

REFLECTIONS ON A DECADE WITH THE SECURITIES COMMISSION 1985 - 1995*

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I. THE DECADE: 1985 - 1995

My decade with the Securities Commission, first as a member from mid-1985 to February 1990 and then as Chairman from February 1990 to 31 March 1996 spanned a significant period for the New Zealand securities markets. By mid-1985 the Commission had established itself as New Zealand's security regulator. The regime for prospectus disclosure had been established by the Securities Regulations 1983. Those Regulations with the accompanying exemption process were operating routinely and the parameters within which the Commission was prepared to work clearly established. The Commission's jurisdiction in relation to the holding of inquiries and the issuing of reports on matters of market concern, had been tested before the Court of Appeal and the Commission's jurisdiction had been laid down in the widest terms in *City Realties Ltd v Securities Commission*.¹

The advent of Rogernomics with the Labour election victory on 14 July 1984 had brought about the dismantling of a variety of regulations which had inhibited market activity - in particular foreign exchange controls, restrictions on bank lending, constraints on the level of interest rates and dividends, and prescribed minimum holdings of government securities by financial institutions had all been removed. By mid-1985 the New Zealand sharemarket was beginning its bull run and a breed of investment companies were enticing new investors from right across middle New Zealand into the sharemarket. The government was moving government controlled commercial activity into the private sector with the creation of the State Owned Enterprises.

This decade witnessed the heady period of 1986-1987 with feverish activity on the Exchange, the spate of new issues, share swaps by controlling shareholders and continuing takeover activity. Then came the sharemarket crash of 20 October 1987 from which the New Zealand sharemarket did not recover until 1992. Market capitalisation had grown from \$17,600m at the end of 1985 to \$42,436m at the end of 1986. By 31 December 1987 market capitalisation had actually fallen to \$24,200m. The collapse of the sharemarket was followed some 12 months later by the collapse of the commercial property market and the demise of several major financial institutions whose investment and property base had been cut away - Equiticorp, Richmond Smart, the property companies of the Chase Group and DFC. The first three of these corporate groups were put into statutory management on the recommendation of the Securities Commission.

In the slow period of consolidation that followed, the Commission was able to secure legislation to implement a significant part of the law reform

* This paper was first presented as an invitation lecture at the Law School of the University of Canterbury.

1 [1982] 1 NZLR 74.

programme which had been initiated by the Commission from as far back as 1982 - disclosure of nominee shareholdings, contributory mortgage regulations, regulations of insider trading and regulation of the futures industry. These measures were followed by the major company law reform package, including the Financial Reporting Act 1993. My time as Chairman concluded with the introduction of the Investment Product and Adviser (Disclosure) Bill. The Accord between Government, the Labour Party and the Alliance on private provision for retirement provided the Commission with an opportunity to promote the introduction of a consistent disclosure regime in relation to all investments offered to the public. The Investment Product and Adviser (Disclosure) Bill (now enacted as the Investment Advisers (Disclosure) Act 1996 and the Securities Amendment Act 1996) extended the application of the Securities Act in order to cover investments which were previously dealt with in a number of disparate ways, eg Life Insurance, Superannuation and Unit Trusts.

Outline of this paper

In this paper I shall endeavour to cover three topics.

1. Comments on the role and functions of the Commission as given to it by the Securities Act 1978 and the way in which the Commission exercised that role and carried out those functions during the period up to 1990. This period will be dealt with briefly as it is already covered in a perceptive article by Peter Fitzsimons.²
2. Comments on the activities of the Commission during the period from 1990 to 1995.
3. Some reflections on the role of the Commission and its future.

II. PERIOD TO 1990

1. The Securities Act 1978

Four principal functions were conferred on the new Commission which was established under the Securities Act.

