ACQUISITION OF SHARES IS DEALING IN SECURITIES: A STUDY OF INTERACTION BETWEEN THE COMPANIES (ACQUISITION OF SHARES) CODE AND THE SECURITIES INDUSTRY CODE

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SYNOPSIS

This article is prompted by dicta in the Supreme Courts of New South Wales and of South Australia in which judicial limitations were placed on the clear and explicit words of the Securities Industry Code section 14. Section 14 provides that the Court can make orders on the application of the National Companies and Securities Commission or a stock exchange where an offence has been committed under the Securities Industry Code "or under any other law in force . . . relating to trading or dealing in securities." These words as quoted provide the foundation of this article.

In *National Companies and Securities Commission* v. *Industrial Equity Ltd*,[1] it was held by Needham J. that the Companies (Acquisition of Shares) Code is not such a law in force relating to trading or dealing in securities, and accordingly, remedies available to the Commission under section 14 of the Securities Industry Code were not available for a breach of the Companies (Acquisition of Shares) Code. Accordingly, an order under section 14 was denied to the Commission. This view was confirmed by Mitchell J. (with whom Walters J. agreed; Cox J. dissenting) in *Von Doussa* v. *Owens (No. 1)*.[2]

Section 14 is worded clearly to the contrary. It is submitted in this article that no authority exists for the judicial propositions advanced, and that these propositions unjustifiably, and indeed destructively, limit the powers of the Commission to effectively administer and supervise Australian companies and securities law. This submission is supported by a close examination of section 14 of the Securities Industry Code and of the Companies (Acquisition of Shares) Code in determining whether

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[1] (1982) A.S.L.R. 70-010, also reported at (1982) 1 A.C.L.C. 35; (1982) 6 A.C.L.R. 1; [1982] 1 N.S.W.L.R. 42.

[2] (1982) A.S.L.R. 76-013; (1982) 6 A.C.L.R. 692 and 833; (1982) 30 S.A.S.R. 367. *Von Doussa* v. *Owens (No. 2)* (1982) 30 S.A.S.R. 391.

acquisition of shares can constitute dealing in securities, or whether dealing in securities is business flavoured (as suggested in these two cases) excluding actions of a private investor. In addition, the significance of the concept "dealing" is examined and its key position in various offences under the Securities Industry Code (such as fraudulently inducing persons to deal [section 124] or insider trading [section 128]) is considered.

The Companies (Acquisition of Shares) Code does not provide for court orders of the kind set out in section 14 of the Securities Industry Code. Accordingly, the importance of establishing the cross-referencing of these laws is critical to the function of the National Companies and Securities Commission.

PART 1: ENFORCEMENT OF COMPANIES (ACQUISITION OF SHARES) CODE BY COMMISSION

The *Companies (Acquisition of Shares) Act* 1980 (Cth.) and state codes (hereafter *C.A.S.A.*) provide a code of conduct for the regulation of company takeovers involving any target company of 15 persons or more.[3] The code prohibits any acquisition of shares in a company otherwise than in accordance with the code if the acquisition would result in a person being entitled to more than 20% of the voting shares in that company[4] or if it would increase the entitlement of a person already entitled to between 20% and 90% of the voting shares[5] unless the prescribed methods of acquisition are followed.[6]

The underlying aims of *C.A.S.A.* are those set out by the Eggleston Committee in 1969, namely, to limit the freedom of action of a bidder so far as it is necessary to ensure:

> "if a natural person or corporation wishes to acquire control of a company by making a general offer to acquire all the shares, or a proportion sufficient to enable him to exercise voting control, limitations should be placed on his freedom of action so far as is necessary to ensure—
>
> (i) that his identity is known to the shareholders and directors;
>
> (ii) that the shareholders and directors have a reasonable time in which to consider the proposal;
>
> (iii) that the offeror is required to give such information as is necessary to enable the shareholders to form a judgment on the merits of the proposal and, in particular, where the offeror offers shares or interests in a corporation, that the kind of information which would ordinarily be provided in a prospectus is furnished to the offeree shareholders;

[3] *C.A.S.A.* s. 13.
[4] *C.A.S.A.* s. 11(1) and (7); *Companies (Acquisition of Shares) Bill 1980 Explanatory Memorandum*, para. 13. See, e.g. H. A. J. Ford, *Principles of Company Law*, (3rd ed., Sydney, Butterworths, 1982) para. [2008].
[5] *C.A.S.A.* s. 11(2).
[6] *C.A.S.A.* ss. 15, 16, 17.

(iv) that so far as is practicable, each shareholder should have an equal opportunity to participate in the benefits offered."[7]

These principles are echoed in at least two sections of *C.A.S.A.*; in one of these sections, section 59[8] (matters to be considered by National Companies and Securities Commission [hereafter "the Commission"] in making exemptions from Code), these guidelines were prefaced with the objects of "an efficient, competitive and informed market."[9]

To achieve these results, the Commission has a wide range of powers covering the policy and administration of company law and regulation of the securities industry, subject only to direction from time to time by the Ministerial Council.[10] In particular, the Commission has power to (a) resolve problems with which legislation cannot cope; (b) exercise adjudicative powers by way of investigations; (c) obtain information to which a court may not have access; (d) formulate policy; (e) exercise powers to measure and to control performance in the industry; and (f) propose alternatives if called for.[11]

Although specific powers are given to the Commission under the legislation comprising the co-operative scheme, the powers are to be read "in accordance with the [Formal] Agreement and shall comply in all respects with the provisions of the Agreement".[12] In particular, the Commission's powers are to be seen in the light of Recital (B) of the Formal Agreement (which appears as the Schedule to this Act) by which uniformity is to be achieved by ensuring throughout the scheme uniformity of legislation, uniformity of administration, efficiency of administration and constant attention to deficiencies in the scheme and their reform.

The Commission has been vested with specific powers under each of the Acts and Codes comprising the scheme, and it is clear that these scattered powers are cumulative with the result that powers granted under one Act/Code are to be read with powers from elsewhere in the scheme. For example, the Commission's powers under *C.A.S.A.* read alone appear modest and incomplete without amplification from powers granted in other Acts/Codes. The specific powers conferred on the Commission by *C.A.S.A.* are indeed limited: the power to approve share acquisitions (section 12(o)); the power to exempt from compliance with *C.A.S.A.* (section 57); the power to modify application of *C.A.S.A.* (section 58); the power to declare unacceptable a share acquisition or other conduct

[7] Company Law Advisory Committee, *Report to the Standing Committee of Attorneys-General on Disclosure of Substantial Shareholdings and Takeovers*, (the Eggleston Committee), Second Interim Report (1969) para. 16.

[8] See also *C.A.S.A.* s. 60 (7A).

[9] J. R. Nosworthy, "*Changes in Law and procedure on the corporate scene*" (1981) 55 A.L.J. 533, 540. In a similar vein, note Companies and Securities Industry Bill 1974 (Cth.) (hereafter "C.S.I.B.") s. 20(4).

[10] *National Companies and Securities Act* 1979 (Cth.), Schedule (the Formal Agreement), cl. 32. See, e.g. R. Baxt, H. A. Ford, G. J. Samuel and C. M. Maxwell, *An Introduction to the Securities Industry Codes*, (2nd ed., Sydney, Butterworths, 1982) para. [403].

[11] Nosworthy, op.cit. p.537.

[12] *National Companies and Securities Commission Act* 1979 (Cth.) s. 9.

(section 60); the power to make certain restraining or directing orders regarding disposition, acquisition etc. of shares (section 60A)[13] and the power to intervene in proceedings (section 61).[14] Many of these powers would be unable to be enforced without recourse to assistance from other Acts/Codes in the scheme. Accordingly, authority for enforcement of these *C.A.S.A.* powers by the Commission is granted elsewhere, such as the power to obtain information, receive assistance or seize books (under the *Securities Industry Act* 1980 (Cth.) and state codes [hereafter S.I. Code] sections 8, 9); the power to require disclosure of information (S.I.Code sections 12(3), 12(3A)); the power to investigate (S.I. Code section 13); the right to require assistance from a stock exchange (S.I. Code section 41); and, the core of this article, the power to apply to the court for certain orders under *C.A.S.A.* "or under any other law . . . relating to trading or dealing in securities" (S.I. Code section 14). Although *C.A.S.A.* section 60A gives the Commission power to make orders restraining, inter alia, disposing of shares and acquiring shares, it is only under S.I. Code section 14 that the Commission can seek an order to restrain a person from carrying on a business of dealing in securities.

PART 2: ENFORCEMENT OF COMPANIES (ACQUISITION OF SHARES) CODE BY COMMISSION UNDER SECTION 14 OF THE SECURITIES INDUSTRY CODE

This article supports the straightforward proposition that an order can be made by the Court under S.I. Code section 14 for a breach of *C.A.S.A.* because, in the words of section 14, *C.A.S.A.* is "any other law . . . relating to trading or dealing in securities." In addition, and pursuant to the definition contained in S.I. Code section 4, "dealing" is interpreted according to its plain meaning without any superimposition of a so-called "business flavour." No business flavour appears in this statutory definition. These views have been expressed by Cox J. in *Von Doussa*'s case in the following words:

> "The language of the latter definition is, in my view, apt to describe any buying or selling of securities, by any person in any circumstances and upon any scale, including, say, the buying of a small parcel of shares on an isolated occasion by a private individual for his own investment purposes."[15]

[13] Inserted by *Statute Law (Miscellaneous Amendments) Act No. 1* 1982 (Cth.) s. 133 — Compare S.I. Code, s. 35 (Power of Commission to make certain orders); Companies Code s. 311 (Power of Commission to make certain orders). See also, C. M. Maxwell, "The New takeover code and the NCSC: policy objectives and legislation strategies for business regulation" (1982) 5 U.N.S.W.L.J. 93, 102.

[14] See further Nosworthy, op.cit. p.541.

[15] *Von Doussa* v. *Owens (No. 1)*, supra p. 86, 221. See also, for example, Baxt, Ford, Samuel, Maxwell, op.cit. pp.204-5: "It is noteworthy that s. 14 is not confined to contraventions or threatened contraventions of provisions of S.I.A.: it applies also where a person has committed an offence under 'any other law . . . relating to trading or dealing in securities'." See also p.122.

Cox J. then adverted to the "business flavour" test with its resultant restricted operation of the expression "dealing", and although His Honour did not expressly state it to be wrong, he noted[16] "It has been said that the definition 'has about it a business flavour' and accordingly should be given a restricted operation." He was unable to accede to this view upon the application of ordinary principles of statutory interpretation. Indeed, Cox J. noted that no business flavour test was to be found in the section 4 definition of the expression "dealing":

> "The activities referred to in the definition are specified disjunctively and, in my respectful opinion, they do not themselves necessarily connote anything in the nature of 'a business or a profit-making venture'.[18] No doubt ordinary private investors do not commonly underwrite securities or do some of the other things described by the draftsman, but they certainly acquire securities and dispose of them and that, as it seems to me, is enough to bring them within the definition. It is true that 'dealing', the word being defined, sometimes carries with it in ordinary usage a notion of trading, frequently as a broker or other kind of middleman. However, in this case the legislature has chosen to give its own meaning to the word, for the purpose of the Securities Industry Act, and to make that meaning exhaustive."[17]

In other words, Cox J. has done no more than to acknowledge the existence of an exhaustive definition of "dealing" in the S.I. Code and has felt constrained to apply this definition. This results in the acquisition, disposition, subscription or underwriting of securities by a private investor as constituting "dealing" for the purpose of the section 4 definition of "dealing." It also leads to the conclusion that an acquisition of shares by a private investor (whether or not regulated by *C.A.S.A.*) constitutes "dealing" in securities, which must therefore be "any other law . . . relating to dealing in securities" pursuant to S.I. Code section 14(1)(a).

Cox J. also rejected the suggestion made by Needham J. that because section 14(1)(c) provides that the court can issue an order restraining a person "carrying on a business of dealing in securities", emphasis is to be placed on the "business flavour" of the section and it is to only apply to acquisition in a business context. This conclusion is not in accord with the language used in section 14. Further, it overlooks the fact that section 12 gives several powers to the court and that these are to be read distributively.[19] Most of the powers in section 14 are suitable for persons only occasionally acquiring or disposing of securities, and none of these provide any assistance to narrow "dealing" and dealing by dealers. This contention of Needham J. could only have validity if section 14(1)(c) were the only order available to the court under section 14.

[16] Ibid. citing *N.C.S.C.* v. *I.E.L.* supra p.86, 213.
[18] *N.C.S.C.* v. *I.E.L.*, supra.
[17] Ibid.
[19] *Von Doussa*'s case, supra p.86, 221.

Finally, Cox J. noted that if the legislature had intended to confine "dealing" to the activities of a "dealer", it would have made this clear. Instead, as his Honour noted, the legislature has adopted the opposite policy — "by contrast, I should say . . . [and] has imported such a business limitation into the meaning it has given to the word 'dealer' in the same Act." The expression "dealer" is expressly defined in section 4 as a person "who carries on a business of dealing in securities" or as "2 or more persons who together carry on a business of dealing in securities." It is submitted therefore that the flavour of business is nowhere to be found in S.I. Code section 14.

