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SHORT SELLING IN AUSTRALIA

Introduction

At first glance, short selling appears to be an innocuous form of market practice. However such a statement is not an accurate reflection of the possible impact of short selling. Indeed the practice of short selling has been the target for much regulation over the centuries and it was not until the 7th April 1986, after a fifteen year absence, that short selling in a regulated fashion was re-introduced to the securities exchanges of Australia. This paper will examine the reasons for and against the practice and consider the legislation that has led to the establishment of a regime of regulated short selling.

The Practice Itself

Short selling may be defined as the practice of selling something (in this case securities) which at the time of sale the seller does not own. On the stock exchanges most investors purchase securities first and sell them later and thus are said to be 'long' in a security. A short sale is in effect a reversal of this process.

The mechanics of a short sale are basically the same as for any other sale of securities. The major difference in the mechanics is due to the non-ownership of the securities and the delivery requirements found in the stock exchange rules. Thus in the case of a short sale of shares, the short seller must somehow obtain the scrip and deliver it to the purchaser within the requisite period. The usual method by which it is done is for the seller to 'borrow' the scrip which are returned to the lender after the short seller's position has been covered.

It may be asserted that short selling is conducted primarily for speculative purposes. Indeed a survey carried out in 1947 by the New York Stock Exchange concluded that two-thirds of all short sales were motivated by speculative purposes.[1] A speculator would indulge in the practice of short selling in the hope that the delivery of the securities sold could be accomplished by purchasing them at a lower price, the return to the speculator being the difference in the purchase and selling prices of the securities. It is this speculative motive that has resulted in the practice of short selling being labelled as 'immoral'.[2] This charge arises from a belief that *prima facie*, '...the very idea of a person's selling something he does not own, in the hope perhaps of buying it back later at a lower price, is essentially immoral'.[3] There are however two other reasons which make the practice of short selling seem more sullied than it is in reality.

The possible loss to an investor from a long position in a security is limited to the amount of the original investment. However, theoretically the potential loss from a short sale is unlimited in that a security's price

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FOOTNOTES

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1 L Loss, *Securities Regulation* (2nd ed supplement, 1969) 3254.

2 L Loss, *Securities Regulation* (2nd ed, 1961) 1224.

3 Ibid.

can rise to several times its initial amount. This may be illustrated by reference to the Poseidon saga that occurred during the mining boom of the late 1960s. At one stage during the boom, the price of a Poseidon share reached $280 but a number of investors shorted on Poseidon when the share price rose from $1 to $5 and were thus faced with a potential loss of $275 per share.[4]

Furthermore it has been said[5] that if unrestricted short selling were allowed it would permit the 'outright' speculator to speculate without having to put up any money. It is perhaps this reason more than any other that has led to short selling being regarded as dishonest or immoral.

There are apart from speculative purposes other reasons that may motivate short selling. There are the so-called 'technical' short sales performed by odd-lot dealers and arbitragers. An odd-lot dealer is one who deals with amounts of stock that are less than the trading unit permitted by the stock exchange. Such a dealer must however deal in regular trading units on the stock exchange and therefore may have to short sell in order to fulfill the orders of clients. Arbitrage is the technique of buying or selling a particular security in one market while simultaneously making an off-setting transaction in the same security on another exchange. The aim of arbitrage is to take advantage of the differing prices in the two markets to make a profit and it is self evident in what circumstances an arbitrager would short sell. The purpose of these so-called 'technical' short sales is to facilitate the maintenance of an orderly market.

Short selling may also be used as a hedging device. An investor may fear that the market will decline but does not wish to off-load any holdings of securities. Such an investor would short sell to approximately the money value of its holdings in other securities. If the market falls, the short sale is covered at a lower price and balances the loss on the securities held by the investor. Whereas if the market rises, the investor makes a loss on the short sale but is compensated by the increase in the value of securities already held by the investor.

The practice of short selling may also be used for taxation purposes in that it would enable an investor to defer a gain until a later taxation year and thus lower the investor's overall taxation liability.