1. A law reform function - "to keep under review the law relating to bodies corporate, securities, and unincorporated issuers of securities, and to recommend to the Minister any changes thereto that it considers necessary" - s 10(b).
2. Reviewing and reporting on practices relating to securities - "to keep under review practices relating to securities, and to comment thereon to any appropriate body" - s 10(c). An amendment to the Act in 1982 empowered the Commission to publish any report or comment made in the exercise of its functions - s 28A.
3. An education function - "to promote public understanding of the law and practice relating to securities" - s 10(d).
4. A regulatory function - "to perform the functions and duties conferred or imposed on it by or under this Act or any other enactment" - s 10(a). The regulatory functions of the Security Commission under the 1978 Act were limited. They were based on the disclosure philosophy. The Commission was given power to suspend or cancel prospectuses when less disclosure than was required by the Act had been given and to prohibit misleading

2 Fitzsimons, "The New Zealand Securities Commission: The Rise and Fall of a Law Reform Body" (1994) 2 *Waikato Law Review* 87.

advertisements. The Commission, in addition, had a general regulatory jurisdiction over the prospectus requirements of the Act and Regulations insofar as the Commission had power to exempt any person or class of persons from compliance with any of the disclosure provisions of the Act and Regulations.

Apart from those limited respects in which the Commission had power to intervene and take regulatory action in order to stop certain practices and secure compliance, the Commission had no enforcement functions. The enforcement of the Securities Act and the Companies Act remained with the Registrar of Companies and the Corporate Fraud Squad of the Police, and when it was later established, the Serious Fraud Office. The Commission's statute did not make it a corporate policeman. Both the government and the business community wished to establish a much less interventionist body than the SEC in the United States or the ASC in Australia. The Commission was to be a corporate watchdog with power to bark, but the biting was to be left to others. Even the Commission's regulatory functions were strictly circumscribed. It was given no general regulatory jurisdiction over the securities markets. Significant areas such as takeovers, insider trading, manipulative market practices and the disclosure of nominee shareholdings might be the subject of investigation and public comment, but no more.

2. The first Chairman

The Commission was fortunate to attract as its first Chairman an experienced commercial lawyer who not only had extensive market and litigation experience, but also a strong interest in the academic law reform aspects of commercial law and had taken part in a number of the leading law reform exercises of the previous decade. With his booming voice, fondness for questioning and impatience with shallow thinking by other lawyers, economists or accountants, Colin Patterson was a colourful figure who gave the Commission a high profile during its early years. He was something of the "poacher made gamekeeper" having been involved in some ingenious schemes to protect the position of directors³ who, when his energies were captured for the Commission, became as ardent a champion for the regulatory cause.

The Commission under its first Chairman proved to be a more interventionist body than perhaps its architects had anticipated. Patterson soon pushed the Commission's investigative role so as to cover not only the review of general practices in the market, but the active investigation and reporting on individual practices by companies, and this not only in the area of prospectuses but in relation to takeovers and other wider market activity. The Commission's interventionist stance was fully vindicated by the Court of Appeal in *City Realties Ltd v Securities Commission*.⁴ The Court of Appeal declared that "the Commission's review function under section 10 is very wide indeed" and that its jurisdiction extended "to company takeovers among many other possible subjects" and "whether or not it is already engaged in a general survey, the Commission can review a particular takeover proposal at any time".

Colin Patterson enjoyed public jousting and I had the good fortune to be a member of the quorum on two celebrated occasions. The first was his spat

3 The establishment of the Androcoles related company to entrench the position of the Board of Lion Breweries Limited "Androcoles and the Lion" which was dismantled after intense market criticism.

4 *Supra*, n 1.

with Sir Robert Jones when Sir Robert refused to answer a question put to him alleging among other things that his summons to the inquiry was “in Swahili” because of a minor typing error. The second occasion was the lengthy public debate between Patterson and Professor Pound of the Harvard Law School in the course of the Commission’s inquiries into the Lion/Nathan takeover. The Commission was considering whether a takeover bidder should be required to offer the same price to minority and controlling shareholders.

3. The Sharemarket Boom

The Commission’s energy during its early years was directed to getting the basic regulatory structure in place. It was not until 1983 that the Securities Regulations with their detailed prospectus schedules had been completed and came into force. Patterson’s work on these Regulations was perhaps his most lasting contribution to New Zealand securities law. The Commission’s report on the introduction of the Regulations, with its articulation of the disclosure philosophy on which the Regulations were based, should still be prescribed reading. The Regulations with the accompanying schedules provide the basic regulatory structure for the New Zealand investment markets and have assumed even greater significance with the enactment of the Investment Advisers (Disclosure) Act 1996 and the Securities Amendment Act 1996. These Acts build on this framework.