PART 3: THE CASES

National Companies and Securities Commission v. *Industrial Equity Ltd*

Orders were sought by the Commission in the Supreme Court of New South Wales (Needham J.)[20] to direct the completion of a takeover of the target company, Huttons Ltd.[21] In the course of a "takeover", Conquip Sales Pty Ltd (a shelf company owned by Industrial Equity Ltd [hereafter I.E.L.] carrying on no business) had acquired over 27% of the capital of the target but, upon discovery of further facts concerning the target (namely, that the financial position of the target appeared to be less secure than originally estimated), Conquip had abandoned its takeover bid. Breach of the stock exchange business or listing rules provides the basis for application to the court, and application was made by the Commission for an order to direct I.E.L. to proceed with the takeover pursuant to A.A.S.E. listing rule 3S(4).[22] The Commission submitted that the combined effect of S.I. Code section 42 and the relevant listing rule of the Sydney Stock Exchange authorised the court to order I.E.L. to comply with *C.A.S.A.* and make the takeover offer.

In addition, an order was sought pursuant to the alleged combined effect of *C.A.S.A.* section 52 and S.I. Code section 14 to restrain I.E.L. (1) "from acquiring, disposing or otherwise dealing with any securities listed

[20] Under S.I. Code s. 42 (Power of court to order observance or enforcement of business or listing rules of stock exchange), based on the *Securities Industry Act* 1975 s. 31 in force in N.S.W., Victoria, Queensland (and later, W.A.), the jurisdictions party to the Interstate Corporate Affairs Commission (1974) hereafter I.C.A.C. — *Securities Industry Act*. Corresponding legislation was enacted in S.A. in 1979.

[21] As noted by Needham J. the target company had "a nationally known motto and what is now known as a logo": *I.E.L.*, supra p. 86, 200. His Honour was referring to the motto "Home on a pig's back." This case is not the first entry of Industrial Equity Ltd. into the company law reports. See, e.g., *Re Tivoli Freeholds* [1972] V.R. 445; *Corporate Affairs Commission* v. *Industrial Equity Ltd.* [1972] 2 N.S.W.L.R. 120; *Industrial Equity Ltd.* v. *Tocpar Pty. Ltd.* [1972] 2 N.S.W.L.R. 505.

[22] Australian Associated Stock Exchange Listing Requirement 3S(4) (since deleted) of the Sydney Stock Exchange provided, inter alia, that
"a company shall not either alone or in concert with any other company or person acquire voting securities in a listed company if—
(a) the acquirer is entitled to less than 20% of those securities before the acquisition and would be entitled to more than 20% of those securities after the acquisition, or
(b) the acquirer is entitled to not less than 20% but less than 90% of those securities before the acquisition and would be entitled to a greater percentage of those securities after acquisition."

on any Australian Associated Stock Exchange" and (2) "from carrying on a business of dealing in securities for twelve months or other appropriate period."[23] It was alleged by the Commission that section 52 ("statement as to proposed takeover offers or announcements": a section to prohibit bluffing takeovers) had been breached in that a bluffing take-over had been made and that accordingly orders ought to be made under section 14(1)(c) and (d) of the S.I. Code.

The problem facing the Commission on each ground was that neither S.I. Code section 42, Stock Exchange listing rule 3S(4) nor *C.A.S.A.* section 52 (bluffing takeover bids) empower the court to make a positive direction that a takeover offer be made by a person allegedly in contravention. Rather, that person is liable only to prosecution for the offence and to imposition of the penalty prescribed. The Commission's case, therefore, was to establish that orders could be made by the court under S.I. Code section 14, especially section 14(1)(c) and (d), and for an order against offences under S.I. Code or "under any other law . . . relating to trading or dealing in securities" (i.e. *C.A.S.A.*). On this interpretation, the Commission apparently invited Needham J. to give a liberal interpretation to *C.A.S.A.* and S.I. Code so as to ensure that the purpose of the scheme should be forwarded and therefore "to be a brave spirit rather than a timorous soul."[24] His Honour took the view that he would rather just apply the ordinary principles of interpretation and that "no beneficial construction of the legislation can create a power or a remedy where none exists expressly or by necessary implication."[25]

None of these issues had to be finally decided, because in fact the purchaser of Hutton's shares was not I.E.L. but a subsidiary, Conquip Sales Pty Ltd. No suggestion was made that the purchase by Conquip was a device or a sham, or that the bona fides could be attacked, and accordingly, it was held that orders under section 42 would be inappropriate, because Conquip, on any reading, was "not a person who is under an obligation to comply with or observe the listing rules of the Sydney Stock Exchange."[26]

Because of this conclusion on the first ground of the Commission's application, its application for orders against, not Conquip, but I.E.L.

[23] *N.C.S.C.* v. *I.E.L.*, supra p.86, 206.

[24] *N.C.S.C.* v. *I.E.L.*, supra p.86, 210 citing the words of Denning L.J. (as he then was) in *Candler* v. *Crane Christmas & Co.* [1951] 2 K.B. 164, 178, where His Lordship said: "This argument about the novelty of the action does not appeal to me in the least. It has been put forward in all the great cases which have been milestones of progress in our law . . . you will find that in each of them the judges were divided in opinion. On the one side there were the timorous souls who were fearful of allowing a new cause of action. On the other side there were the bold spirits who were ready to allow it if justice so required. It was fortunate for the common law that the progressive view prevailed."

[25] *N.C.S.C.* v. *I.E.L.*, supra p.86, 210; noted by H. A. J. Ford, W. E. Paterson and H. H. Ednie, *Guide to the National Companies and Securities Scheme* (Sydney, Butterworths, 1982) para. [15]. Needham J. also left open the question of the applicability of s. 15AA of the *Acts Interpretation Act* 1901 (Cth.) to the codes. This is noted further at fn. 69.

[26] Ibid. p.86, 212, citing *Repco Ltd.* v. *Bartdon Pty. Ltd.* [1981] V.R. 1; and *Designbuild Australia Pty. Ltd.* v. *Endeavour Resources Ltd.* (1980-81) A.S.L.C. 176-003.

under S.I. Code section 14 to restrain gained significance. The decision of Needham J. that section 14 was inapplicable in these circumstances forms the basis of this article.

Von Doussa v. *Owens*

The dicta of Needham J. in the *I.E.L.* case on the interrelationship between *C.A.S.A.* and the S.I. Code were cited with approval by a majority of the Full Court of the Supreme Court of South Australia (consisting of Mitchell J., with whom Walters J. agreed; Cox J. contra). The case involved a challenge by one witness, the respondent Owens, (the then Managing Director of Advertiser Newspapers Ltd and Chairman of Directors of Television Broadcasters Ltd.), to the jurisdiction of the inspector (the applicant Von Doussa) appointed to investigate dealing in securities of Elder Smith Goldsbrough Mort Ltd, (hereafter Elders) and Petroleum Distributors Pty Ltd (hereafter P.D.) at the time of a takeover bid by The Bell Group.[27] In particular, the respondent Owens objected to certain questions put to him by the inspector on the identity and whereabouts of two overseas companies and their spokesmen which had purchased Elders' shares in the name of nominee companies allegedly to block the bid of the Bell Group. An order of the court was sought and granted under S.I. Code section 19(14)(a) to order compliance and its subsequent breach led to proceedings for contempt of court, conviction and imprisonment of the respondent Owens.[28]

One of the contentions of counsel for Owens was that the investigation was not one which could be ordered under the *Securities Industry Act* 1979 (S.A.) or the S.I. Code because that legislation was merely designed to regulate and control the business of sharebrokers and that it did not relate to the acquisition of shares by persons or companies not dealing in shares,[29] which was in turn "regulated solely"[30] by *C.A.S.A.* This contention of counsel was supported by the views of Needham J. in *N.C.S.C.* v. *I.E.L.*[31] on the definition of dealing, an opinion confirmed by Mitchell J:

> "I respectfully agree with those reasons. The definition of 'dealing' in the Companies Acquisition of Shares Code is in pari materia (in an analogous case) with that in sec. 4 of the *Securities Industry Act* except that, in the first mentioned Code, a reference is made to 'sub underwriting' as well as to underwriting securities. It is notable however that throughout that Code, where appropriate, the word 'acquisition' of

[27] The inspector, Mr. Von Doussa was appointed by the Attorney-General on 26 May 1981 under the *Securities Industry Act* 1979 (S.A.) s. 17, and was subsequently reappointed under S.I. Code s. 16 upon its coming into force on 1 July 1981. The transitions provisions are contained in *Securites Industry (Application of Laws) Act* 1981 s. 23 (Investigations), providing for the carry-over of investigations, appointment of inspectors etc. from the now-repealed *Securities Industry Act* 1979 (S.A.) to the S.I. Code s. 16.

[28] *Von Doussa* v. *Owens (No. 2)* (1982) 30 S.A.S.R. 391.

[29] *Von Doussa* v. *Owens (No. 1)*, supra pp.86, 232-86, 233.

[30] Ibid.

[31] Set out at text accompanying fnn. 41 and 84.

shares is used and not the word 'dealing' in shares. Notwithstanding the inclusion in the definition of 'dealing' in securities of acquiring, disposing of, and subscribing for securities the mere acquisition, disposition or subscription cannot, in my view, properly be described as 'dealing' in securities. The acquisition disposition or subscription may be part of a dealing.[32]

To arrive at this conclusion, Mitchell J. has overlooked the definition of "dealing" contained in section 4 of the S.I. Code, which clearly states that the expression "dealing" means, *inter alia*, "acquiring." To suggest that *C.A.S.A.* is not a law with respect to dealing overlooks the aim of *C.A.S.A.* to regulate, not all dealing in shares, but only one aspect of dealing, viz., the acquiring of shares.[33]

The view of Mitchell J. is further weakened by the presence in *C.A.S.A.* at the time of *Von Doussa's* case[34] of a definition of "dealing" (section 6), identical to that in the S.I. Code section 4. This definition was removed from *C.A.S.A.* in 1981 as a rationalisation exercise on the basis that the expression "dealing in securities" was already contained in the Companies Code.[35]

Rather than exploring the correct meaning of the expression "dealing", her Honour concerned herself with exploring the scope of the *Securities Industry Act* 1979 (S.A.) and whether or not it was "merely a statute to regulate and control the business of sharebrokers."[36] By examining the long title of this 1979 South Australian Act,[37] Her Honour was able to assert, without the support of authority, that its purview was wider than merely the control of the business practices of sharebrokers, and that it would authorise investigation into "any matters concerning dealing in securities" as set out in I.C.A.C. *Securities Industry Act* section 17 (see now S.I. Code section 16) including "any matters which concern such dealing".[38] Accordingly, Her Honour concluded the appointment of the inspector to be valid.[39]

It is submitted that the adoption of the views of Needham J. in the *I.E.L.* case were unnecessary for this conclusion, and in fact their application does not support the conclusions reached by Her Honour.

[32] *Von Doussa* v *Owens*, supra p.86, 232.
[33] J. P. Hambrook, "Dealing in securities under the companies and securities legislation: judicial sabotage and legislative counter-attack" (1982) 8 Adel.L.R. 202, 205.
[34] *Von Doussa* v. *Owens*, supra.
[35] *Companies (Acquisition of Shares) Amendment Bill (No. 2) 1981*, Explanatory Memorandum, para. 34, commenting on the removal by cl. 13 of certain definitions "having equivalents in the CB (i.e. the *Companies Bill*) . . . The share acquisition code will be incorporated into, and read as part of, the CB" as now provided for by *Companies and Securities (Interpretation and Miscellaneous Provisions) Act* 1980 (Cth.) and Codes, s. 3(1)(c). This is noted further at fnn. 55 and 113.
[36] *Von Doussa* v. *Owens*, supra p.86, 233.
[37] And noting the words of Isaacs J. in *James* v. *Cowan* (1930) 43 C.L.R. 386, 408 cited at fn. 49, that the long title "may be a useful aid in identification by assisting to ascertain the general scope of the legislation and help the interpretation." The corresponding long title from the N.S.W. Act is set out in fn. 147.
[38] *Von Doussa* v. *Owens*, supra p.86, 233.
[39] Walters J. concurring.

According to the reading of dealing by Needham J. in the *I.E.L.* case, acquiring a share (as regulated by *C.A.S.A.*) is not dealing in that share unless the dealing has a business flavour. The appointment of the investigator required him to investigate dealing in the securities of Elders and P.D. It further specified investigation of dealing in Elders' securities by A.C. Goode and Co. Nominees Pty Ltd or by an associate of this stockbroking firm. The investigator was further to enquire into the identity of any person who was at any time an associate of A.C. Goode Nominees Pty Ltd, the facts and circumstances surrounding the giving of instructions in connection with dealing in these securities, the nature of these instructions, the identity of the person giving the instructions, questions relating to funding and further questions relating to dealing in the securities of Elders and P.D. According to the reading of dealing advanced by Needham J., as supported by Mitchell J., dealing by persons otherwise than with a business flavour would fall outside the concept of "dealing" and would therefore fall outside the terms of reference of the investigator. Accordingly, because "the net was cast too widely . . . [because many of the matters specified] . . . were not matters concerning dealing in securities",[40] some of the clauses in the instrument of appointment would be invalid under the test of Needham J. This problem was adverted to by Mitchell J. but was not given the full meaning possible by her adoption of the Needham J. opinion, namely, to potentially deny the validity of the appointment of the applicant inspector because the respondent Owens was not a dealer, was not engaged in dealing (with a business flavour) and therefore on the view of Needham J. his dealing, as a private investor, would fall outside the S.I. Code. This issue was not explored in the judgment.