Although it may be stated that there is a consensus as to the reasons why a short sale would occur, there exists no such consensus as to the merits of the practice. Indeed, in 1934 the United States Banking and Currency Committee concluded that there were not many stock exchange practices that had been characterized by greater differences of opinion than that of short selling.[6]

Those who favour short selling argue that *inter alia* the practice facilitates the operation of an open market for securities; that it serves to dampen the effects of wide fluctuations in the market prices of securities; and that since short selling is allowed in many leading foreign stock exchanges, not to permit the practice in Australia would result in

4 T Sykes, *The Money Miners* (1978), 71.
5 M I McAlister, 'Short selling — is it as nasty as it sounds?' (1972) Volume 1 No 5 *Australian Stock Exchange Journal* 12, 13.
6 L Loss, *Securities Regulation* (1961), 1227.

a loss of trading in Australian securities at the expense of the domestic stock exchanges. Whereas those who oppose short selling contend that the practice hinders the operation of an open market for securities;and it promotes the deliberate depression of market prices; and that it has no economic justification in that it enables outright speculation to occur in the market place.

The 'open market' argument in favour of short selling is based on the assumption that short selling enables the market to meet any large demand for a particular security and thus promote the widening of the market and its overall efficiency.[7] Further weight for this argument may be derived from the activities of the professional trader or specialist. It has been submitted[8] that the role of these specialists is to create a market and thereby contribute to the width and efficiency of the overall market. Therefore short selling should be permitted, it is argued, to be used by these specialists not only so that they can fulfill their purpose but so that they may also profit from the process as a reward for their activities.

However it has also been acknowledged[9] that unrestricted short selling may result in the creation of false markets. This would occur where the market involved is narrow, or where there are no disclosure requirements of short positions or where the process of scrip delivery is not under strict supervision.[10] This is of particular relevance to Australia, bearing in mind the 'Antimony Nickel affair' described below where what was attempted has been described as the, '...father and mother of all bear traps...'[11]

The argument that short selling smooths out fluctuations in the market prices of securities is not one which upon closer inspection maintains its credibility. Although it may be true that short selling establishes a ceiling on a rising market by meeting any increase in demand, the converse, namely that short selling provides a cushion in a falling market is not necessarily the case. Deutsch[12] makes the point that, '...the buoyant power of short covering is likely to be far less effective than the depressive power of short selling'. Furthermore Deutsch[13] propounds that as a general rule short sellers will only cover their positions when the market is near its trough, thus accelerating the decline in market prices.

It is also important to note that unrestricted short selling can affect the price of different securities in different ways. This point can be illustrated[14] by comparing the impact of short selling on the price of shares in a small undercapitalised company to that on the price of shares in a large company with substantial market capitalisation. Short selling in the former situation could lead to the manipulation of the market price due to the creation of an artificial supply and demand.

7 Australian Associated Stock Exchanges and National Companies and Securities Commission *Joint Exposure Draft on Proposed Amendments to AASE Member Stock Exchanges Business Rules to Facilitate Short Selling in Approved Securities and Public Securities Quoted on Australian Stock Markets* (hereafter Joint Exposure Draft) (1985), 14.

8 M I McAlister, *loc cit* 12-13.

9 Ibid.

10 AASE and NCSC, *Joint Exposure Draft* 15.

11 T Sykes, n 4 above, 70-74.

12 R Deutsch, 'Short Selling' (1982-1984) 1 *C & SLJ* 142, 151.

13 Ibid.

14 Ibid.

The final argument mentioned in favour of short selling is grounded more on 'patriotic' instincts than considerations of equity or efficiency. It has been argued[15] that there is an increasing market in Australian securities in overseas markets such as New York and London due to the fact that short selling is allowed in those markets. It is further argued that that overseas market in Australian securities can be won back to the domestic exchanges, only if Australian brokers are able to compete on an equal basis with overseas dealers. Therefore in order to even up this competition short selling should be permitted on the Australian exchanges.

It should be noted that the arguments canvassed for and against short selling have been discussed on the basis of there being unrestricted short selling. The Committee of Inquiry into the Australian Financial Syustem (the Campbell Committee)[16] acknowledged that in the absence of appropriate safeguards, short selling could create instability and went on to say that if properly regulated short selling could contribute to the depth and stability of the Australian market.

The Push for Regulation

This divided opinion as to the merits of short selling has at times resulted in the practice being treated as a, '... favourite whipping boy, both when it has deserved to be and when it has not'.[17] The history of securities regulation is dotted with attempts by various nations to make short selling an unlawful practice.[18] However despite these attempts the common law has adopted an attitude that recognises short selling to be legal for otherwise the prohibition of the practice, '... would put an end to half the contracts made in the course of trade'.[19] It would seem that most attempts to prohibit or restrict short selling have come in the wake of periods of severe market instability and this certainly was the case in Australia.