The Commission produced reports in 1981 and 1982 on substantial securityholder disclosure and takeovers both of which it regarded, and particularly the former, as essential planks in proper market regulation. It also produced a set of contributory mortgage regulations directed at what was then a significant area of investment by small investors. The first two proposals were strongly opposed by Treasury. The contributory mortgage regulations were given a low priority by government. In the meantime, following the advent of the Labour Government in 1984 and the rapid push towards a market economy, the New Zealand investment markets entered a phase of frenetic activity. In the absence of any effective supervisory body in relation to the sharemarket (the Market Surveillance Panel was not established until 1989) and in the absence of nominee shareholder disclosure or an effective takeovers regime, the Commission was powerless to intervene at a time of major but undisclosed share shuffling in the marketplace all too often accompanied by manipulative activity. The Commission’s proposal on contributory mortgages languished until they were introduced in 1989 by which time there were virtually no contributory mortgage companies left.

The Commission has been criticised for sitting on its hands during this period. This criticism seriously misunderstands the limited role and resources available to the Commission at this time. In particular -

1. As indicated earlier, the regulatory structure which would have provided a proper basis for intervention was lacking. Apart from a Stock Exchange scheme which was ineffectively administered, there were no rules governing nominee disclosure. Share shuffling and manipulative practices could take place undetected. Had the Commission’s 1982 proposals been adopted a whole series of takeovers which exploited the position of minority shareholders could have been avoided.
2. With a limited budget and a professional staff of only three persons other than the Chairman, the Commission did not have the resources to investigate and report on the excesses of the time. Patterson’s energies

were principally directed to law reform. I am aware of at least two serious market situations which the Commission could not investigate because it would have diverted Patterson away from reports on insider trading and takeovers which government, by late 1987 and 1988 was calling for.

4. Statutory Management

The Commission was called on in 1988 and 1989 to consider whether three major corporate groups should be put into statutory management. Later, in 1990 DFC was put into statutory management under the corresponding regime in the Reserve Bank Act 1989. The statutory management regime was strongly attacked by the banks and in 1992 the Commission examined these criticisms and reported on the legislation. I have no doubt in my mind that the New Zealand financial markets were well served by having this regime available during the post-crash period. Each of these large and complex groups was administered in a cost effective and expeditious way which would not have been possible apart from this legislation. The Australian experience with the collapse of the Bond and Qintex groups of companies shows⁵ the significant advantages of the regime which was available in New Zealand. As the Commission reported in 1992⁶ the regime should be used sparingly and only in cases such as complex interlocutory corporate groups where there is no ability to appoint a single receiver or manager, but I believe its value in these special circumstances has been proven.

III. THE PERIOD FROM 1990 - 1995

1. A different environment

By 1990 the Commission was operating in a very different environment. The sharemarket crash introduced a level of sanity into a number of areas of the market. Treasury's voice had been muted and Sir Geoffrey Palmer, who was then Minister of Justice, pushed for a complete overhaul of the Companies Act and for legislation on insider trading and takeovers. As Peter Fitzsimons has pointed out,⁷ the Commission used its report on insider trading to press for the introduction of a statutory regime for the disclosure of substantial security holdings. In the Securities Amendment Act 1988 the Commission succeeded in having legislation introduced to deal with the disclosure of substantial security holdings, the regulation of insider trading, and the regulation of the futures industry. Other substantial changes introduced during this period were the establishment of the Stock Exchange Market Surveillance Panel, and the introduction by the Stock Exchange of greatly improved procedures for share transfer and settlement, the establishment of the Serious Fraud Office and significantly strengthened powers for the Registrar of Companies for dealing with "at risk" companies in the Corporations Investigations and Management Act 1989, along with the introduction in that Act and in the Reserve Bank 1989 of a regime for statutory management. These legislative changes were followed by the passing of the Companies Act 1993 which provided for a complete overhaul of the companies legislation, and the passing of the Financial Reporting Act

5 *Bond Brewing Holdings Ltd v National Australia Bank Ltd* (1990) 8 ACLC 330 and *Qintex Australia Finance Ltd v Schroeders Australia Ltd* (1991) 9 ACLC 109, 111.