PART 4: COMPANIES (ACQUISITION OF SHARES) CODE IS "A LAW . . . RELATING TO TRADING OR DEALING IN SECURITIES"

It is proposed to analyse sentence by sentence the dicta of Needham J. which have prompted this article, stating at the beginning:

> "I am of opinion that the plaintiff must fail on this branch of its case because the Acquisition of Shares Code is not 'a law in force in New South Wales relating to trading or dealing in securities' — sec. 14(1)(a) Securities Industry Code . . . [His Honour later continued] . . . The subject matter of the Acquisition of Shares Code is plainly different from that of the Securities Industry Code, and I think that the phrase 'trading or dealing in securities' relates to the carrying on of that activity as a business or profit making venture. The Acquisition of Shares Code is not a law relating to such an activity."[41]

This assertion of Needham J. was expressed baldly and was unsupported by authority beyond His Honour's reading of the definition of "dealing"

[40] *Von Doussa* v. *Owens*, supra p.86, 233.
[41] *N.C.S.C.* v. *I.E.L.* supra pp.86, 212 — 86, 213.

contained in S.I. Code section 4. As discussed below, His Honour's reading of a "business flavour" test into dealing was the reason for the conclusion that *C.A.S.A.* is not a law relating to trading or dealing in securities.

These words supported His Honour's decision that no order could be made under S.I. Code section 14, as sought by the Commission, for breach of S.I. Code section 42 (power of court to order observance or enforcement of business rules or listing rules of stock exchange) or for breach of *C.A.S.A.* section 52 (statements as to proposed take-over offers or announcements [bluffing take-over offers]). In particular, this opinion rejected the Commission's application for a court order to restrain I.E.L. carrying on the business of dealing in securities (per section 14(1)(c)) and an order to restrain any dealing by I.E.L. (per section 14(i)(d)).

These dicta raise immediately the question of whether or not *C.A.S.A.* is one such "law in force . . . relating to trading or dealing in securities", as considered in the following paragraphs. It is submitted that this "destructive" view,[42] expressed without citation of authority, cannot withstand the application of any principles of statutory interpretation. One paramount rule of construction is that "every statute is to be expounded according to its manifest and express intention."[43] The function of the courts is to ascertain from the words used by the legislature exactly what the legislature has said. As Lord Simon of Glaisdale put it:

> "in the construction of all written instruments including statutes, what the court is concerned to ascertain is, not what the promulgators of the instruments meant to say, but the meaning of what they have said. It is in this sense that 'intention' is used as a term of art in the construction of documents."[44]

If the intention of the legislature is not clear, the courts may have to determine the intention of the legislature by necessary implication from the words used in the legislation.[45]

Characterisation of a statute requires the isolation and the identification of the subject matter of the statute, and this is achieved from examining not what the legislature may have intended, but from examining the exact

[42] The word used by Hambrook, op.cit. p.202.
[43] *Attorney-General (Canada)* v. *Hallett and Carey Ltd* [1952] A.C. 427, 449 per Lord Radcliffe.
[44] *Farrell* v. *Alexander* [1977] A.C. 59, 81.
[45] See e.g., *Bawn Pty. Ltd.* v. *Metropolitan Meat Industry Board* (1971) 92 W.N. (N.S.W.) 823, 842 per Mason, J.A.: "It has always been accepted that the legislative will in its enactments is to be gathered not only from what has been said expressly, but also from what appears by way of necessary implication."

terms used in order to ascertain the true meaning of the legislation.[46] Examination of the words of *C.A.S.A.* will indicate the intention of *C.A.S.A.* and where these words are precise and unambiguous, these words will explain the intention of *C.A.S.A.*[47]

In addition to interpretation of the legislation pursuant to its plain meaning, the various elements of an Act can be looked at for assistance in the interpretation of the Act and accordingly, reference can be had to such signs as the short title, the long title, the effect of a Code, parts divisions and headings and the object of the Act (if expressed). It is submitted that reference to these indicators also fails to support the dicta of Needham J. in the *I.E.L.* case.[48] Each is examined separately.

1. Short Title

Authorities conflict on the proposition that the short title of an Act can be referred to as an aid in the interpretation of the Act. Sir Isaac Isaacs put it thus in *James* v. *Cowan*:[49]

> "The title is the label which the Legislature thinks most suitable to identify the contents of the depository of its will on the given subject. It is no part of its enactment as to the 'purposes' of the Act, except as to its authoritative selection as a label. The title is no more part of the remedy designed to cope with the evil dealt with than is the label on a druggist's bottle part of the remedy for the malady intended to be cured. In case of doubt, it is a useful aid in identification by assisting to ascertain the general scope of the legislation and help the interpretation. If the operative words are ambiguous, it is often a great aid to construction to be sure of the general object of the statute. 'The title

[46] The lessons of interpretation for Australian Constitutional validity may be instructive. These are set by P. H. Lane, *The Australian Federal System* (2nd ed., Sydney, Law Book Co. Ltd., 1979), pp.105-106. Consider also the dictum of Lord Scarman in *McLoughlin* v. *O'Brien* [1982] 2 All E.R. 298, 311 on the role of the courts in the domain of policy: "the policy issue . . . is not justifiable."

[47] As recognised by Gibbs C.J. in *Cooper Brookes (Wollongong) Pty. Ltd.* v. *F.C.T.* 81 A.T.C. 4292, 4296: "The danger that lies in departing from the ordinary meaning of unambiguous provisions is that 'it may degrade into mere judicial criticism of the propriety of the acts of the legislature', as Lord Moulton said in *Vacher & Sons Ltd.* v. *London Society of Carpenters* [1913] A.C. 107, 130; it may lead judges to put their own ideas of justice or social policy in place of the words of the statute." This view is discussed by I. C. F. Spry, "The Cooper Brooks Case and statutory interpretation" (1981) 10 A.T.R. 208. The Supreme Court of the United States put it thus: "when we find the terms of a statute unambiguous, judicial inquiry is complete, except in 'rare and exceptional circumstances." *William Rubin* v. *United States* 449 U.S. 424, 66 L.Ed. 633 at 430, 638 (1981). See also R. Cross, *Statutory Interpretation*, (London, Butterworths, 1976) pp.64-65.

[48] *N.C.S.C.* v. *I.E.L.*, supra.

[49] (1930) 43 C.L.R. 386, 408.

may be looked at for aid in finding out the object.'[50] It may be used in interpreting the rest of the Act.''[51]

The short title may be colourless and of no descriptive value, or it may provide an abbreviated statement of the object of the Act in question.[52] On the one hand, the view is as expressed by Isaacs J. that the short title is no more than a label.[53] On the other hand, it can be suggested that because the short title is formally approved by the legislature, it may prove of value in assessing the scope of the legislation.[54]

Does the short title of the Companies (Acquisition of Shares) ([name of state]) Code indicate the code is designed in relation only to the acquisition of shares in companies? It is submitted that the title of the code is narrowed to acquisition only so as to accord with its purpose of the regulation of takeovers. However, the definition of ''dealing'' contained in the S.I. Code section 4[55] is stated to ''mean'' ''acquiring, disposing of, subscribing for or underwriting the securities'' and accordingly the short title indicates an Act on the subject of one only of the four meanings of dealing; in other words, the law relating to dealing in securities in relation to which court orders can be made under S.I. Code section 14.

2. Long Title

Authorities accept the proposition that the long title of an Act may be referred to as an aid to interpretation if there is any uncertainty but the long title may not contradict any clear and unambiguous language.[56] If

[50] Citing *Salmon* v. *Duncombe* (1886) 11 App. Cas. 627 at 634.

[51] Citing *Justices of Middlesex* v. *The Queen* (1894) 9 App. Cas. 757 at 772; *Vacher & Sons Ltd.* v. *London Society of Compositors* [1913] A.C. 107 at 128. This page is cited, without expression of approval or disapproval, by Neaves A., (now Neaves J. of the Federal Court of Australia) in Attorney-General's Department, *Another look at statutory interpretation*, A.G.P.S., 1982, 11.

[52] As applied in each state, the *Companies (Acquisition of Shares) Act* 1980 (Cth.) is entitled *Companies (Acquisition of Shares) (name of state) Code*. This loose usage of the title ''code'' is to be distinguished from an Act codifying and replacing a particular body of law designed to replace all existing law and to become the sole source of law such as the criminal codes in force in Queensland, W.A. and Tasmania or the Model Federal code of the American Law Institute. Indeed, the source of law governing acquisition of shares is contained in *C.A.S.A.* as well as S.I. Code, Companies Code, contract law, agency law etc. *C.A.S.A.* is not the absolute and only source of take-over law. On Codification Acts, see e.g., S. C. G. Edgar, *Craies on Statute Law* (7th ed., London, Sweet and Maxwell, 1971), pp.364-366; O. C. Pearce, *Statutory Interpretation in Australia* (2nd ed., Sydney, Butterworths, 1981), paras [183]-[185].

[53] *James* v. *Cowan* (1930) 43 C.L.R. 386, 408. This appears to be the view of Pearce, op.cit. para. [65].

[54] E.g. *Middlesex Justices* v. *Queen* (1884) 9 App. Cas. 757, 772 per Earl of Selbourne L.C.; *Fenton* v. *Thorley & Co. Ltd.* [1903] A.C. 443, 447. This view appears to have the sympathy of Sir Rupert Cross, op.cit. p.112. See also Pearce, op.cit. para. [65].

[55] The same definition with the extra meaning of ''sub-underwriting securities'' appeared under the heading ''dealing in securities'' in *C.A.S.A.* s. 6 as originally passed. It was omitted from *C.A.S.A.* by the *Companies (Acquisition of Shares) Amendment Act (No. 2)* 1981 (Cth.) (No. 94 of 1981) s. 13 on the basis that an equivalent definition appeared in the Companies Code s. 5 (Interpretation): Explanatory Memorandum, para. 34, as noted further at fnn. 35 and 113.

[56] *Von Doussa* v. *Owens*, supra p.86, 233 per Mitchell J.; Pearce, op.cit. para. [64]; Cross op.cit. p.109; Attorney-General's Department, op.cit. pp.10-11, and cases cited therein.

the meaning of the statute is clear, it cannot be limited by reference to the long title.[57] As with the short title and for the reasons advanced in the discussion above, the long title of *C.A.S.A.*, which "relates to the acquisition of shares in companies incorporated in [name of state] and matters connected therewith", indicates a law relating to one of the forms of dealing in securities as defined in "dealing" in relation to which court orders can be made under S.I. Code section 14.

3. Parts, Divisions, Headings

As with the title, signposts contained within the statute such as parts, divisions and headings may be resorted to as an aid for resolution of an ambiguity.[58] In the case of *C.A.S.A.*, the titles of the six parts clearly indicate that the Act is concerned only with various aspects of the acquisition of shares by means of take-over offers or take-over announcements, and, read in the light of the definition of dealing in S.I. Code section 4 (which includes acquiring in the definition of dealing) confirms the conclusion that *C.A.S.A.* is a law in relation to dealing in securities in relation to which court orders can be made under S.I. Code section 14.

4. Object

The words of a statute must be read in the context of the act in which they appear. As noted by the House of Lords, it may be unreal to proceed without knowing whether a provision in dispute was contained in a finance Act or in a Public Health Act.[59] An Act may contain an express statement of object to facilitate the use of general language in the Act intending it to be read in the light of the stated object.[60]

The *Companies (Acquisition of Shares) Act* 1980 (Cth.) contains the following statement of intention in section 3 under the heading "Object":

> "The object of this Act is to regulate the acquisition of shares in companies incorporated in the Australian Capital Territory and this Act has effect, and shall be construed, accordingly."[61]

This is translated to the state codes with a co-operative flavour. Section 3 (Agreement) requires that the code "be read and construed together with" the Formal Agreement[62] in relation to the co-operative scheme, and accordingly must be read in the light of that Agreement's desire for commercial certainty, efficiency of the capital markets, maintenance of investor confidence in the securities market as well as uniform, effective and Australia-wide legislation (Recital (A)). There is no suggestion in the For-

[57] See e.g., *Ward* v. *Holman* [1964] 2 Q.B. 580 per Lord Parker C.J.; Pearce, op.cit. para. [64]; Craies, op.cit. pp.193-194.
[58] See e.g. Pearce op.cit. para. [68]; Craies, op.cit. pp.207-212, Cross op.cit. p.112.
[59] *Attorney-General* v. *Prince Ernest Augustus of Hanover* [1957] A.C. 436, 473, cited by Cross op.cit. pp.48-49.
[60] See e.g., Attorney-General's Department, op.cit. pp.9-15: Objects clauses in Acts.
[61] Cf. S.I. Act and Codes s. 3, noted in Part 7, infra.
[62] This appears in the Schedule to the *National Companies and Securities Act* 1979 (Cth.).

mal Agreement to support any narrow interpretation of the expression "acquisition of shares".

Authorities on objects clauses indicate that a statement by the legislature in the operative provisions of a statute as to the object or purpose of an Act will be taken into account and will be given due weight, but at the same time, the presence of an objects clause will not be treated as dispensing with the necessity of examining the legislation in the process of statutory interpretation.[63]

5. Statutory Interpretation

It is submitted that there can be no doubts that *C.A.S.A.* is a law relating to trading or dealing in securities for various purposes including the making of court orders under S.I. Code section 14. This is most certainly confirmed by the various approaches to interpretation and presumptions usually grouped under the heading of the "non-subject"[64] of statutory interpretation. Three passages from speeches of Lord Reid in the House of Lords provide some assistance in the interpretation of legislation:

(1) "In determining the meaning of any word or phrase in a statute the first question to ask always is what is the natural or ordinary meaning of that word or phrase in its context in the statute? It is only when that meaning leads to some result which cannot reasonably be supposed to have been the intention of the legislature, that it is proper to look for some other possible meaning of the word or phrase."[65]

This combines the so-called literal and golden rules, and requires no more than examination of and compliance with the language used by parliament.

