form of intervention proposed by us in the Unfair Contract Terms Report Number Forty-Three of this Committee. As you were not in favour of a form of intervention limited by safeguards we draw your attention to the much wider power of intervention proposed Section 14 (1) *(f)*.

Subsection (3) does not go far enough. It should be obligatory to serve notice of the application unless there is some reason why the Court dispenses with that being done.

Division 2.

Investigations:

The whole of this division is objectionable. It authorises investigations at large under the direction of a Minister or a member of the civil service. Section 16 means that if a Minister wants to carry on an investigation for any political purpose that he thinks fit he may do so, and simply call it "the public interest". We have seen examples recently in Australia of the use of ministerial powers of this type for political ends. The Minister or the Commission or the Ministerial Council should have to satisfy a Court that an investigation is necessary before one is started, because the powers that are given under Section 17 will surely wreck the business of any person who is sought to be investigated. The moment the notice is promulgated in the Gazette, his credit and his business will depart from him.

Under Section 19 the person to be examined should be told what is alleged against him. He should have the right of examination of other witnesses and he must at all times be entitled to the services of solicitors and counsel for the purpose of defending himself. Any person who is investigated without just cause or is required to attend for examination without just cause should have a right of action for damages against the Commission or the Minister or Council who authorized it.

There is a general criticism of the drafting of the whole of the Division in that listing provisions coming from business rules are not dealt with separately from licences which come from the express provisions of the Act.

Section 14:

The Committee think that subsection *(g)* should be deleted as the whole of the area is covered by subsection *(h)*.

Section 15:

The word "prescribed" is not used in its legal sense of being mentioned in a regulation or other subordinate legislation.

Section 16:

This should be restricted to any matter relating to any dealing with securities within the limits of the Commonwealth and State agreement.

The Committee point out that in relation to the taking away of the books of a business both here inferentially and in other sections expressly, the Victorian Section 10 simply permitted the investigator to go into the company's premises, take extracts and make copies. We think that this should be sufficient without depriving the company of its day to day use of the business books if an evidentiary section was put in giving the copies so taken the same status in evidence as the originals.

Section 17:

The words "a direction other than a prescribed direction" have no limitation and should be restricted to give a precise connotation to the phrase.

We point out that in subsection (3) *(b)* (i) the words "take into account any views" mean that opinion is being substituted for evidence and we think the subclause should be redrafted.

We point out that under subsections (6) and (8) the question of whether or not there should be publication in the first instance in the Gazette with consequential injury to business might well be a matter to be left to be decided by the Court as a specific direction if as the Committee thinks the whole matter should be left in the discretion of the Court and not in the unbridled discretion of the Ministers.

We think that the ambit of the matter to be prescribed should be given with such particularity as the nature of the matter would permit with power for further directions to be given from time to time with equal particularity if other matters come up in the course of the investigation which reasonably and properly followed from the original direction.

Section 18:

We draw attention to the words "that correspond with this Division". Does this mean that the sections must be identical or in mirror form or is it sufficient if there is a general resemblance between the sections in various States?

Section 19:

In subsection (2) we point out that the subsection fails to take up that part of the Crimes Act which deals with bribery, undue influence and prevention of corruption in respect to officers carrying on an investigation. The difficulty arises by the deeming of an extra-judicial person or body as a judicial one.

Section 21:

The person being investigated should be entitled to a copy of the record without charge in any event. It should not be at the will of the inspector. A fortiori it should not be only for somebody who wants to take proceedings against somebody else. The defendant should have an absolute right to a copy. There should be a subsection requiring the person in carrying out the investigation to take and complete a formal record in every case so that there is no question of conflicting oral evidence afterwards as to what in fact did happen.

Sections 23 and 25:

The present law of evidence on this topic is a good law and a proper law and it should be respected and preserved. People who commit breaches of the securities industry have to be dealt with. They do not have to be dealt within a manner which we do not use in prosecuting a common criminal. The same observations apply to Section 24. Surely the questions and answers should only be admissible in relation to a prosecution under this Act or to a prosecution for perjury arising out of the answers.

As far as civil evidence is concerned, Section 24 is far too wide. For example, it does not deal with Crown privilege and on the face of it a Minister could be summoned to give evidence and that evidence would be admissible in any event. In criminal cases the matter is unsatisfactory because the overriding discretion of the Judge to exclude any evidence in a criminal case where the prejudicial effect of admitting the evidence outweighs the value of the evidence has not been preserved. The Committee would prefer to see out present Section 34c to 34g of our Evidence Act as the criteria in civil proceedings subject only the report which the Committee will in due course present to the Attorney on the law of civil evidence generally. The Committee point out that rank hearsay for example is evidence under the proposed Section 24. The section removes any possible right of cross-examination in civil proceedings and so much so that the other side would be forced to call the maker of the statement to examine him in chief to rebut his hearsay. The above comments as to the Evidence Act are equally and more emphatically relevent to Section 25.

Section 26:

Does this mean that you can for example tender an unadmitted list of convictions because you could have asked the witness about them if he had been called?

Section 27:

This is fundamentally wrong. It means in practice that if a man does not have a lawyer to tell him what to do or is in prison, or in any other way he cannot get a lawyer to take the point forthwith, the evidence is automatically admissible against that person on a major criminal prosecution. This is totally unacceptable.

Section 30:

This means that reports can be printed to "get even" with somebody or to blacken somebody. Once that report is printed, the person named in it has no earthly hope of getting a fair trial.

In subsection (5) the Attorney-General may be the Minister in both cases so that this attempted safeguard should be re-examined.