6 *Statutory Management, Report on Part III of Corporations (Investigation and Management) Act 1989*, April 1992.

7 *Supra*, n 2.

1993. The latter Act which built on the Commission's substantial report of December 1989,⁸ addressed serious weaknesses in company accounting requirements which had been evident during the pre and post sharemarket crash period.

2. The work of the Commission

It is not surprising that the changes in the regulatory environment have led to changes in the nature and emphasis of the Commission's work. In earlier years a major part of the Commission's time was involved in law reform which was designed to provide the ground rules for effective regulation of the financial markets in New Zealand. The work on improved product and financial adviser disclosure is nearing completion and the ground rules will then have been laid and future law reform will be more concerned with evaluating and improving the existing structure. The Commission's effort in recent years has, therefore, been less directed to law reform than to overseeing the application of the regulatory provisions, granting exemptions from disclosure requirements in appropriate cases and investigating and reporting publicly on cases of non-compliance or inadequate market practices.

During this period the Commission was involved in a number of major inquiries, some of which were followed by legal proceedings. Most of the major inquiries conducted by the Commission have come under one of the following headings -

1. Financial reporting issues
 - BNZ Inquiry⁹
 - Apple Fields Inquiry¹⁰
 - Regal Salmon Inquiry¹¹
2. Prospectus disclosure
 - Agricola Resources Limited¹²
 - Metropolitan Life Care Limited¹³
3. Alleged misleading disclosure to the market or market irregularity
 - New Zealand Five Year Government Stock Futures Contract¹⁴
 - Air New Zealand Limited¹⁵
 - London Pacific Limited¹⁶
 - Fortex Group Limited¹⁷
4. Alleged breach of nominee shareholder disclosure requirements
 - City Realities Limited (followed by application to the court)¹⁸

⁸ *Capital Structure and Financial Reporting in New Zealand*, December 1989.

⁹ *Report of an Enquiry into Certain Arrangements entered into by BNZ in March 1988*, 24 May 1993.

¹⁰ *Report of an Inquiry into the Published Financial Statements of Apple Fields Ltd*, 20 July 1994.

¹¹ *Report of an Inquiry into Aspects of the affairs of Regal Salmon Limited including Trading in its Listed Securities*, 28 July 1994.

¹² *Report on Enquiry into a Registered Prospectus issued by Agricola Resources Ltd dated 3 June 1986*, July 1991.

¹³ *Report of an Inquiry into Aspects of the affairs of Metropolitan Lifecare Group Ltd*, 17 April 1996.

¹⁴ *New Zealand Five Year Government Stock Futures Contract*, 1 November 1990.

¹⁵ *Report on Enquiry into the Voting Securities of Air New Zealand Ltd*, October 1991.

¹⁶ *Report on Enquiry into London Pacific Ltd*, March 1993.

¹⁷ *Report on an Inquiry into Aspects of Fortex Group Ltd including Trading in its Listed Securities*, 13 October 1995.

¹⁸ *Securities Commission v Gulf Resources and Chemical Corporation* (1990) 5 NZCLC 66324.

Euronational Corporation Limited (followed by application to the Court in *Securities Commission v Honor Friend Ltd*)¹⁹

5. Alleged insider trading
 - Gulf Resources Limited²⁰
 - Wilson Neill Limited (followed by litigation brought by complaining shareholders)²¹
 - Regal Salmon Limited²²
 - Fortex Group Limited²³

The Commission in the Regal Salmon Report rejected the argument that it had no jurisdiction to inquire into insider trading.

In addition to the litigation which followed the inquiries which have just been referred to, the Commission during this period also successfully took or defended Court proceedings in relation to four other matters.