(2) "Then (in case of doubt) rules of construction are relied on. They are not rules in the ordinary sense of having some binding force. They are our servants, not our masters. They are aids to construction, presumptions or pointers. Not infrequently one 'rule' points in one direction, another in a different direction. In each case we must look at all relevant circumstances and decide as a matter of judgment what weight to attach to any particular 'rule'."[66]

Examination of the "relevant circumstances" of *C.A.S.A.* confirms the obvious, that *C.A.S.A.* is a law with respect to the acquisition of shares, and that acquisition of shares is dealing in securities for the purposes of the S.I. Code. Application of the literal approach, as so forcefully adopted

[63] Attorney-General's Department, op.cit. p.14 and cases cited therein.
[64] Lord Wilberforce *H.L. Debates*, cited by Cross, op.cit. p.29.
[65] *Pinner* v. *Everett* [1969] 3 All E.R. 257, 258, cited by Cross, op.cit. p.29: As the Supreme Court of the United States put it: "When we find the terms of a statute unambiguous, judicial inquiry is complete, except in 'rare and exceptional circumstances'." *Rubin* v. *United States* 449 U.S. 424, 430 (1981), and cases cited therein.
[66] *Maunsell* v. *Olins* [1975] A.C. 373, 382, cited by Cross op.cit. p.29.

by the High Court in tax cases through the 1970's and early 1980's[67] confirms that *C.A.S.A.* is a law with respect to the acquisition of shares in companies. Application of the mischief rules and the four tests advanced in its founding case in 1584[68] leads to the conclusion that *C.A.S.A.* was designed to regulate acquisition of shares in companies. Application of the purposive rule[69] confirms the object of the Act as set out in section 3, namely, that *C.A.S.A.* is a law "to regulate the acquisition of shares", and that because to acquire is one of the four defined meanings of dealing, *C.A.S.A.* is clearly a law relating to trading or dealing in shares.

(3) "It is a cardinal principle applicable to all kinds of statutes that you may not for any reason attach to a statutory provision a meaning which the words of that provision cannot reasonably bear. If they are capable of more than one meaning, then you can choose between those meanings, but beyond that you must not go."[70]

This third quotation from Lord Reid is advanced to rebut the proposition advanced by Needham J. It is submitted that the limitations on the clear

[67] E.g. *F.C.T.* v. *Westraders Pty. Ltd.* 80 A.T.C. 4357, 4358 per Barwick, C.J.: "The function of the Court is to interpret and apply the language in which the Parliament has specified those circumstances (i.e. to pay tax). The Court is to do so by determining the meaning of the words employed by Parliament according to the intention of the Parliament which is discoverable from the language used by the Parliament. It is not for the Court to mould or to attempt to mould the language of the statute so as to produce some result which it might be thought the Parliament may have intended to achieve, though not expressed in the actual language employed."

[68] The mischief rule was set out in *Heydon's* case (1584) 3 Co. Rep. 7a, 7b; 76 E.R. 637, 638 as follows (Coke's Notes and references omitted):
"And it was resolved by them, that for the sure and true interpretation of all statutes in general (be they penal or beneficial, restrictive or enlarging of the common law), four things are to be discussed and considered:—
1st. What was the common law before the making of the Act.
2nd. What was the mischief and defect for which the common law did not provide.
3rd. What remedy the Parliament hath resolved and appointed to cure the disease of the commonwealth.
And 4th. The true reason of the remedy; and then the office of all the judges is always to make such construction as shall suppress the mischief, and advance the remedy and to suppress subtle inventions and evasions for continuance of the mischief."
See e.g., Craies, op.cit. pp.96-98. More recent applications of this principle include *Ward* v. *R.* (1980) 29 A.L.R. 175, 193 (High Court). *Black-Clawson International* v. *Papierwerke Waldhof-Aschaffenburg AG* [1975] A.C. 591 (House of Lords). See further Attorney-General's Department, *Another look at statutory interpretation*, A.G.P.S., 1982, pp.2-8.
The mischiefs aimed at by *C.A.S.A.* were first legislated for in the uniform *Companies Acts* 1961-62, Part VIB. Prior to 1961-62, offers of acquisition could be made without notice to the company; offers could be made for specific parcels only. As set out in the Explanatory Memorandum accompanying the Companies (Acquisition of Shares) Bill 1980, "the policy of the proposed code . . . is aimed at regulating acquisitions by a person who holds between 20% and 90% of the voting shares of a company . . ." (para. 9) and "there will be a basic prohibition on any acquisition of shares in a company, otherwise than in accordance with the code . . ." (para. 13).

[69] Note that *Acts Interpretation Act* 1901 (Cth.) s. 15AA, added in 1981, applies to *C.A.S.A.* (i.e. to the Commonwealth Act). Section 15AA reads: "In the interpretation of a provision of an Act, a construction that would promote the purpose or object underlying the Act (whether that purpose or object is expressly stated in the Act or not) shall be preferred to a construction that would not promote that purpose or object." As noted by Needham J. in the *I.E.L.* case, supra p.86, 210: "A nice question could then arise as to whether that Act (i.e. the *Interpretation Act*) applied to the provisions of the New South Wales *Companies Act* which are incorporated into the Acquisition of Shares Code."

[70] *Jones* v. *Director of Public Prosecutions* [1962] A.C. 635, 668, cited by Cross, op.cit. p.29.

words of S.I. Code section 14, that it applies to "any other law . . . relating to trading or dealing in securities" have taken these clear and unambiguous words beyond their limits and have broken the judicial boundary between interpretation and amendment.[71]

A code relating to acquisition of shares cannot, on any interpretation, be characterised as excluding trading or dealing in shares under the S.I. Code. The definition of dealing contained in the S.I. Code includes acquiring as one of the four definitions of dealing without anything in the sense of a course of business or a transaction by a professional dealer. Accordingly, action under S.I. Code sections 14 and 16 extends to any conduct involving securities carried on by any person, whether private, institutional or professional investor, dealer or anyone else. This is the plain meaning and catches conduct under *C.A.S.A.*, the S.I. Code, the Companies Code as well as criminal and civil law (such as fraud or negligence).[72]

PART 5: DEFINITION OF "DEALING"

It is the contention of this article that the acquiring of shares, as regulated by *C.A.S.A.*, is also a dealing in relation to securities as regulated by the S.I. Act and Codes. The definition of "dealing" contained in the S.I. Code section 4 supports this straightforward proposition. Plain language is used in the definition and it contains no apparent ambiguities in or convolutions of expression. Moreover, the definition contains nothing of a "business flavour"; there is not any requirement that dealing be carried out by a "dealer" (as also defined in section 4) nor is there any regularity or course of business test.[73] An acquisition of shares, even in a once-off transaction is clearly a "dealing" as defined, and this results in the proposition that *C.A.S.A.* can be included, with no torture of language, in the class of laws in force "relating to trading or dealing of securities" contained in section 14 of S.I. Code. The explicit definition of dealing reads as follows:

> "'dealing', in relation to securities, means (whether as principal or agent) acquiring, disposing of, subscribing for or underwriting the securities, or making or offering to make, or inducing or attempting to induce a person to make or to offer to make, an agreement—
>
> (a) for or with respect to acquiring, disposing of, subscribing for or underwriting the securities; or
>
> (b) the purpose or purported purpose of which is to secure a profit or gain to a person who acquires, disposes of, subscribes for or underwrites the securities or to any of the parties to the agreement in relation to the securities."[74]

[71] The distinction advanced by Cross, op.cit. p.32.

[72] In addition, jurisdiction is conferred on the court and the Trade Practices Commission under the *Trade Practices Act* 1974 (Cth.) for offences involving trading or dealing in securities. The Small Claims Tribunals of each jurisdiction could also hear claims in this area up to the level of its jurisdiction.

[73] As discussed by Needham J. in *N.C.S.C.* v. *I.E.L.*, supra p.86, 213.

[74] Almost identical to the I.C.A.C. *Securities Industry Act* 1975 s. 4 definition; there are minor differences to the C.S.I.B. definition contained in s. 3 (Definitions).

There is no authority on the exact limit of this definition beyond the prophetic dicta of Anderson J. of the Supreme Court of Victoria on the almost identical definition appearing in the *Securities Industry Act* 1975 (Vic.). His Honour noted that this definition "is involved and comprehensive and it may extend further, but I am not concerned to explore its limits. A restraint on 'dealing' involves a restraint on all those matters mentioned in the definition."[75] In this case, an order was made under the *Securities Industry Act* 1975 (Vic.) section 12 (substantially identical to S.I. Code section 14) to restrain "dealing" in securities; as it transpired, the respondent did carry on business as a financier, and his dealing did have a business flavour. He was not, however, licensed as a "dealer", or otherwise authorised under the legislation.

The code itself distinguishes "dealing" from the more specific "business of dealing in securities";[76] "dealing", as defined, and in everyday language, contains no business connotation. This definition is clearly aimed at any transactions involving securities as well as at persons who carry on the business of dealing in securities. The Code's distinction between "dealing" in securities and the business of dealing in securities also results in the proposition that dealing in securities, otherwise than as a business, does not give rise to the necessity of a dealer's licence under section 43. As section 43 puts it, "(a) persons shall not carry on the business of dealing in securities" without being licensed. In other words, a person can deal without being a dealer, and an isolated dealing in securities as well as occasional and unconnected dealings would not fall within the concept of a "business of dealing in securities".[77]

The definition of "dealing" for the purposes of the co-operative scheme was taken from substantially the same definition contained in the I.C.A.C. *Securities Industry Acts*, which was in turn originally modelled on the definition contained in the comparable U.K. legislation, the *Prevention of Fraud (Investments) Act* 1958 (U.K.).[78] In its first part headed "Provisions for Regulating the Business of Dealing in Securities", the U.K. Act distinguished "dealing in securities" from the business of dealing in securities.[79] As with the S.I. Code, and the equivalent legislation, this

[75] *Waldron* v. *Auer* [1977] V.R. 236, 243.

[76] E.g. S.I. Code ss. 43, 44, 71(1)(a). Is this why s. 552 (share hawking) is retained in the Companies Code? Is it not rendered obsolete by ss. 43 and 44 of the S.I. Code?

[77] Baxt, Ford, Samuel and Maxwell, op.cit. p.203.

[78] 6 and 7 Eliz. 2, c. 45.

[79] Section 26 (Interpretation)
"'dealing in securities' means doing any of the following things (whether as a principal or as an agent), that is to say, making or offering to make with any person, or inducing or attempting to induce any person to enter into or offer to enter into—
(a) any agreement for, or with a view to acquiring, disposing of, subscribing for or underwriting securities or lending or depositing money to or with any industrial and provident society or building society, or
(b) any agreement the purpose or pretended purpose of which is to secure a profit to any of the parties from the yield of securities or by reference to fluctuations in the value of securities,
and 'deal in securities' shall be construed accordingly."

distinction is made by the requirement of obtaining a dealer's licence by, not any person dealing in securities, but by a person who carries on "the business of dealing in securities".[80] (In this regard, C.S.I.B. also made clear that a person can carry on the business of dealing in securities whether or not licensed.)[81] Similarly, both S.I. Code and the U.K. statute provide for exemptions from licensing for certain dealers depending on the nature of transactions carried out by that person.[82]

The S.I. Code often uses expressions analogous to "dealing" without any reference to a business flavour. For example, "trading", the counterpart of dealing, as expressed in S.I. Code section 14, is used in the code in a manner similar to that of "dealing". A plain reading of the language used indicates that "trading" as used in, for example, S.I. Code section 40 (Power of Commission to prohibit trading in particular securities) or S.I. Code section 124 (False trading and market rigging) has no business flavour or course of business connotation. Definitions of "trading" are not restricted to any course of business test. For example, Dixon J. noted in the *Bank Nationalisation* case that "it has been said that 'trade' strictly means the buying and selling of goods. That, however, is a specialised meaning of the word. The present primary meaning [of the word] is much wider."[83] The general non-business reference to "trading" in S.I. Code section 14 is in contrast to S.I. Code section 64, which requires in respect of a "transaction of sale or purchase of securities" (a neutral expression) the issue by a dealer of a contract note: the business flavour of section 64 is expressed in the language of the section itself.