The impetus for the reform of securities regulation in Australia was provided by the mining boom of the late 1960s and early 1970s.[20] The mining boom was a period of intense speculation in mineral stocks which was ignited by the rapid rise in the market price of shares in Poseidon NL caused by reports of nickel finds in Poseidon fields in Western Australia. As a consequence of the excitement generated by the Poseidon find, many speculators and first-time investors bought shares in a number of small and untried mining companies, which in hindsight seemed to have been done so purely on the basis that the shares were mining shares. However the mining boom also witnessed a number of stock market disasters, examples of which were the collapse of Mineral Securities Australia Limited and the Endurance Mining Corporation NL and Tasminex NL 'scandals'. These disasters were caused by a number of unscrupulous practices, such as the use of unsubstantiated geologists'

15 For example, AASE and NCSC, *Joint Exposure Draft* 14.
16 Australia, 'c2-Report of the Committee of Inquiry into the Australian Financial System' (1981), 382.
17 L Loss, *Securities Regulation* (1961), 1224.
18 Ibid.
19 *Hibblewhite* v *M'Morine* (1839) 5 M & W 462, 467 per Alderson B.
20 For an account of the mining boom — see T Sykes, above n 4.

reports in prospectuses; privileged share placements' insider trading; market rigging; and the speculative use of short selling.[21]

A small number of cases arose out of the mining boom which although were not directly concerned with the issue of short selling, nevertheless provide worthwhile examples of the legal problems that may arise as a result of unrestricted short selling.

The New South Wales Supreme Court decision of *Osborne* v *Australian Mutuala Growth Fund*[22] had as its basis, another mining boom disaster the 'Antimony Nickel Affair'. This 'affair' came about as a result of a failed takeover attempt of Antimony Nickel NL by the Australian Mutual Growth Fund which was controlled by Gordon Barton. The company's securities were listed on the Sydney Stock Exchange in February 1971 Barton had concluded that the takeover attempt was a failure since 51 per cent of the shares were held by the directors and other shareholders. However Barton had also realised that part of his shareholding came from short sellers. He continued buying shares in Antimony Nickel NL thereby forcing the share price to rise and the supply of scrip to dry up. By 19th March, 1971 the directors held 51 percent of the shares, Barton had 44 per cent and other small shareholders accounted for 10 per cent, which meant that the efforts of the short sellers had resulted in the shares being sold 105 per cent. To further complicate matters, Barton had reached an agreement with the directors of Antimony Nickel NL that they would not sell any of their holdings without first informing Barton. This meant that the short sellers could only cover their positions by obtaining scrip from either the small shareholders or Barton's group. Eventually the Sydney Stock Exchange stepped in and suspended trading in Antimony Nickel NL shares on the basis that the market was not orderly.[23]

The Court in *Osborne* was concerned with the relationship of the Australian Mutual Growth Fund with its stockbroker, Osborne and Company. On 16th March, 1971 the Fund had instructed its broker to acquire 100,000 shares in Antimony Nickel NL. The contract notes sent to the Fund stated that the contract was subject to the articles and by-laws of the Sydney Stock Exchange. Article 101 provided that,

> 'Failure to deliver or to accept and pay on delivery shall not annul a contract nor shall any contract be cancelled or liable to cancellation except by mutual agreement.'

There were also other by-laws that provided the time limits for the delivery of securities and the procedure for buying-in shares in instances where a selling broker had failed to deliver the appropriate scrip.

The selling brokers were only able to deliver on time scrip for 38,000 shares. Osborne and Company commenced buying-in as laid out in by-law 12, but the Sydney Stock Exchange suspended the buying-in. By the end of March 1971, the Sydney Stock Exchange suspended both trading and buying-in procedures in respect of Antimony Nickel NL shares.

On 17th August, 1971 the Fund purported to rescind its contract with Osborne and Company and with the three selling brokers who had failed

21 P J Drake, 'Performance, Responsibility and Control in the Australian Securities Markets' in R R Hirst & R H Wallace (ed) *The Australian Capital Market* (1974) 527-530.

22 [1972] 1 NSWLR 100.