1. *Kiwi Co-operative Dairy Co Ltd v Securities Commission* which was concerned with whether an offer had been made to the public which required the issue of prospectus. The Commission's argument was upheld by the Court of Appeal.²⁴
2. *Securities Commission v Jones*²⁵ where Sir Robert Jones was held to be in breach of the nominee shareholder requirements of the Securities Amendment Act 1988 and forfeiture of 6 million shares was directed.
3. *Meridian Global Funds Management Ltd v Securities Commission*.²⁶ (Appeal by one of the parties of the Honor Friend litigation rejected by the Privy Council and that party held to be in breach of the nominee disclosure requirements. The person who with the company's authority required a relevant interest is bound to disclose.)
4. *Fleming v Securities Commission*.²⁷ The Court of Appeal held that there was no duty of care on the part of the Commission in carrying out its regulatory functions, in this case the function of prohibiting a financial advertisement.
5. *Westpac Financial Services Ltd v Securities Commission*.²⁸ The Commission's arguments were accepted that it had no power to grant a retrospective exemption.

Although much of the Commission's work attracts little public attention and because of the commercial sensitivity of the information coming before it, the Commission's inquiries are normally conducted under confidentiality orders, the Commission's inquiry into the Bank of New Zealand and its inquiries and litigation in relation to Sir Robert Jones generated considerable media publicity. In the former case the Commission found itself at the centre of political controversy. Mr Winston Peters was calling for a public inquiry into the affairs of the Bank of New Zealand at a time when the Commission was making its own confidential inquiries into certain transactions which affected the bank. In September 1992 when Winston Peters made allegations in Parliament and tabled a number of documents in relation to an alleged captive insurance scheme, the Commission decided that it should also look at this particular transaction. It did so as a matter of its own independent

19 *Securities Commission v Honor Friend Ltd* (1991) 5 NZCLC 67512.

20 *Report on Enquiry into Dealings in the Voting Securities of Gulf Resources Ltd*, June 1992.

21 *Colonial Mutual Life v Wilson Neill Ltd* [1994] 2 NZLR 152, CA.

22 *Supra*, n 11.

23 *Supra*, n 17.

24 [1995] 3 NZLR 26.

25 [1993] MCLR 529.

26 [1995] 3 NZLR 7.

27 [1995] 2 NZLR 514.

28 (1996) 7 NZCLC 261106.

decision and without any prompting on the part of Government. I would add that at no time while I was Chairman of the Commission has Government ever sought to interfere in the workings of the Commission. The Commission maintained a good relationship with successive Ministers of Justice, both of whom were scrupulous in respecting the independence and integrity of the Commission.

The Commission resisted pressure from the media to conduct its inquiry in public. My experience has shown that where commercially sensitive information is in issue in relation to continuing transactions (so called "captive insurance arrangements" had not been fully wound down at the time of the Commission's inquiry) the Commission will much more readily and expeditiously be able to get to the facts if its inquiry can be conducted in confidence. Politicians and the media are fond of public inquiries, but they are not always the best means of examining on-going commercial issues. The Commission's report,²⁹ perhaps predictably, pleased neither Mr Peters nor the parties who had been involved in implementing the insurance arrangements. A significant feature of the report was the Commission's preparedness to express a forthright view on what was appropriate accounting practice to be followed by a company in reporting its annual profit in a situation where there was considerable disagreement within the accountancy profession itself. It is important that there be an independent body which has accounting expertise available to it (a member of the Commission quorum was an experienced and senior chartered accountant) which can make judgments on financial reporting issues. Section 16(2) Financial Reporting Act 1993 now recognises that the Commission has a role in this area.

The other case which attracted considerable publicity during my time as Chairman was the proceedings brought by the Commission against Sir Robert Jones alleging non-compliance with the nominee disclosure provisions of the Securities Amendment Act 1988.³⁰ The Commission took the proceedings following a Stock Market Surveillance Panel inquiry which had drawn attention to alleged irregularities. Because of Sir Robert's high profile with the media these proceedings were bound to, and did, attract considerable publicity. Notwithstanding Sir Robert's attempts to trivialise the proceedings, McGechan J held him responsible for failure on the part of those to whom he said he had delegated the function, of giving the prescribed notices under the Securities Amendment Act and a forfeiture of a parcel of Sir Robert's shares was directed. I believe that this case indicates the importance of having an independent body such as the Commission which is in a position to take action in support of the Stock Exchange Market Surveillance Panel. The Commission's action gave a clear signal that disclosure rules in the securities legislation must be complied with.