PART 6: AN ACQUISITION OF A SHARE IS A "DEALING" IN THAT SHARE

> "The plaintiff submitted that 'acquiring' a share in a company was, in accordance with the definition, 'dealing' in that share. Such a conclusion is, on its face, unreasonable, and I think the definition would need to be more precise to require it to be drawn."[84]

These words of Needham J. followed his Honour's citation in full of the definition of "dealing" contained in S.I. Code section 4 as discussed above. Contrary to this judicial opinion, it is submitted that "acquiring" a share in a company, as regulated by *C.A.S.A.*, constitutes a "dealing" in securities as defined in the S.I. Code for the purposes of S.I. Code section 14. It is submitted that the contention of the Commission is fully in accord with the plain language of the S.I. Code and of *C.A.S.A.*, and

[80] S.I. Code ss. 43-4; *Prevention of Fraud (Investments) Act* 1958 (U.K.) s. 1.
[81] C.S.I.B. cl. 4. A dealer in securities was to be licensed under cl. 66.
[82] S.I. Regulations, Reg. 26 (Exemptions from licensing) made under authority of S.I. Code s. 150; *Prevention of Fraud (Investments) Act* 1958 (U.K.) s. 16(2). An example is the issue of a prospectus.
[83] *Bank of New South Wales* v. *Commonwealth* (1948) 76 C.L.R. 1, 381.
[84] *N.C.S.C.* v. *I.E.L.*, supra pp.86, 212-86, 213.

that *C.A.S.A.* is, as required by S.I. Code section 14, "any other law . . . relating to trading or dealing in securities".

1. Is Acquisition of Shares Dealing in Shares?

This proposition was stated by Needham J. to be "unreasonable",[85] yet section 4 of that S.I. Code clearly states that "dealing" is defined to "mean" inter alia acquiring securities. On any reading of this section 4 definition, an acquisition of securities is one of the four enumerated meanings of dealing. The legislature's definition of "dealing" contains the exhaustive "means" rather than the enlarging "includes" and excludes other possible meanings from the expression "dealing." The definition in section 4 is therefore explanatory and prima facie restricted to the words enumerated.[86]

2. "Dealing": Ordinary Meaning

Interpretation of section 14 ("dealing in securities") according to its ordinary meaning indicates that an acquisition of shares is a dealing in shares. As defined by the *Oxford English Dictionary* (1969 ed.), "dealing" means, *inter alia*, "trading, trafficking; buying and selling."[87] The verb "to deal" is defined, *inter alia*, as "an act of dealing or buying and selling; a business transaction, bargain." Although some of these definitions could involve regularity of conduct, none necessarily imparts any business flavour into an expression meaning buying and selling.

3. "Dealing": Legal Meaning

Deal and dealing occur frequently in legislation, and it is not possible to carry any one specific technical legal meaning into "dealing" as appearing in the S.I. Code. For example, deal and its derivatives occur frequently in legislation as an action expression.[88] The expression "dealing" has received specific definition in various cases. For example, in 1848, Alderson B. noted "I take it that the strict definition of 'dealing' is 'distributing'. A Dealer is one who distributes."[89] Another old authority, bringing dealing back to the dictionary definition, stated that a dealer is one who trades, buys or sells.[90]

[85] *N.C.S.C.* v. *I.E.L.*, supra p.86, 213.

[86] On "means" v. "includes", see, e.g., Craies, op.cit. pp.212-214; Cross, op.cit. pp.103-104; Pearce, op.cit. para [133]. See further *Von Doussa* v. *Owens*, supra p.86, 221 per Cox J.

[87] This definition is footnoted in the *Oxford English Dictionary* as follows:
"*1664* Evelyn Kal. Hort. (1729) 234. Such as would not be impos'd upon, will find the best Ware and Dealing at Brumpton Park.
1868 Rogers Pol. Econ iii (ed. 3) 22. Where dealings are transacted on a large scale, it is not difficult for commodities to be exchanged against commodities."

[88] According to one computerised legal data base comprising all Commonwealth legislation, to "deal with" occurs 196 times.

[89] *Allen* v. *Sharp* (1848) 17 L.J. Ex. 209, 212, where the issue was whether a person was "a horse-dealer" for taxation purposes. Section 5 of 29 Geo. 3, c. 49 defined "a horse-dealer" to be one who seeks his living by "buying and selling" horses.

[90] *Berks County* v. *Bertolet* 13 Pa. 552 (1850). The issue was whether a mill owner was liable to tax as a "dealer."

In addition, "dealing" has a specific meaning in various areas of law such as bankruptcy[91] and Torrens title land law.[92] To "deal" in narcotics is another use of the expression. In *R.* v. *Hooper*,[93] the Supreme Court of New Zealand felt unable to accept the contentions of the Crown that dealing had any business flavour, and specifically rejected the view that dealing has any meaning of "carrying on business" for the purpose of the *Narcotics Act* 1965 (N.Z.). Indeed, this view is consistent with that advanced in this article.

PART 7: THE DEFINITION OF "DEALING" DOES NOT HAVE A BUSINESS FLAVOUR

The extract from *N.C.S.C.* v. *I.E.L.* which opened the previous part of this article was followed by these words:

> "The definition [i.e. of "dealing"] has about it a business flavour. That flavour is emphasised by sec. 14(1)(c), where the Court, 'in the case of persistent or continuing breaches of the Code or any other law in force in New South Wales relating to trading or dealing in securities' may restrain a person 'from carrying on a business of dealing in securities'. Such an order would be inapt where a person had breached a provision of the Acquisition of Shares Code by, for example, purchasing a number of shares in excess of that permitted."[94]

The opinion of Needham J. just discussed, that acquiring a share did not constitute a dealing in that share, was followed by the two sentences quoted above. These sentences contain the business flavour test discussed by his Honour. The effect of this business flavour test is to confirm the view that a private investor acquiring shares could never be the subject of court orders under S.I. Code section 14, or would be immune from many sections in the securities scheme dependent on (often) one-off transactions or dealings.[95]

It is submitted that the contention of this article, namely that to acquire is to deal (as defined with S.I. Code) is supported by the S.I. Code itself.

[91] E.g. *Bankruptcy Act* 1966 (Cth.) ss. 134(h), 153(3), 189(3); "to realize or otherwise deal with:" ss. 228(3), 230(2), 233(3), 238(3), 240(2), 249(5). See further *In re a Debtor (No. 3 of 1909); Ex parte Goldstein* [1917] 1 K.B. 558 (dealings of a debtor); *Halesowen Presswork & Assemblies Ltd.* v. *Westminster Bank Ltd.* [1971] 1 Q.B. 1 ("dealings" in bankruptcy).

[92] E.g. *Real Property Act* 1900 (N.S.W.), s. 3 "dealings" – Any instrument other than a grant or caveat which is registrable or capable of being made registrable under the provisions of this Act . . ."; "s. 31 B(2): The Register shall be comprised of – . . . (b) dealings . . ."

[93] [1975] 2 N.Z.L.R. 763.

[94] *N.C.S.C.* v. *I.E.L.* supra p.86, 213.

[95] Limitations to various sections imposed by this reading of "dealing" are discussed at Part 9.

1. Object of *Securities Industry Act* 1980 (Cth.) and Codes

Although the wording of section 3, the object section of the *Securities Industry Act* 1980 (Cth.) and the Securities Industry Codes, varies,[96] the essence of each statute is to provide for regulation of the securities industry. It is submitted that an acquisition of shares, even on a one-off basis cannot but involve the securities industry. To be involved in the securities industry does not require a regular course of business and does not import any business flavour test. Any definition of security includes shares as one class.[97] The ready transferability of shares is one key feature of a public company.[98]

Moreover, the Explanatory Memorandum accompanying the Securities Industry Bill 1980 indicates that the S.I. Act and codes are "based on the Security Industry Acts of the 4 (sic) States which are parties to the Interstate Corporate Affairs Commission."[99] The I.C.A.C. *Securities Industry Act* also stated its object in its long title without any business flavour as "An Act to consolidate and amend the law with respect to the regulation and control of *trading* in securities . . ." (italics added). As Needham J. noted in *I.E.L.*, "'Trading' is not defined in the Code and its meaning is clear enough."[100] It requires no more than to buy and/or to sell and does not involve a course of conduct.

2. Prior Definitions of "Dealing"

As discussed in Part 5 supra, these are conclusive in favour of construction of the expression "dealing" according to ordinary concepts. To deal means to buy and sell according to ordinary concepts and prior case law definitions, and accordingly the rule enunciated by Griffith C.J. in *D'Emden* v. *Pedder*[101] would be applicable. In the words of Griffith C.J.: "When a particular form of legislative enactment which has received authoritative interpretation, whether by judicial decision or by long course of practice, is adopted in the framing of a later statute, it is a sound rule of construction to hold that the words so adopted were intended by the legislature to bear the meaning which had been so put upon them."[102]

3. "Dealing" v. "Dealer"

The straightforward application of the *expressio unius est exclusio alterius* rule (the express mention of one person or thing is the exclusion of another) suggests that "dealing" is to be read without implication of any requirement that dealing be conducted by a "dealer" (as defined in S.I. Code

[96] As with *C.A.S.A.* s. 3, noted at fn. 61, s. 3 of the Commonwealth Act states a specific object of "to regulate the securities industry", whereas s. 3 of the S.I. Code contains a co-operative flavour and is linked to the objectives of the co-operative scheme as set out in the Formal Agreement.

[97] E.g. S.I. Code, s. 4, definition of "security".

[98] Cf. proprietary company, as specified in Companies Code s. 34(1)(a).

[99] *Securities Industry Bill 1980 Explanatory Memorandum*, para. 10.

[100] *N.C.S.C.* v. *I.E.L.*, supra p.86, 212.

[101] (1904) 1 C.L.R. 91.

[102] Ibid. p.110. See also, e.g., *Webb* v. *Outrim* [1907] A.C. 81, 89.

section 4 with a "carrying on a business" requirement). The exclusion of "dealer" from the "dealing" definition expressly excludes any business flavour requirement.

Moreover, if, as suggested by Needham J., "dealing" had a dealer connection, it is submitted that this connection would have been expressly included. By expressly excluding "dealer" from "dealing", the legislature has opened "dealing" to include the transactions of the ordinary investor and any other non-business person.

By contrast, *C.A.S.A.* does make explicit its application to all persons, natural or corporate and is expressed to extend to "acts done or omitted" (unlimited scope).[103] It is submitted the same policy is applicable to the S.I. Code.

4. Disjunctive Reading of the *Securities Industry Act* 1980 (Cth.) and Codes

In the opinion of Needham J. the business flavour of the definition of dealing is enhanced by the remedy open to the court under sub-section 14(1)(c). This sub-section, as already noted, provides that the court can make an order restraining a person from carrying on a business of dealing in securites etc. Certainly sub-section 14(1)(c) is business flavoured in providing for penalties directed at dealers, investment advisers, dealers' representatives and investment representatives. Sub-section 14(1)(e) is similarly business flavoured in providing for the appointment of a receiver of the property of a dealer.

However, the orders provided for in section 14 are specified disjunctively and do not call for a conjunctive reading.[104] They are not expressed conjunctively with an "and"; rather section 14(1) states that the court may "make one or more" of the orders enumerated. As noted by Cox J. in *Von Doussa's* case, the sub-section 14(1)(c) order is the kind of order that might be made in the case of an offending stockbroker, and it would indeed be relevant in interpreting the expressions "trading" and "dealing" if that were the only order which could be made upon proof of breach of the section.[105] The section however, invests several other powers in the court including the power to restrain a person from buying or selling particular securities which can clearly be made in the case of any person who trades or deals in securities, whether professional dealer or small investor. By applying the various powers of the court in section 14 in a distributive way according to the circumstances, nothing is cast upon the meaning of the word dealing so as to create any trace of a business flavour.

[103] *C.A.S.A.* s. 10, as did the uniform *Companies Act* 1961, s. 180B.

[104] Only in extreme circumstances can the conjunctions "and" and "or" be interchanged: Pearce, op.cit. paras. [34], [35]; Cross, op.cit. pp.88-89.

[105] In *Von Doussa* v. *Owens*, supra p.86, 224, Cox J. actually referring to the I.C.A.C.—S.I.A. predecessor of s. 14(1)(c), viz., s. 12(1)(c), which is in substantially identical terms.

PART 8: SECURITIES INDUSTRY CODE IS CROSS-REFERENCED TO COMPANIES (ACQUISITION OF SHARES) CODE

The dicta of Needham J. opening the previous part of this article were followed by the assertion that the S.I. Code would not refer to *C.A.S.A.* "in a roundabout manner":

> "In any event, it seems, even in the context of this legislation, absurd that the Securities Industry Code would refer to the Acquisition of Shares Code, which came into operation at the same time as it did, in such a roundabout manner. While the draftsman seems to have had a penchant for obscuring relatively simple concepts, I find it impossible to accept that, if he had wanted to add a reference to the Acquisition of Shares Code, he would have done so in such an oblique manner. I think the reference [i.e. to 'trading or dealing in securities' in S.I. Code s. 14] is a 'catchall' provision and is not one to the Acquisition of Shares Code."[106]

These words confirm the opinion expressed earlier in the judgment to the effect that *C.A.S.A.* and the S.I. Code are "complex, maze-like and full of convoluted cross-reference."[107]

It is suggested that these words fail to appreciate the interconnections in the legislation comprising the co-operative companies and securities scheme. They also run contrary to basic principles of statutory interpretation requiring the interpretation of a statute by other statutes. When Acts are so far related as to form a subject or a code of legislation on the same, not merely a similar subject matter, it is accepted that such Acts "are to be taken together as forming one system, and as interpreting and enforcing each other."[108] This principle was also stated by Lord Mansfield that "where there are different statutes *in pari materia*, though made at different times, or even expired and not referring to each other, they shall be taken and construed together as one system and as explanatory of each other."[109]

The co-operative companies and securities scheme is both interconnected according to these principles of statutory interpretation as well as by express provision within the scheme. The cross-referencing may at first sight appear to be roundabout, but it is effective in providing for a uniform legislative package of both Commonwealth and state legislation on the subject of regulation of companies and securities. Explicit cross-referencing takes place by at least the following three methods.