23 T Sykes, above n 4, 70-74.

to deliver the balance of the scrip. Within a period of 10 days of the purported rescission, the selling brokers delivered the balance of the scrip to Osborne and Company who paid for the shares. The action in the New South Wales Supreme Court was commenced by Osborne and Company, who sought a declaration that the Fund was bound to accept and pay for the scrip for the remaining 62,000 shares.

Street J. held that Article 101 did not,

> '...have the effect of leaving two parties to an uncompleted contract for ever locked in contractual connection unless they both expressly agree to bring their contract to an end.'[24]

His Honour, on the basis that contracts for the sale of shares required prompt and expeditious performance, further held that the Fund by 17th August 1971 was entitled to infer that the sellers did not intend to fulfill their obligations and this in turn allowed the Fund to terminate any contractual relationship concerning the shares to which the Fund was a party.

It can be seen that the effect of short selling in this case resulted in a loss to Osborne and Company who as Street J noted had done, '...nothing to implicate them[selves] in responsibility for the regrettable failure of the unknown sellers to honour their obligations under the contracts'.[25]

The case of *Utz* v *Javor*[26] is another example of the legal problems that may arise from short selling. On 16th March 1971 the defendant instructed the plaintiff stockbrokers to sell a thousand shares in Leopold Minerals NL at $0.65 per share. A contract note was sent by the plaintiffs to the defendant which stated that the transaction was subject to the articles and by-laws of the Sydney Stock Exchange. On 18th March 1971 a representative of the plaintiffs saw that the last sale for Leopold Minerals NL was $1.00. The same representative, noted the next day that the price had risen to $4.90. After a perusal of the scrip ledger card for Leopold Minerals NL the representative found the defendant's sale of a thousand shares. Upon a check with that company's register the representative found the defendant was not a registered holder of shares in Leopold Minerals NL. As this information came to the attention of the plaintiffs, the defendant instructed the plaintiffs to purchase 2,000 shares in Leopold Minerals NL 'at best'. The plaintiffs only purchased a thousand shares because it had doubts as to the defendant's ability to pay for such an order. The issue involved in the case was the defendant's refusal to settle his account with the plaintiffs on the ground that his instructions had not been complied with by the plaintiffs.

The plaintiffs argued that they had a right to buy the thousand shares on the account of the defendant in pursuance of a common law right of indemnity. It was further argued that this alleged right was strengthened by Article 100 of the Sydney Stock Exchange which made the plaintiffs liable as principals to the purchasing stockbroker to deliver the scrip in due course. However the articles allowed ten business days for the delivery of scrip and yet only three business days had passed since the defendant's sale of shares. Therefore the Court found that the

24 [1972] 1 NSWLR 100, 112.
25 Ibid 113.
26 [1973] 2 NSWLR 1.

time of delivery had not arrived and accordingly at that stage the plaintiffs were not in breach of Article 100. In those circumstances the Court held that the plaintiffs were not, '...correct in asserting...that on 19th March, 1917, they had become entitled to buy shares on account of the defendant in anticipation of breach by him'.[27]

The final case that came out of the mining boom to be considered which involved short selling was the New South Wales Supreme Court decision of *Dowling* v *Scarf*.[28] In June 1969 the defendant instructed the plaintiff stockbrokers to short sell 3000 shares in a mining company. The plaintiffs in September 1969 managed to appropriate the shares to meet the order from a 'pool system'. In September 1970 the plaintiffs bought shares in the mining company to replenish the 'pool' at the then market price which amounted to $14,155 as compared to the $171 that the shares would have cost in September 1969.

The plaintiffs sued for $14,155 in damages on the basis either of a right established by Article 105 of the Sydney Stock Exchange or of a common law right to be indemnified by the defendant. Needham JA (as he then was) held that,

> '...art 105 (and any common law right can be no more extensive) gives *inter alia* a right to the selling broker to buy scrip against his principal if his principal fails to produce the scrip the subject of the sale.... Once the right has been exercised any right against the seller is a right to damages or to an indemnity'.[29]

Thus it was found that the defendant's obligation towards the plaintiff in relation to the scrip crystallised in September 1969 when the shares were appropriated from the 'pool'. This meant that the amount of the indemnity owed to the plaintiffs was $171 being the price of the shares in September 1969.