Subsection (7) is in effect a new form of misprision relating to what is only a minor misdemeanour. At least our ancestors had sense enough to restrict misprisions to treason and felony. This subsection should be deleted. Informers have been regarded as odious in every age.

Section 31:

As has been said earlier, the power to retain books is the power to put a man out of business. The books should be in a place where access on a daily basis is to be given to the man who is carrying on his business, if our suggestions as to the redrafting of Section 16 are not given effect.

Section 32:

We have already commented in respect of Section 11 on what is wrong with this section.

Section 33:

Subsection (4) gives a power to the Commission to fine a person because this is what it amounts to. No person should be fined by being ordered to pay the expenses of an investigation unless a Court orders him to so do. The Commission should not be prosecutor, judge and jury. It is contrary to all ideas of fairplay.

Section 34:

Again the onus of proof is reversed. It should not be. The section should commence "A person who with intent to hinder the investigation" and then the section should go on as before. The same applies to Section 35 (5) which should read "A person shall not wilfully contravene or fail to comply with an order" etc.

Part III.

Section 40:

In subsection (2) there is no time limit inserted within which the Stock Exchange must take action or if it does not the Commission may. We think that a specific number of days should be inserted for this purpose. We draw attention to the criticisms of this section in Baxt (op. cit.) at pages 52-53.

Section 42:

The words "person aggrieved" have a long history of conflicting interpretations in Statutes and those words should be excised and other words used and there are certain anomalies when read in connection with the court's power in Section 12 to make orders, which ought to be straightened out: see Baxt at pages 55-56.

Part IV.

There should be a full right of appeal to the Supreme Court against any revocation or suspension of any licence. It would appear that revocation is covered by Section 134, but on the expressio unius principle it is probable that a suspension is not.

Part V.

Section 64:

Subsection (3) . The words "or could reasonably be expected to know" should be deleted. Either the man knows or he does not know. If he does not know he should not be penalized. However he may have a suspicion not amounting to knowledge and the words "or has reasonable cause to suspect" should be inserted.

Section 68:

We point out that subsection (3) *(b)* which deals with arbitrage transactions is dealing with a similar subject to short sales dealt with later in the section and the position of the two should be assimilated for the purpose of this Section: see Baxt (op. cit.) page 191.

Part VI.

No comment.

Part VII.

We do not think that interference with the freedom of the press is justifiable. If the freedom of the press can be regulated in this way, why not anything else, that a journalist cares to write about? We think that it is more important to maintain freedom of the press than to deal in this way with newspapers and with journalists which may well provide a precendent for other interferences with the freedom of the press. On the other hand an investment adviser who is not by profession a journalist but publishes a periodical sheet to attract customers may well be considered to be a proper subject for regulation.

Part VIII.

No comment.

Part IX.

No comment.

Part X.

Section 125:

Subsection *(b)*. The words "or ought reasonably to be known" should be struck out. If the statement is made knowingly, or not caring whether it is true or false then it comes within the strict definition of fraud in *Derry v. Peek (1889) 14 App. Cas. 337.* Anything wider than this is wrong and unnecessary and this is especially so when one considers the penalty in Section 129.

Section 130:

We draw attention to the interesting form of class action which could follow under the powers given by Section 130 (6). Under 130 (8) the *(a)* should read "A Director Secretary or Manager of the body corporate". If the employee is only an ordinary employee and is in no position to influence what the company does or does not do, such a remote connection should not give rise to any of the rights in Section 130.

Part XI.

We have already commented on Section 134 to a certain extent in relation to Section 60. We further comment that the right of appeal by the Court should be a full review both on the law and on the facts. Parties should be entitled to adduce fresh evidence and the appeal should not be restricted to a mere review as to whether or not the Commission had or had not legal power to do what it did.

Section 140:

This should read "A person shall not wilfully obstruct or hinder". The abuse of obstructing or hindering sections by the police in other contexts is well known and there should be no penalty under this section except for what a person does intentionally. Particularly when one adds the words "directly or indirectly knowingly concerned" in Section 141 which are themselves much wider than we think is necessary.

Section 142:

Again the word "intentionally" should appear after the words "a person who" in subsection (1).

Section 145:

There ought to be an ultimate time limit on all prosecutions except those on indictment. Summary prosecutions should be brought within twelve months, while the facts are still fresh in the memory of the parties. In the case of charges on indictment, where a jury are concerned the jury may be trusted to deal with stale claims. It may be thought proper as in the Companies Act to give the Attorney power to extend the twelve month period by certificate that there is good cause to extend the time beyond the limit in the Act.

Section 147:

We draw attention to what we have said under Section 30 subsection (7) on this matter. As we there said, the wisdom of our forefathers at least confined misprision to treason and felony. There is no reason at this late date to create a new misprision offence.

Section 151:

In this and in any other case where a Court on application by the Commission may order certain things to be done, the Commission should in every case have to give the usual undertaking as to damages. The powers of the Commission are far too wide in any event, but if they exercise their powers wrongly then they should be accountable at least to the same extent as an ordinary person. After all the Commission has skilled legal staff and they should not be in any better position than an ordinary litigant; in fact, commonsense requires that they should be held more strictly to account than a person who is an ordinary man trying to vindicate his rights and who in every case is by the practice of the Court required to give such an undertaking. There is no reason at all why the Commission

should be put in a privileged position of this kind. Because of the doubt as to whether the Commission has the prerogatives of the Crown, Section 152 (5) should place a positive obligation on the Commission to give the necessary undertaking as the price of obtaining an injunction.

We have the honour to be

Howard Zelling
J. M. White
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Law Reform Committee of South Australia.

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