(1) The Formal Agreement specifically provides for uniformity of legislation, uniformity of administration and the minimum of procedural requirements in the scheme legislation throughout the Commonwealth and

[106] *N.C.S.C.* v. *I.E.L.*, supra p.86, 213.
[107] Ibid. p.86, 199.
[108] *R.* v. *Palmer* (1784) 1 Leach 352, 355; 168 E.R. 279, 280.
[109] *R.* v. *Loxdale* (1758) 1 Burr. 445, 447; 97 E.R. 394, 395. Each is cited in Craies, op.cit. p.134. See also Cross, op.cit. p.128-128.

the states of Australia.[110] For example, section 3 of the S.I. Code provides that the Code shall be read and construed together with both the Formal Agreement of 22nd December 1978 as well as the *Securities Industry (Application of Laws) Act* 1981 (of each State) and the *Companies and Securities (Interpretation and Miscellaneous Provisions) Act* 1981 and codes.

(2) All the scheme legislation is to be read subject to the one interpretation Act, the *Companies and Securities (Interpretation and Miscellaneous Provisions) Act* 1980 (Cth.) and corresponding state codes. For the purpose of interpretation, each of the Acts/codes in the scheme is called a "relevant Act/Code"[111] and is therefore subject to the interpretations offered by this Act/code.

(3) Specific cross-referencing is contained in the scheme legislation. For example, the *Companies (Acquisition of Shares) Act* 1980 (Cth.) states in section 5 that it "shall be read as one" with the *Companies and Securities (Interpretation and Miscellaneous Provisions) Act* 1980 (Cth.) and with the *Companies Act* 1981 (Cth.). Section 5 is transferred to the acquisition codes. As noted in the *C.A.S.A. Explanatory Memorandum* (1980), "this will ensure that the proposed code will operate in the context of the existing companies legislation and regulations."[112]

Examples are given of expressions used in *C.A.S.A.*, but not defined therein, which will have the meanings assigned to them under the Companies Code. These include "officer in default", "related corporation", "subsidiary", "voting share." Other provisions of companies legislation were also noted by this Explanatory Memorandum to apply to *C.A.S.A.* These include such matters as registration provisions and the admissability of documents (Companies Code section 31) and regulations prescribing important trivia such as size of paper etc. (Companies Regulations, Regulation 7). As part of a statutory rationalisation, certain definitions were removed from *C.A.S.A.* in 1981 on the basis that they had equivalent definitions in the Companies Code.[113]

C.A.S.A. section 6 expressly defines some expressions used in *C.A.S.A.*, such as "company" and "prescribed occurrence", to be those defined in the Companies Code. Similarly, certain concepts from the Companies Code, such as "exempt dealer" or "prescribed interest" (as incorporated

[110] *National Companies and Securities Commission Act* 1979 (Cth.), Schedule (Formal Agreement), recital (B).

[111] Section 3 of the *Companies and Securities (Interpretation and Miscellaneous Provisions) Act* 1980 (Cth.) provides that for the purposes of the Act, the following Acts are included as "relevant Acts": the *National Companies and Securities Commission Act* 1979 (Cth.); *C.A.S.A.*; and any Act containing a "relevant application provision". These are found in the Companies Code s. 4(a) and the S.I. Code s. 3.

[112] Para. 21.

[113] *Companies (Acquisition of Shares) Amendment Bill (No. 2) 1981 Explanatory Memorandum*, para. 34, introducing cl. 13, which deleted from *C.A.S.A.* such definitions as "dealing in securities", "director", "executive officer", "expert", "marketable securities", "nominee corporation", "officer", "prescribed interest" and "securities". This is noted further at fnn. 35 and 55.

into the S.I. Code definition of "security") are incorporated into section 4, the interpretation section of the S.I. Code.

The effect of *C.A.S.A.* section 5 can be illustrated as follows. Appeals to the Court from decisions of the Commission are set out in Companies Code section 537 and S.I. Code section 134; appeals to the Court from Commission decisions under *C.A.S.A.* are not expressly stated in *C.A.S.A.* but would lie under the Companies Code provision because of the cross referencing section 5 of *C.A.S.A.*[114]

The S.I. Code provides for disclosure to the Commission of certain breaches of, *inter alia*, *C.A.S.A.*, under S.I. Code section 12(3A)(d) and (e). Section 12(7) of the S.I. Code expressly states that information concerning acquisition of shares to be disclosed to the Commission includes an acquisition caught by *C.A.S.A.* Therefore to interpret the S.I. Code or *C.A.S.A.*, a reader will have to go beyond the actual words of those enactments. In the words of four commentators: "The result is that . . . readers of [*C.A.S.A.*] will find it necessary to refer to, or take into account, all the foregoing sources of information."[115] Indeed, this does confirm the dicta of Needham J. that this cross-referencing is "roundabout" and it is most certainly "oblique."[116] It certainly confirms the proposition advanced in this paper that court orders can be made under S.I. Code section 14 for any contraventions of *C.A.S.A.* on the basis that the two codes overlap, and that *C.A.S.A.* is just one law relating to trading or dealing in securities.

PART 9: FURTHER SIGNIFICANCE OF THE DEFINITION OF DEALING

Several sections of the S.I. Code are only applicable if there has been "dealing" in securities. The use of "dealing" in these sections is unqualified and is not connected to the activities of a "dealer."[117] If the narrow view of "dealing" as expressed by Needham J. in the *I.E.L.* case[118] were applied, these provision of the S.I. Code woud have to be read down, contrary to their express language, to apply to "dealings" by business dealers with the result that the operation of the S.I. Code, a code "relating to the securities industry", would be of limited application to only professional dealers in securities. This runs against the language of the code and is illustrated by the absence in any of the sections using the

[114] As confirmed by Baxt, Ford, Samuel, Maxwell, op.cit. p.42.

[115] H. A. J. Ford, W. E. Paterson, H. H. Ednie and F. J. O. Ryan, *Guide to the National Companies and Securities Scheme* (Sydney, Butterworths, 1982) pp.13-14, repeating their words in W. E. Paterson, H. H. Ednie and H. A. J. Ford, *A Guide to the National Scheme and Revised Companies Bill 1980* (Sydney, Butterworths, 1980, p.13.

[116] *N.C.S.C.* v. *I.E.L.*, supra p.86) 213.

[117] The sections based on dealings by dealers are not affected by the dicta of Needham J. and are not discussed in this Part. See, e.g. S.I. Code s. 132 (Dealings by employees of holders of licences); S.I. Code s. 83 (Power of Court to restrain dealings with dealer's bank accounts).

[118] *N.C.S.C.* v. *I.E.L.*, supra.

word "dealing" of anything resembling a "business flavour." "Dealing" appears in the following sections:

1. Disclosure of Dealings to Commission

The Commission has the authority to require the disclosure from various parties of information regarding securities. The sub-sections distinguish the parties from whom disclosure is required, with section 12(1) requiring a "dealer" to disclose details of "any acquisition or disposal of securities", whereas under section 12(3A), the Commission may require of company officers and other persons information concerning "any dealing in relevant securities."[119]

Section 12 is based on I.C.A.C. — *Securities Industry Act* section 9, a section applying only to dealers, recognised dealers (i.e. in other participating states), an authorised trustee and various other trustees. In contrast, the equivalent section of the Corporations and Securities Industry Bill 1974 (Cth.), section 263, gave the Commission power to obtain information, documents and evidence with no limitations. It was not applicable to a "dealer" only and gave the Commission power over "a person", undefined and therefore of full application.

The addition of section 12(3A) to the Act in 1981,[120] requiring disclosure by company officers and other persons of, *inter alia*, "any dealing in relevant securities", indicates that section 12 is intended to affirm and clarify the authority of the Commission and its responsibility for investigation over all securities. The section recognises that dealing is carried on by persons other than the professional and business personnel specified in sections 12(1) to (3).

2. Restrictions on Dealing in Securities by Commission Staff

The scheme legislation recognises that dealing can be carried on by non-dealers. Restrictions are imposed on dealing in securities by staff of the Commission under the *National Companies and Securities Commission Act* 1979 (Cth.)[121] as well as on staff of each of the local authorities under the *National Companies and Securities Commission (State Application) Acts* of each jurisdiction.[122] As noted by Cox J. in *Von Doussa* v. *Owens*,[123] the policy underlying the predecessor to these sections[124] is surely applicable to any transaction of this kind by any employee, "no matter how

[119] S.I. Code, s. 12(3A)(g)(1).

[120] By *Securities Industry Amendment Act (No. 1)* 1981 (Cth.) s. 10 (Disclosure to Commission). As explained in the Explanatory Memorandum accompanying Securities Industry Amendment Bill 1980, this section is one of those by which the "N.C.S.C. will be given additional powers to obtain information concerning any dealing in securities" (para. 24).

[121] Section 48(1)(a)-(c), (Restrictions on dealings in securities). Consistent with C.S.I.B., cl. 38 (Dealings in securities subject to investigation); cl. 124 (Prohibition of dealings in securities by government employees).

[122] *National Companies and Securities Commission (State Provisions) Act*, s. 16 (Restrictions on dealings in securities).

[123] *Von Doussa* v. *Owens*, supra.

[124] I.C.A.C. — *Securities Industry Act* s. 14.

occasional or unbusinesslike it may be."[125] His Honour advanced this section as one example of how one can be "dealing" without being a "dealer."

3. Investigations

Two sections of the S.I. Code authorise investigations. Investigations into possible offences under the code, or fraud, or "an offence against any other law with respect to dealing in securities" is authorised by S.I. Code section 13 (Investigation of certain matters).

In addition, Part II Division 2 of the S.I. Code headed "Investigations",[126] provides twenty one sections dealing with formal investigations under an inspector. This Part incorporates the system of control and allocation of powers set out in Part III of the Formal Agreement appended to the *National Companies and Securities Act* 1979 (Cth.).[127] Each class of investigation is in some way reliant on there being a "dealing in securities"; hence the interpretations afforded "dealing" by Needham J. would effectively limit dealing to business dealing and would therefore prevent the Commission investigating securities. Orders made under the S.I. Code section 13 or section 16 are those enumerated in section 14 and "dealing" in those sections is "pivotal"[128] to the application of these provisions.

4. Market Rigging and False Information

In addition to the sections using the expression "dealing", there are other provisions in Part X of S.I. Code (Trading in Securities) which proscribe an activity, such as market rigging[129] or disseminating false information,[130] which may be constituted by a single transaction.[131] If the business flavour test gained currency, it could be applied here to limit these offences to transactions by dealers. As they stand, an offence under the provisions mentioned could be committed in a once-off transaction by any person, dealer or otherwise.

5. Fraudulently Inducing Persons to Deal in Securities

Section 126 of the S.I. Code,[132] which prohibits the fraudulent inducing of a person to "deal in" securities would have little effect if it could not apply to a single transaction. Such a fraudulent inducing would be unlikely

[125] *Von Doussa* v. *Owens*, op.cit., 86, 222.
[126] Identical to I.C.A.C. — *Securities Industry Act* s. 11; S.I. Act, Explanatory Memorandum, para. 48.
[127] Cf. I.C.A.C. ss. 16-26; *Securities Industry Act Explanatory Memorandum*, para. 52 et.seq. Note Formal Agreement, cll. 16-18; note also overlaps with Companies Code Part VII "Special Investigations"
[128] Hambrook, op.cit. p.202.
[129] S.I. Code s. 124; I.C.A.C. — *Securities Industry Act* s. 109; C.S.I.B. cl. 119.
[130] S.I. Code s. 125; I.C.A.C. — *Securities Industry Act* s. 110; C.S.I.B. cl. 121.
[131] As noted in *Von Doussa* v. *Owens*, supra p.86, 222 per Cox J. citing *Ryan* v. *Triguboff* (1976) C.L.C. 40-245; [1976] 1 N.S.W.L.R. 588.
[132] Headed "Fraudulently inducing persons to deal in securities". Based on I.C.A.C. — *Securities Industry Act* s. 111; cf. C.S.I.B. cl. 121; *Prevention of Fraud (Investments) Act* 1958 (U.K.) s. 13.

to lead the victim to engage in a course of conduct of dealing and would be most likely committed on a once-off basis. However, on the reading of Needham J. an offence involving dealing would not be committed unless dealing (with a business flavour) were involved. This would exclude from the section the fraudulent inducing of the private investor to deal in securities.

6. Insider Trading

Similarly, the narrow interpretation of "dealing", to mean only business dealing, would severely curtail the operation of section 128, the section prohibiting insider trading.[133] As noted by Cox J. in *Von Doussa's* case, section 128 is designed to enforce a high standard of commercial morality.[134] There is no indication that section 128 does not apply to such people as, say, company employees in possession of inside information. To limit section 128 to only stockbrokers and other such dealers would be inconsistent with the express words of section 128. This, however, would be the result of the interpretation of dealing offered by Needham J. in the *I.E.L.* case.[135]

PART 10: ENFORCEMENT BY COMMISSION OF SECURITIES INDUSTRY CODE AND CASA

1. Benefits to Commission of S.I. Code section 14

A wide range of law enforcement is envisaged by S.I. Code section 14 in a manner consistent with the functions placed on the Commission by the Formal Agreement, namely, the "responsibility for the entire area of policy and administration with respect to company law and the regulation of the securities industry."[136] Very wide powers are needed by the Commission for the execution of this task and indeed the very wide powers given to the Commission are scattered through numerous sections in the co-operative companies and securities scheme.[137] These various powers come to a head in section 14 (Power of court to make certain orders).