3. Role of the Commission

One consequence of the Commission's activity in investigating and reporting publicly on cases of non-compliance or inadequate market practices is that some commentators criticised the Commission for departing from its role under the Securities Act by seeking a greater enforcement role. If those commentators are suggesting that the Commission has become more active in monitoring and investigating non-compliance of the regulatory

²⁹ *Supra*, n 9.

³⁰ *Supra*, n 25.

claimed against AWA and its directors alleging contributory negligence. His Honour said that in relation to non-executive directors that they were not bound to give continuous attention to the affairs of the company. Their duties are of an intermittent nature to be performed at periodic board meetings and meetings of any committees on which they happen to be placed. Notwithstanding a small number of professional company directors there was no objective standard of the reasonably competent company director to which they may aspire. The very diversity of companies and the variety of business endeavors do not allow of a uniform standard. In the absence of any evidence to suggest that the non-executive directors ever became aware of the serious deficiencies in the internal controls and accounts of AWA the non-executive directors were entitled to rely on management and the auditors. His Honour held that not only did the non-executive directors not breach their statutory duty they had not been negligent at common law.

The judgment of Rogers CJ influenced the drafting of the 1992 amendments to s 232(4). This was made clear in the Explanatory Memorandum.²⁷ The decision in Rogers C J was referred to with approval in a number a subsequent Australian cases²⁸ but in the New South Wales Court of Appeal the majority (Clarke and Sheller JJA)²⁹ implied that the standard required of non-executive directors was higher than the standard which had been set by Rogers CJ. They referred to his Honour's statement that a non-executive director did not have to turn himself into an auditor, managing director, chairman or other officer to discover whether management was deceiving them and they said 'in our respectful opinion it does not accurately state the extent of the duty of directors whether non-executive or not in modern company law'.³⁰ Their Honours held that in accepting the office directors assume the responsibility for exercising a reasonable degree of care and diligence in the performance of the office. More was required than 'supine indifference'.³¹ Both diligence and action was required. Looking at the responsibilities of non-executive directors, they stated that the relevant question was what in the particular circumstances are the duties and responsibilities of directors and then what time is required of them as a board to carry out these duties and responsibilities. It was not a matter of tailoring the extent of the duty or function to fixed intervals between board meetings.³² In the end they agreed that the non-executive directors where entitled to rely on the information they honestly believed the auditors were providing and on their own management.

An interesting question of statutory construction is the extent to which the Court of Appeal judgments are relevant to the interpretation of the present wording of s 232(4). The judgments were based on the earlier wording and the revisions were based on the first instance judgment of Rogers CJ. It is arguable, therefore, that his Honour's judgment carries more weight than the judgments of the majority in the Court of Appeal in the interpretation of the new wording of s 232(4).

In New Zealand Henry J in *Fletcher v National Mutual Nominees Ltd*³³ said that the standard of care to be exercised by directors 'is to be assessed

27 Ibid para 83.

28 *ASC v Gallagher* (1993) 11 ACLC 286; *Vrisakis v ASC* (1993) 11 ACLC 763; *Permanent Building Society v Wheeler* (1994) 12 ACLC 674.

29 (1995) 13 ACLC 614.

30 Ibid 663.

31 Ibid 656.

32 Ibid 662.

33 [1990] 3 NZLR 641, 661.

by also having regard to the circumstances pertaining to the responsibilities to which the directors have undertaken'. On appeal³⁴ Gault J with whom McGechan J agreed rejected the argument that a lower standard of care should be applied to a non-executive director but this was on the basis of the old case law. Henry J's dictum is consistent with the wording of s 137, particularly when read in conjunction with s 138. Thus New Zealand and Australia seem to face the same problem of statutory interpretation. Is the case law on the old law a sure guide to the interpretation of the new wording? It is submitted that the approach of Rogers C J in *AWA* and Henry J in *Fletcher v National Mutual Nominees* represent a more realistic approach to interpretation of the new sections. There is a need to be selective in the use of earlier dicta.