As a result of the excesses of the mining boom a number of States[30] moved to either prohibit or circumscribe the practice of short selling. However the most important feature that resulted from the mining boom was the beginnings of a general trend towards a real system of national uniformity of the securities industry and for federal supervision or regulation of the industry.[31] A strong advocate of national uniformity in the secutities industry was the then Leader of the Opposition in the Senate, Senator Lionel Murphy, who was rewarded for his perserverence in mid-April 1970 by the formation of a Senate Select Committee on Securities and Exchange (the Rae Committee).

The Rae Committee recommended the establishment of a federal body to supervise and regulate the conduct of the securities industry. Amidst the bulk of its recommendations the Rae Committee briefly considered the 'Antimony Nickel affair' and noted that short selling had resulted in market instability.[32] Eventually under the guise of 'co-operative federalism' the recommendations of this Committee were adopted which led to the

27 Ibid 5 per Bowen JA.
28 (1975) 1 ACLR 248.
29 Ibid 251.
30 R Baxt, *The Rae Report — Quo Vadis?* (1974), 147-149.
31 P J Drake, above n 21, 526.
32 Australia, '*Report from the Senate Select Committee on Securities and Exchange: Australian Securities Markets and their Regulation*' (1974) Part 1 Volume 1 pp475-476.

establishment of the National Companies and Securities Commission (the NCSC) and the promulgation of a number of Commonwealth Acts which under the co-operative scheme became law in the member States.

Section 68 of the Securities Industry Act 1980 (Cth) effectively prohibited short selling on all Australian stock exchanges. However in 1981 the Campbell Committee made a number of observations on the practice of short selling which questioned the efficacy of the then state of the law.

The Committee acknowledged[33] that unrestricted short selling could cause market instability. It also noted that the market for many shares in Australia was thin and thus in the absence of adequate disclosure, short selling could have a volatile effect on the price of such shares. Furthermore the Committee agreed that short selling by relatively unsophisticated investors could expose them to excessive risk and that the stability of the stockbroking industry would be undermined by the failure of a major short seller to meet his obligations.

However the Committee were also of the opinion that if properly regulated short selling could contribute to the depth and stability of the market. It was recognised that the options market already provided a means of short selling which had had no adverse effects on the securities market and that short selling was also an essential prerequisite of the futures market.

After this statement of the benefits and dangers of short selling the Committee spelt out some requirements that had been suggested by others[34] which were to be fulfilled before short selling could be permitted. The practice would be confined to companies which had a substantial market capitalisation, a diverse shareholding and an activie market. All short positions were to be disclosed at the time of the transaction. There would also have to be the provision by the short seller of a substantial cash margin and if during the period of the short position, the price moved against a short seller by more than 10 per cent, an appropriate payment was to be made to the broker to cover this liability. The Committee concluded that,

> '...such requirements would be compatible with stability in the stock markets and the protection of investors. It therefore suggests that the National Companies and Securities Commission should examine, at an early date, the feasibility of allowing short selling, subject to the imposition of appropriate requirements to discourage the development of a false market and to prevent the development of unfunded speculation.'[35]

The sentiments expressed by the Campbell Committee were eventually taken up by the NCSC and this led to the amendment of section 68 and the insertion of section 68A in the Securities Industries Act by the Companies and Securities Legislation (Miscellaneous Amendments) Act 1985. In order for the amendments to have any effect, a new business rule on short selling had to be devised and this was achieved by April 1985 after a period of joint consultation between the NCSC and the

33 The Campbell Report, 382.
34 M I McAlister, above n 5, 12, 13.
35 The Campbell Report, 382.

Australian Associated Stock Exchanges (AASE),[36] which by virtue of the Australian Stock Exchange and National Guarantee Fund Act 1987 (Cth) has been replaced by the Australian Stock Exchange Limited (the ASX). The end result of these amendments and changes was the reintroduction on the 7th April 1986 of limited and regulated short selling on the Australian securities market.

Section 68

It is pertinent to note, before commencing an examination of the regulation of short selling in the Securities Industry Act, the position of the short selling provisions in the legislation as compared to the position of provisions which deal with other market practices. The sections on short selling appear in Part V of the Act which deals with the conduct of the securities business whereas the other market practices are collected under Part X of the Act which is concerned with trading in securities. It has been suggested[37] that one reason for this is that brokers and others in the securities business are those who advocate short selling. A more obvious result of this segregation of short selling from other market practices is the lack of a specific civil remedy for short selling as compared with the other market practices.[38]

i. The Prohibition

Section 68 of the Securities Industry Act is the major provision in the Act that deals with short selling. Section 68(1) prohibits a person (or his agent) from selling securities if he does not have or has no reasonable grounds to believe that he has a presently exercisable and unconditional right to vest the securities in the purchaser. It has been suggested[39] that there are four crucial elements to this general prohibition of short selling. They are:

a. sale of *securities*;
b. belief on *reasonable grounds*;
c. a *presently exercisable and unconditional right* to vest the securities in the purchaser; and
d. the vendor must *sell* securities.