Section 14 is a wide section authorising the court to make various orders where a person has committed, or is about to commit, an offence under the S.I. Code (such as contravention of conditions of a dealers licence or breach of the business or listing rules of a stock exchange)[138] and any other securities law.[139] The language of section 14 does indicate the section is not applicable to the S.I. Code alone, and can be correlated with the

[133] Based on I.C.A.C. — *Securities Industry Act* s. 112; cf. C.S.I.B. cl. 123.
[134] *Von Doussa* v. *Owens*, supra p.86, 222.
[135] *N.C.S.C.* v. *I.E.L.*, supra.
[136] Formal Agreement, clause 32.
[137] E.g. Power of Commission to intervene in proceedings: Companies Code s. 540; *C.A.S.A.* s. 61; S.I. Code s. 148.
[138] See further S.I. Code s. 42, based on I.C.A.C. — *Securities Industry Act* s. 31.
[139] Such as misrepresentation, breach of *C.A.S.A.* (as advanced in this article).

intention expressed in other sections of the Code where application to the Code alone is intended and stated.[140]

Under S.I. Code section 14 the Commission or a stock exchange can apply to the Court[141] for various orders under the widely defined circumstances set out in section 14(1)(a) and (b):

> "Power of court to make certain orders
> Section 14(1) Where—
> (a) on the application of the Commission, it appears to the Court that a person has committed an offence under this Code, or under any other law in force in [name of state] relating to trading or dealing in securities, or has contravened the conditions or restrictions of a licence or the business rules or listing rules of a stock exchange or is about to do an act with respect to trading or dealing in securities that, if done, would be such an offence or contravention; or
> (b) on the application of a stock exchange, it appears to the Court that a person has contravened the business rules or listing rules of the stock exchange."

Six orders can be made by the Court pursuant to section 14 (without prejudice to orders it could make under any other law) including an order to restrain dealing in securities and an order declaring a contract relating to securities to be void or voidable. These orders are as follows:

> "(c) in the case of persistent or continuing breaches of this Code, or of any other law in force in [name of state] relating to trading or dealing in securities, of the conditions or restrictions of a licence, or of the business rules or listing rules of a stock exchange — an order restraining a person from carrying on a business of dealing in securities, acting as an investment adviser or as a dealer's representative or investment representative, or from holding himself out as so carrying on business or so acting;
> (d) an order restraining a person from acquiring, disposing of or otherwise dealing with any securities that are specified in the order;
> (e) an order appointing a receiver of the property of a dealer or of property that is held by a dealer for or on behalf of another person, whether on trust or otherwise;
> (f) an order declaring a contract relating to securities to be void or voidable;
> (g) for the purpose of securing compliance with any other order under this section, an order directing a person to do or refrain from doing a specified act;
> (h) any ancillary order deemed to be desirable in consequence of the making of an order under any of the preceding provisions of this subsection."

Of special relevance to the Commission, as the regulator of the securities industry, is the order under section 14(1)(c), namely, the order to restrain

[140] E.g. s. 147 (Power of court to prohibit payment or transfer of moneys, securities or other property); s. 149 (injunctions): "Where a person has engaged . . . in any conduct that . . . would constitute an offence against this Code."

[141] "Court" is defined in the *Companies and Securities (Interpretation and Miscellaneous Provisions) Act* 1980 (Cth.) and codes as the Supreme Court of the relevant state or territory.

a person being exposed to the public and carrying on "a business of dealing in securities, acting as an investment advisor" etc. Under the predecessor to section 14, the section was often relied upon to restrain persons carrying on the business of dealing in securities without a licence.[142] Section 14(1)(c) and (d) were relied upon by the Commission in the *I.E.L.* case and, providing the basis of this paper, their applicability was rejected by Needham J. on the ground that an acquisition of shares, as regulated by *C.A.S.A.*, could not be covered by section 14, a section said to relate only to the business of dealing in securities.[143]

There is a dearth of case law on the predecessor to section 14, (section 12 of I.C.A.C. *Securities Industry Act* 1975). It is submitted this does not indicate section 14 to be unworkable; rather, it is no doubt a function of the policy lying behind the administration of companies and securities law in the former participating states of the Interstate Corporate Affairs Commission. For example, some hesitation was indicated by the Courts in the cases that did surface, such as reluctance on the part of the Court to appoint a receiver.[144]

This attitude was and still is reflected in the code where the requirement is stated that the court shall, before making an order under section 14(1), satisfy itself that the order would not unfairly prejudice a person.[145]

The interrelationship of the various statutes making up the co-operative companies and securities scheme has been adverted to without qualification by various authorities.

2. Application of S.I. Code section 14 to Breaches of the Companies Code

Unlike the powers of the Court created by other sections in scheme legislation, the powers of the Court under section 14 relate to offences under the S.I. Code as well as "under any other law . . . relating to trading or dealing in securities." This has already been noted by commentators to give the court powers under the S.I. Code applicable to securities provisions of the Companies Code.[146] Accordingly, breaches of various Companies Code sections such as section 108 (Criminal liability for untrue statement or non-disclosure in prospectus), section 552 (Restriction on offering shares, debentures, etc. for subscription or purchase), section

[142] Namely, I.C.A.C. — *Securities Industry Act* 1975 s. 12. See, e.g., *Waldron* v. *M.G. Securities A/asia Ltd* [1975] V.R. 508; (1971-1979) Australian Securities Law Cases 75-014; (1974) C.C.H. Company Law Cases 40-108; *Waldron* v. *Auer* [1977] V.R. 236; (1971-1979) Australian Securities Law Cases 75-018; (1977) A.C.L.C. 40-314; *Commissioner for Corporate Affairs* v. *Nut Farms of Australia Pty Ltd* (1980) A.S.L.R. 76-002; (1980) A.C.L.C. 40-642. Under the English equivalent, see *Rex* v. *Hamid* [1945] 1 K.B. 540. See generally, C.C.H. *Australian Securities Law Reporter*, 1-875.

[143] *N.C.S.C.* v. *I.E.L.*, supra p.86, 213.

[144] E.g. *Waldron* v. *M.G. Securities A/asia Ltd.* [1975] V.R. 508, 535; *Commissioner for Corporate Affairs* v. *Nut Farms of Australia Pty. Ltd.* (1980) A.C.L.C. 140-642 at 34, 267-34, 268.

[145] S.I. Code s. 14(2), based on I.C.A.C. *Securities Industry Act* s. 12(2).

[146] E.g. Ford, op.cit. para. [1316]; Baxt, Ford, Samuel, Maxwell, op.cit. pp.122; 204-205.

563 (false or misleading statements) or section 564 (false reports) would be actionable under the S.I. Code section 14 as an alternative or in addition to remedies provided in the Companies Code.

3. Application of S.I. Code section 14 to Breaches of the S.I. Code

Section 14 is central to the effective administration of the S.I. Code. It gives the Commission, or a stock exchange, power to apply to the court for an order enforcing the Code, or any other law relating to trading or dealing in securities. This section is placed in Part II ("Administration"), Division 1 (General) and its enforcement is augmented with sections like section 8 (Power of Commission to require production of books), section 9 (Power of magistrate to issue warrant to seize books), section 12 (Power of Commission to require disclosure from dealers, company officers etc.) and the power to investigate (section 13). Section 14 is further augmented by sections appearing in Part XI ("Miscellaneous") of the Code, viz. sections 136 (Preservation of records for 5 to 7 years), section 137 (Prohibition of concealment of books), section 138 (falsification of records), section 140 (Obstruction of Commission) etc.

The purpose of the code is the regulation of the securities industry.[147] To that end the legislation's aim of fairness, honesty and disclosure in the industry is encouraged by the proscribing of certain conduct by offences policed *inter alia* by section 14. Accordingly, the Commission or a stock exchange can apply to the court under section 14 for orders where breaches of the code, or any other law relating to trading or dealing in securities, have taken place or may take place. Orders under section 14 would be relevant to restrain etc. such offences as the making of false or misleading statements (section 125), fraudulently inducing a person to deal in securities (concealment) (section 126), dissemination of information about illegal transactions (section 127) and insider trading (section 128). The remedies under section 14, in addition to the more obvious restraints on dealing etc. in securities (enumerated in section 14), "could"[148] or "could possibly"[149] include the power to apply to the court to have contracts involving any of these matters relating to securities declared void or voidable. In this regard, section 14 is augmented by sections such as section 130 (provision of compensation for loss sustained by any person under section 128) and section 149 (power of court to grant an injunction).

Section 14 also supports the licensing provisions of the code contained in Part IV (Licences — sections 43-62). Contravention or a threatened contravention of licence conditions as to activities or financial structure, for example, may lead to an order being made under section 14. In addition,

[147] Cf. I.C.A.C. — *Securities Industry Act* 1975, "An Act to consolidate and amend the law with respect to the regulation and control of trading in securities, the licensing of persons dealing in securities and the establishment and the administration by stock exchanges of fidelity funds." Cf. text accompanying fn. 37.

[148] Baxt, Ford, Samuel, Maxwell, op.cit. p.222.

[149] Ford, op.cit. p.252.

section 14 permits the making of an order restraining a person carrying on the business of dealing in securities (section 14(1)(c)) as well as the appointment of a receiver of the property of a dealer, or of the property of a dealer held "for" another person whether on trust or otherwise, and indeed the court will think hard about appointing a receiver if such will unfairly prejudice a person.[150]

Section 14 of the S.I. Code also gives the Commission and a stock exchange authority to apply to the Court to ensure the observance of stock exchange business or listing rules. Section 42(2) of the S.I. Code confirms that a listed company is under an obligation to observe the listing rules of the stock exchange.[151] The business rules provide information concerning numerous matters as set out in section 38(2). These business rules are to be approved by the Commission. Similarly, the listing rules, as set out in section 4, are those relating to admission etc. to the stock exchange official list, and the activities and conduct of corporations admitted to the list. Section 42 provides for the power of the Court to order observance or enforcement of the business or listing rules; this section is enlarged by section 14. The order under section 42 is limited to an order giving directions concerning compliance with, observance or enforcement of, or the giving effect to the listing rules. This power is therefore augmented by the powers in S.I. Code section 14, which enlarges the power of the court to include for example persons not affected by a section 42 order (upon notice by the Court under section 14(3)). Moreover, the scope of orders which can be made under section 14 greatly exceeds those available under section 42.

4. Companies (Acquisition of Shares) Code section 45: Orders Where Prohibited Acquisitions Take Place

In contrast to the S.I. Code, *C.A.S.A.* does not contain an armory of enforcement sections. Its main concern is the setting up of procedures to be followed in the case of acquisition of over 20% shareholding. The main enforcement provision in *C.A.S.A.* is contained in section 53, which provides that contravention of the Code is an offence punishable by a fine of $2500 or imprisonment (6 months) or both.[152] In addition, *C.A.S.A.* gives the Commission powers to declare an acquisition of shares or other conduct to be unacceptable by instrument in writing (section 60), or by an instrument in writing published in the Gazette (section 60A).

Rather than aiming at regulation on a broad scale, as does the S.I. Code, *C.A.S.A.* is limited to the one aspect of the securities business, viz. the acquisition of shares. In addition to the sections mentioned, *C.A.S.A.* provides for various restraining orders (where there has been a breach of

[150] As noted at fn. 144.
[151] Based on s. 31 of the I.C.A.C. — *Securities Industry Act* 1975.
[152] An offence punishable by imprisonment for a period not exceeding six months is punishable summarily: *Companies and Securities (Interpretation and Miscellaneous Provisions) Act* 1980 (Cth.) and Codes, s. 35.

C.A.S.A.) affecting the acquirer's enjoyment of shares. Sections 45 to 49 contain provisions dealing with the powers of each Supreme Court[153] to make orders where acquisitions prohibited by *C.A.S.A.* take place (section 45),[154] where offers are not dispatched pursuant to a Part A statement (section 46) or where rights under a take-over scheme or take-over announcement require protection (section 47). Section 45 underlies the operation of sections 46 and 47 in that section 46 authorises the Court, on the application of the Commission, to make one or more of the orders referred to in section 45(1) and/or order that a Part A statement be forwarded to accompany the offer already dispatched. Further, the nine orders which can be made by the Court under section 47[155] to protect rights under a take-over scheme or announcement are those of section 45 augmented by section 47(1)(a) (an order directing an offeror to supply information to shareholders in the target company) and sections 47(1)(b) (an order directing a person to meet the requirements of *C.A.S.A.*).[156]

[153] Ibid. s. 9 (Definitions): "Court" means the Supreme Court of the relevant state or territory.

[154] Loosely based on uniform *Companies Act* 1961 s. 180R, which appeared as cl. 256 of C.S.I.B. but more exactly modelled on uniform *Companies Act* 1961 s. 69N (powers of court with respect to defaulting substantial shareholder): *C.A.S.A. Explanatory Memorandum*, para. 145.