The wording of s 138 of the New Zealand Act justifies reliance on management but the board as a whole is only excused from responsibility if the delegate has been monitored. The belief that the delegate will exercise the powers properly must be based on reasonable grounds. Similarly a director relying on reports must make proper enquiry where indicated by the circumstances. A director will not be excused unless he or she can show that he or she acted in good faith, made proper enquiry and did not know the reliance was unwarranted. Tomkins J in his Waikato lecture³⁵ said he saw no difficulty with these provisions. If a director suspects an employee may not be completely reliable there was nothing unreasonable in requiring the director to monitor the performance of the employee or to treat any advice or information received with care and caution. The overall consequence was that no longer would directors be able, in respect to actions or decisions which are or should be those of the board, to evade responsibility simply because those actions or decisions were left to others.

3. A degree of skill?

As we have seen the Australian section does not refer to skill but the New Zealand and Canadian sections do. It has been assumed in Australia that the omission of skill is significant.³⁶ A more relevant question in both jurisdictions is perhaps the appropriate degree of diligence. There are no common standards for company directors and the sections recognise that the ultimate standard is a matter of relativities. The specific proposal of the Law Reform Division to impose a higher standard of care on a professional person was deleted as we have seen from the New Zealand section. Conversely, a director, whatever his or her background, has a duty greater than that of simply representing a particular field of experience. This was recognised by the majority in the New South Wales Court of Appeal in *Daniels v AWA Ltd*. They said that a director has a duty to become familiar with the business of the company and how it is run and to ensure that the board has available means to audit the management of the company so that it can satisfy itself that the company is being properly run. The responsibilities of directors require that they take reasonable steps to place themselves in a position to guide and monitor the management of the company.³⁷ They are not, however, expected to exercise the degree of skill of a professional

34 *Deloitte, Hoskins and Sells v National Mutual Life Nominees* (1991) 5 NZCLC 67, 418 at 67, 442-3 and 67, 446.

35 *Ibid* 31.

36 See *Byrne v Baker* [1964] VR 443, 450. Cf also *Norman v Theodore Goddard* [1991] BCLC 1028.

37 (1995) 13 ACLC 614, 665-6.

way committed to my vision for the future, I throw out the following thoughts.

1. A significant part of the Commission's work in the future is likely to be taken up with monitoring the effective working of the new regime for improved disclosure in relation to investment products and financial advisers once the Securities Amendment Act 1996 and Investment Advisers (Disclosure) Act 1996 come into effect. The Commission will need the cooperation of the institutional and investment adviser agencies in carrying out that task. There has been a good start in that respect in that the Working Group which produced the report and draft legislation which forms the basis for these Acts, consulted closely with all sectors of the financial community. One of the features of this legislation is that it has emerged from widespread consultation and discussion in the marketplace with sector interest groups from virtually all sections of the financial community examining and making recommendations on the draft proposals.

It is vital that this disclosure regime and the related Ombudsman schemes work effectively and engender investor confidence. Government through the Accord on Provision for Retirement has put its faith in a disclosure regime providing adequate safeguards to investors when making their decisions as to the destination of their savings for retirement. If there are major defaults and losses in this area, then recent experience in the UK shows that public clamour for a compensation regime will be too powerful to resist. Any set backs in the confidence of investors in this area could also seriously inhibit saving for retirement with long-term economic consequences for the nation.

