# WANTED: A REAL LAW

## COMPANIES ACT IS NO PROTECTION

*by NICK WRIGHT*

***Existing company law cannot be applied to property trusts, according to studies by Securities Institute committees. There may be a need for specific legislation.***

In late 1983 Stockland Trust made a takeover offer for Stocks and Holdings Property Trust. The offer and response to it were made as far as possible in accordance with the Companies (Acquisition of Shares) Code. To the writer's knowledge this was the first of only two takeover offers for listed unit trusts, though there have been many changes in management and control since.

A recent example is the struggle for control of NZI-Brick Securities Property Trust. In this instance an old-fashioned bidding match took the market price of the units to $2 from a low for the year of 85 cents. Few unitholders would have received the higher prices and few are likely to, because the takeover code is now held not to apply to unit trusts.

There have been no court decisions to this effect and no policy statements from the NCSC of which the writer is aware. Yet the CACs have not attempted to intervene and have not given even an impression of trying to referee some of the recent battles for control of listed unit trusts. The Companies Act does not apply to unit trusts.

However, in the Stockland/Stocks and Holdings case, and the QBE Insurance/ Equitable Property Trust takeover in 1984, the NSW Corporate Affairs Commission took an active interest in proceedings and, although the Code did not apply to the offers, there was an impression that sanction of some sort might be applied if there was not reasonable adherence.

Further, the NCSC, in its 1987 Property Trusts Draft Policy Statement, makes several references to the Companies Act. For example, auditors must "comply with the provisions laid down for auditors of companies in Part VI of the Companies Act and Codes, *as if the trust undertaking were a company* (my emphasis). Or again, the accounts which are forwarded to unit holders must include statements on "all matters that would be required to be shown in accounts under the Companies legislation if the property trust were a company subject to the legislation, *with such adaptations as are necessary*." (Again, my emphasis.)

So it would seem that the NCSC is adopting conflicting positions. On the one hand, it is requiring trust managements and trustees to comply with the Companies Act in some matters. On the other, it is not attempting to apply the Code to regulate takeover activity. Strategies reminiscent of 1970s-style dirty tricks in the takeover game are being dusted off for use in struggles to control property trusts.

The takeover Code does not fit well with unit trusts. For one thing a trust does not have directors to make a recommendation to unitholders. Does the manager or the Trustee make the recommendation? And who appoints the independent expert? In one instance in which Mullens & Co. gave independent advice neither the manager nor the trustee would make a

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recommendation, and it was left to Mullens & Co. to do so.

Nevertheless, it cannot be said that accounting standards, even "with such adaptations as are necessary", suit unit trusts either.

We have already seen the NCSC refuse to intervene where a company has bid for a unit trust (Oilmet for Sydney Japan Investment Trust and Sydney Tokyo Investment Trust). Would it intervene if the roles were reversed, and, if so, what is the fundamental difference?

Since the beginning of 1986 there have been 11 instances of 20 per cent or greater holdings in listed property trusts being accumulated without a formal takeover offer. (This is equivalent to 50 per cent of the property trusts listed at that date.) In each instance the object appears to have been to gain control of the management rather than the assets, which are protected, being held by trustees. Usually the prices paid for units have been not so far below net tangible asset value as to render liquidation of the trust profitable anyway, and most of the changes in management seem to have turned out for the better, so far.

Perhaps the financial community can live with this. Then, provided we can also accept that some alert unitholders can receive a price twice their trust's NTA while the majority remain in ignorance of the opportunity, there may be no cause for alarm. Perhaps that is the way it should be, in which case regulations governing on-market offers for companies should be abolished.

Perhaps unitholders should have more say in who manages their trust. The stock exchanges and then the NCSC introduced regulations preventing property trust managements voting on motions for their own dismissal. For some time it has been a requirement that new deeds and substantially amended deeds must provide for the manager to be removed on a simple majority of unitholders present and voting. In only one of the 11 instances mentioned do the unitholders appear to have been given the opportunity to approve the new manager appointed by the trustee (Ariadne Australia and the Bartlett Property Trust, plus Telford among the unlisted trusts). So unitholders can get rid of the manager relatively easily but are unlikely to have to say in who the new manager will be.

**The NCSC's regulations... place responsibilities on the trustees which, in practical terms, are more appropriate to the managers.**

The trustee cannot prevent a manager being dismissed by the new controllers of the trust but it can make life difficult for their nominee as manager.

The trustee is ultimately responsible to unitholders. The NCSC's regulations run along these lines, as they tend to place responsibilities on the trustees which, in practical terms, are more appropriate to the managers.

It is not the trustee which determines the performance of the trust. Unitholders seldom select a trust because of its trustee and I have yet to see a stockbroker use the identity of the trustee as a reason for a buy recommendation. (A few years ago, in the unlisted arena, it could have been adequate reason for a recommendation against in some instances). It is not for nothing that in some of the more successfully marketed trusts considerable emphasis is placed on the manager and indeed on personalities.

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The importance of the manager needs more recognition in the regulations; changes of management are something that should happen within the framework of a code similar to the Companies Takeover Code.

The Securities Institute of Australia has twice advocated the introduction of a Public Unit Trust Act in submissions to the NCSC on property trust regulation. It has done this as much out of an understanding that attempting to apply the Companies Act where it does not fit the peculiarities of a unit trust was fundamentally unworkable as out of fear that at some stage investors would suffer losses through takeovers. In this it has been supported by the Unit Trust Association of Australia.

The NCSC appears to be broadly in favour of a Public Unit Trust Act. The question that seems to be holding it up, is just what types of entities the Act is to cover. The NCSC seems to have in mind that the definition of "prescribed interest" should be broadened, perhaps sufficiently to cover insurance bonds. The Companies and Securities Law Review Committee has produced a 200-page discussion paper (No. 6) on this question without reaching firm conclusions.

There may well be a good case for making the definition broader and more precise. There is also a case for acting expeditiously, because it seems inevitable that sooner or later something will occur which will cause an outcry, and that is not the right climate in which to bring down complex legislation. □