[155] Orders to protect rights under take-over schemes or announcements Section 47. (1) Where a Part A statement relating to offers under a take-over scheme has been served on a target company or a take-over announcement has been made, the Court may, on the application of the Commission, the offeror, the on-market offeror, the target company or any person who holds shares in the target company or held shares in the target company at the time when the Part A statement was so served or the take-over announcement was made, if the Court is satisfied that a provision of this Act has been contravened or has not been complied with, make such orders as it thinks necessary or expedient to protect the rights of a person affected by the take-over scheme or take-over announcement (including a person who is the holder of non-voting shares in, or renounceable options or convertible notes granted or issued by, the target company), including, but without limiting the generality of the foregoing, one or more of the following orders:

(a) an order directing the offeror, the on-market offeror or the target company to supply to the holders of shares in the target company such information as is specified in the order;

(b) where a person has failed to do an act or thing that he was required by this Act to do — an order directing that person to do that act or thing within such time as is specified in the order, notwithstanding that the time specified in this Act for the doing of that act or thing has expired;

(c) an order restraining the exercise of any voting or other rights attached to any shares;

(d) an order restraining the disposal of, or of any interest in, shares in the target company;

(e) an order directing the disposal of, or of any interest in, shares in the target company;

(f) an order directing the company not to register the transfer or transmission of shares;

(g) an order cancelling a contract, arrangement or offer relating to the take-over scheme or take-over announcement;

(h) an order declaring a contract, arrangement or offer relating to the take-over scheme or take-over announcement to be voidable;

(j) for the purpose of securing compliance with any other order made under this section, an order directing a person to do or refrain from doing a specified act.

[156] i.e. *C.A.S.A.* s. 47(1)(c) approximates *C.A.S.A.* s. 45(1)(b); s. 47(1)(d) approximates s. 45(1)(a); s. 47(1)(e) approximates s. 45(1)(d); s. 47(1)(f) approximates s. 45(1)(e); s. 47(1)(g) approximates s. 45(1)(c), (f); s. 47(1)(h) approximates s. 45(1)(c); s. 47(1)(j) approximates s. 45(1)(g).

Very useful orders can be made under section 45 on the application of the Commission or the company, a member of the company or the person from whom the shares were acquired, but although wide-ranging, they do not include the power to restrain the conduct of an offender as does section 14 of the S.I. Code. The orders available under section 45 are as follows:

"Orders where prohibited acquisitions take place
Section 45(1) Where a person has acquired shares in a company in contravention of section 11 the Court may, on the applicaion of the Commission, the company, a member of the company or the person whom the shares were acquired, make one or more of the following orders:

(a) an order restraining the person who acquired the shares from disposing of, or of any interest in, the shares or such of the shares as are specified in the order;
(b) an order restraining the exercise of any voting or other rights attached to the shares or such of the shares as are specified in the order;
(c) an order directing the company not to make payment, or to defer making payment, of any sum or sums due from the company in respect of the shares or such of the shares as are specified in the order;
(d) an order directing the disposal of, or of any interest in, the shares or such of the shares as are specified in the order;
(e) an order directing the company not to register the transfer or transmission of the shares or such of the shares as are specified in the order;
(f) an order that any exercise of the voting or other rights attached to the shares, or such of the shares as are specified in the order, be disregarded;
(g) for the purpose of securing compliance with any order referred to in any of the preceding paragraphs, an order directing the company or any other person to do or refrain from doing a specified act."

5. Overlap S.I. Code section 14 and *C.A.S.A.* section 45

Although *C.A.S.A.* section 45 and S.I. Code section 14 overlap in part,[157] section 14 contains two definite advantages for the Commission (or for a stock exchange). The first is that provided by section 14(1)(c), the ability to apply to the court for "an order restraining a person from carrying on a business of dealing in securities" etc. to thereby withdraw a person

[157] Width of s. 14:

S.I. Code	*C.A.S.A.*	Comment
s. 14(1)(c)	N/A	to restrain a person dealing
s. 14(1)(d)	s. 45(1)(a), (b), (c)	s. 14 wider: s. 45 limited to disposing only
s. 14(1)(e)	N/A	appointment of receiver
s. 14(1)(f) approximates	s. 45(1)(d), (e)	under S.I. Code, securities contract void or voidable; *C.A.S.A.*: an order for disposal or non-registration of shares
s. 14(1)(g)	s. 45(1)(f), (g)	ancillory orders, and *C.A.S.A.*
s. 14(1)(h)		s. 45(1)(f) order re voting could include an order under S.I. Code s. 14(1)(g).

from the market and to prevent his continuation of trading. In contrast, *C.A.S.A.* remedies tend to be directed at the enjoyment of shares, such as orders to restrain a person disposing of shares or voting.

Secondly, only the S.I. Code enables the Commission to actually put a dealer out of business by the appointment of a receiver of the property of a dealer or of property held by a dealer on behalf of another person (section 14(1)(e)).[158] This section is however limited to "dealers" as defined in section 4 and by definition is inapplicable to the dealings of a non-professional investor. Perhaps section 14(1)(e) should be amended by deletion of the narrowly encompassed expression "dealer" and replacement with the more realistic "person dealing", which would ensure catching a person dealing as in, for example, *Von Doussa* v. *Owens*.[159]

Being tied to only breaches of *C.A.S.A.*, section 45 is unavailable to restrain trading or dealing in securities as is S.I. Code, section 14. Section 45(1)(a), although comparable to S.I. Code section 14(1)(d), provides for an order restraining a person who acquired shares in breach of *C.A.S.A.* only from disposing of them. This is in marked contrast with the wider object of section 14(1)(d), which provides for an order restraining "acquiring, disposing of or otherwise dealing with any securities." To that extent, section 14(1)(c) covers three times the ground of section 45(1)(a).

Various other benefits attach to S.I. Code section 14 which are absent from section 45. Section 14 also provides for the making of interim orders (section 14(1A)); for the imposition of penalties for failure to comply with an order (section 14(6)); and for the rescinding, variation and discharge of orders (section 14(8)). It also provides that no undertaking as to damages can be awarded, (section 14(1B)), and that a court order is not unfairly to cause prejudice (section 14(2)).[160] Section 45 contains none of these provisions; it does, however, provide for some manoeuvre in section 45(3), viz., that inadvertent contravention may be raised and that the Court may refrain from making an order if there has been inadvertent contravention.[161]

PART 11: THE EFFECTIVENESS OF SECTION 4(1A) OF THE SECURITIES INDUSTRY CODE

With the *I.E.L.* case and *Von Doussa's* case[162] adding to the plain meaning of "dealing" a business flavour apparently rendering the expression applicable to only dealers and professional investors, the legislature has responded with the addition of a new sub-section to section 4 (the interpretation section) of the S.I. Code. Section 4(1A), inserted into the Code in 1982,[163] is designed to provide guidance in the meaning of dealing. It reads as follows:

[158] S. 14(1)(e) is to be read with 14(4) and (5).
[159] *Von Doussa* v. *Owens*, supra.
[160] Cf. C.S.I.B. cl. 258 (1).
[161] As with C.S.I.B. cl. 257.
[162] *N.C.S.C.* v. *I.E.L.*, supra; *Von Doussa* v. *Owens*, supra.
[163] *Statute Law (Miscellaneous Amendments) Act (No. 1)* 1982 (Cth.) s. 208.

> "Where a person is, for the purpose of the Companies (Acquisition of Shares) [name of state] Code, taken to acquire shares in a company, the person shall, for the purposes of the definition of 'dealing' in subsection (1), be taken to acquire those shares."

As noted by the editors of the C.C.H. *Australian Securities Law Reporter*,[164] "It seems fairly clear that this provision was designed to overcome the apparent limitation in section 14 exposed by *N.C.S.C.* v. *Industrial Equity*." Section 4(1A) appears not to have been in force at the time of *Von Doussa's* case.

In fact, does section 4(1A) overcome the problems raised by the *I.E.L.* case, namely, whether *C.A.S.A.* is a "law . . . relating to trading or dealing in securities" for the purpose of S.I. Code section 14, and, whether the acquisition of shares is "trading or dealing in securities" for the purposes of S.I. Code section 14? Section 4(1A) of the S.I. Code states that when a person acquires shares, the acquisition (as regulated by *C.A.S.A.*) shall be deemed to be dealing for the purposes of the S.I. Code.

Firstly, it must be remembered that the device of "deeming" (or, as in section 4(1A), "shall . . . be taken to") whereby meaning is added to a word, is a statutory fiction and that care must be taken to ensure that both the extended meaning and the natural meaning are distinguished and applied as appropriate.[165] In other words, the ordinary meaning of dealing will not necessarily be taken away by section 4(1A) extending the meaning of "acquiring." Accordingly, in principle the meaning of acquire for the purposes of *C.A.S.A.* is to be taken to be a dealing for the purposes of the S.I. Code, subject to the limitations of any deeming clause.

It is submitted that section 4(1A) is unlikely to have the effect of making *C.A.S.A.* "a law with respect to dealing in securities" for the purposes of the S.I. Code. Indeed four problems can be highlighted under section 4(1A):

(1) Section 4(1A) only deems an acquisition of *shares* to be dealing under the S.I. Code. "Share" has received a narrow definition under S.I. Code section 4 to *mean* "share in the share capital of a body corporate." It does not include other securities of a wider class as enumerated two definitions above in the S.I. Code under the definition of "securities." A similarly expansive definition is that contained in *C.A.S.A.* section 47(2), where "shares" for the purposes of that section are defined to include securities of classes wider than shares alone. If section 4(1A) is to provide for full cross-referencing between *C.A.S.A.* and the S.I. Code, it is submitted it should not be narrowed to shares alone.

(2) Section 4(1A) provides for cross-referencing only where there is an acquisition of shares. This means that the other facets of the "dealing" definition in S.I. Code section 4 (namely, disposing of, sub-

[164] C.C.H. *Australian Securities Law Reporter*, p.1604.
[165] See, e.g. Pearce, op.cit. para. [61]; Craies, op.cit. p.214.

scribing for or underwriting securities) are not deemed to be dealing for the purposes of the S.I. Code. Hence *C.A.S.A.* is still not triggered by section 7 beyond acquisition of shares (the acquisition of a relevant interest, as defined in section 9) and accordingly disposing, subscribing or underwriting, if caught by *C.A.S.A.*, will not be deemed to constitute dealing for the purpose of the S.I. Code.[166]

(3) Furthermore, because disposing of securities, which may be relevant under *C.A.S.A.* (as the opposite of acquiring shares) is not caught by section 4(1A), the application of the S.I. Code to conduct under *C.A.S.A.* will be limited only to acquiring of shares by a business investor and therefore all the sections of the S.I. Code requiring a dealing (as noted in Part 9, supra) will not apply to the non-business investor because of the precedents of the *I.E.L.* case[167] and *Von Doussa* v. *Owens*.[168]

(4) It is doubtful whether section 4(1A) actually overrides the restricted definition of dealing given by Needham J. in the *I.E.L.* case, as confirmed by *Von Doussa* v. *Owens*. Insofar as section 4(1A) states that acquiring shares under *C.A.S.A.* is to be taken to constitute dealing, is dealing to be read narrowly with a "business flavour" as advanced in those cases? As the law stands, dealing does not mean buying and selling by any investor but means instead "the carrying on of (trading or dealing in securities) as a business or profit making venture."[169] Section 4(1A) has not altered this position.

PART 12: CONCLUSION

In view of the limitations of S.I. Code section 4(1A), it is submitted that it may be open to the Commission to restrain dealing in securities by the instigation of an investigation under the Companies Code. Section 291 (Investigations) is another section clearly intended to catch any affairs of a corporation.[170] This section is wide in its ambit, and there is no reason to exclude from "the affairs . . . of a corporation" transactions in shares by third parties. An order could be made to restrain dealing in shares — by professional dealer or otherwise — in the course of a section 291 inspection.

This section is raised as an alternative for the Commission because the current status of S.I. Code section 14 appears to indeed be limited as a result of the case law discussed in this article. Rather than having the wider application to all laws "relating to trading or dealing in securities"

[166] Hambrook, op.cit. p.207.
[167] *N.C.S.C.* v. *I.E.L.*, supra.
[168] *Von Doussa* v. *Owens*, supra.
[169] *N.C.S.C.* v. *I.E.L.*, supra p.86, 213. Compare *Von Doussa* v. *Owens*, supra p.86, 222 per Cox J.
[170] Companies Code, s. 291: "Where it appears to the Minister that it is in the public interest . . . that an investigation be carried out into the affairs . . . of a corporation, the Minister may . . . direct the Commission to arrange for the investigation into the affairs . . . of that corporation." Based on *Uniform Companies Act* 1961, s. 170.

intended by the words of the section, section 14 has been limited by the *I.E.L.* case[171] to actions only under the S.I. Code involving professional dealers. This reading would therefore prevent the Commission applying for orders in relation to the actions of a private investor which may or may not be caught by *C.A.S.A.*

To overcome this limitation, amendments could be made to the co-operative scheme by at least one of three methods:

(1) the addition of the equivalent of S.I. Code section 14 to *C.A.S.A.*
(2) the modification of the words "any other law . . . relating to trading or dealing" to ensure that *C.A.S.A.* is interpreted as one such law.
(3) the modification of *C.A.S.A.* section 45(1)(a) by the addition of the word "dealing" to ensure that an order could be made to restrain dealing in shares.

Whereas any of these alternatives would achieve the purpose of section 14 of the S.I. Code, it is regrettable that legislative action should be necessary to bring the law in section 14 back to where it stood before the pronouncement of the dicta limiting its scope which have formed the basis of this article.

[171] *N.C.S.C.* v. *I.E.L.*, supra.