2. There is a continuing need for an independent body such as the Commission with its composition of senior marketplace practitioners and professional advisers to inquire into market irregularities or suspected breaches of the regulatory provisions and comment on these publicly. Experience since the sharemarket crash indicated an increasingly important role for the Commission in commenting on the financial statements of companies and other public issuers. The developments of good standards within the marketplace requires the prompting and discipline of agencies from outside. Given the realities of human nature, marketplace disciplines alone are not sufficient. I hope we have learned at least that lesson from the turbulent events of the 80's.
3. It is essential for the Commission to effectively carry out its role of seeing disclosure provisions work fairly and effectively with the assistance of the exemption process, where that is needed, and the investigation of alleged market irregularities or suspected breaches of the regulatory provisions, that the Commission be adequately resourced. It is untenable to expect on the one hand that the Commission will be an effective monitor of the marketplace and to give it increased functions in that respect and at the same time to deny it any increase in funding. I find the recently announced decision of the Ministry of Commerce not to increase the Commission's funding difficult to understand. It is quite unhealthy for the Commission to be put in the situation, in which I found myself as chairman, of having to go to the Minister and seek special funding in order to bring proceedings in relation to particular transactions which were causing us concern.
4. The regulation of the New Zealand financial markets will continue to require the active participation of self-regulating bodies such as the Stock Exchange and the Futures Exchange. There is no room for competition

between regulators. A close and candid relationship between the Exchange and the Commission is essential if market concerns are to be properly addressed. One of the surprising features of the New Zealand regulatory system is that the Stock Exchange (unlike the Futures Exchange) is under no obligation to consult with the Commission on changes to its rules or on the exercise of its disciplinary procedures. The Commission should not find itself in the position of an outsider in relation to the Exchange when it comes to deliberation of significant amendments to listing rules and the rules governing members of the Exchange or when dealing with major market irregularities. The Committees of the Exchange and the Market Surveillance Panel now have significant outside input but are still organs of an association which is established by its own members. When delicate issues are discussed affecting members' interests such as, for example, the establishment of separate protected client accounts for the holding of client monies, it is important that an independent regulatory body have substantial input.

5. I would like to see a more effective means of securing access to the Court on the part of small shareholders for appropriate orders where an opinion has been given by a lawyer under the Securities Amendment Act that a cause of action for insider trading exists. In my time as Chairman I was disturbed by the inability of minority shareholders to pursue their complaint of insider trading in the face of compromise action being taken on the part of the board of directors and the alleged insider. The Commission has since put forward proposals for the amendment of the Act and these should, in my opinion, be implemented as soon as possible.
6. I would like to see the breakdown of the barriers to the development of a Trans-Tasman market for securities. The New Zealand Commission and the ASC are both seeking to promote the development of such a market through the use of the exemption process, but there is much more work to be done, particularly at the Stock Exchange level. The absence of an effective regime for the regulation of takeovers in New Zealand remains an impediment to progress in that area. Enterprise in both countries could benefit significantly if a common capital market could be developed, with New Zealand having the most to gain, through access to a larger market.
7. My interchange with other Securities Commissions through IOSCO (the International Organisation of Securities Commissions) has confirmed to me that we have the right structure for our Commission in New Zealand, with a full or substantially full-time Chairman and nine part-time Commission members. Between them they form a committee of the marketplace representing a wide range of experience in many sectors of New Zealand commercial life. In this way the members of the Commission bring a range of skills to the deliberations of the Commission which not only make this a stimulating forum in which to work, but I believe also enhance the quality of the decisions which that body is able to make and keeps that body in close touch with marketplace realities. A Commission composed of full-time members would be insulated away from the market and also, in a small commercial environment such as New Zealand, would also have difficulty in attracting membership of sufficient calibre. I believe that New Zealand has been well served by the quality and variety of experience of those men and women who have been prepared to give time, often at peak points in their commercial careers, to the service of the Commission.

The Commission also has, I believe, the right mix of functions. By focusing primarily on regulatory and law reform issues, it avoids the difficult conflicts of interest which arise when a regulatory body is also the primary enforcement agency. As a watch dog rather than a blood hound, it is able to maintain good working relationships with most sectors of the marketplace. Those relationships are essential to the effective conduct of its regulatory functions. In addition, by leaving the registration and enforcement functions with the Registrar of Companies the Commission is able to operate with a small and focused professional staff and the Commission members and staff have been able to operate as a cohesive team in a way which is simply not possible with a larger organisation, such as the ASC.