Securities have been defined in sectin 4 of the Act to mean debentures, bonds, notes, stock, shares, option contracts and prescribed interests. The very width of this definition would seem to indicate an intention by Parliament to have as many forms of investment activity covered by the national system of securities regulation. However it may be argued that this definition in the context of short selling of securities may impinge upon areas where short selling is of no consequence.[40]

That this may be so, may be illustrated primarily by reference to the inclusion of prescribed interests within the definition of securities. It has been noted by the judiciary[41] that prescribed interests may be defined in

36 AASE and NCSC, *Joint Exposure Draft.*
37 R Baxt, H A J Ford, C J Samuel and C M Maxwell, *An Introduction to the Securities Industry Codes* (1982), 228.
38 Securities Industry Act, (1980) (Cth), Section 128.
39 R Deutsch, above n 12, 142, 143.
40 Ibid.
41 For example: *Australian Softwood Forests Pty Ltd* v *Attorney-General of New South Wales* (1981) 36 ALR 257, 262 per Mason J.

a manner that would include most business schemes. Indeed earlier State legislative definitions and the original Commonwealth definition have meant that schemes involving *inter alia* time-sharing[42] and franchises[43] have been regarded as prescribed interests. Ths problem came to a head in *Brentwood Village Limited* v *Corporate Affairs Commission*[44] where an offer of an interest in a retirement village scheme was held not to involve a prescribed interest. It was in response to this decision that the definitions of securities and prescibed interest in the Securities Industry Act were amended. The net effect of these amendments is, that as from 1st July 1987 offers of an interest in a retirement village will not be an offer of a prescribed interest.

However it is submitted that this patch-work amendment did not overcome the problem of the definition of securities being too wide for the purposes of regulating short selling. It may be argued that the placement of the provisions dealing with short selling in Part V of the Act evinced an awareness that brokers, dealers and perhaps by implication sophisticated investors are those who are more likely to use short selling. If this is so the provisions on short selling are concerned with forms of investment activity where there is an organised (in terms of structure) and liquid (in terms of turnover) market. Further support for this argument may be derived from the fact that the new section 68(3)(e) and business rule 6.18 deal with shares and the stock markets. The definition section of the Securities Industry Act commences with the words, 'In this Act, unless the contrary intention appears...' and it is contended that the placement of the short selling provisions in Part V provides a guide as to this contrary intention. Thus the amendments required to overcome this initial problem are twofold. The definition of securities would need to be amended by including prescribed interests not *per se* but subject to the qualification, '...to which this Act applies...' as is the case for option contracts. The second requisite amendment would involve the inclusion of a regulation which would either permit the NCSC to specifically indicate what schemes are to be regulated by the short selling provisions or enable the NCSC to establish certain criteria in relation to the trading of interests which would determine whether the short selling provisions apply.

The only controversy that exists with the element of belief on reasonable grounds is from what perspective are these grounds to be based. The section itself is silent on this issue, perhaps implicitly recognised that these reasonable grounds are to be determined from the viewpoint of the mythical person on the 'Clapham omnibus'. However it is contended that there is merit in the argument that where the seller is a broker (or dealer as the case may be) or where a broker is acting for the seller, the determination of those grounds should be from the perspective of a reasonable broker. Although this argument if accepted would impose a higher standard where brokers and dealers are involved in the selling of securities, it is submitted that this would not be too onerous an imposition. Brokers and dealers should be more familiar with the trading of securities and more aware of any signals that would indicate a possible short sale. Furthermore, if one accepts the proposition

42 *A Home Away Limited* v *CCA* (1980) 5 ACLR 299.

43 *Hamilton* v *Campbell & Anor* (1984) Australian Securities Law Cases 76-032 cf *Streeter & Anor* v *Pacific Seven Pty Ltd* (1985) 3 ACLC 430.

44 (1983) 1 ACLC 1,006.

that the placement of section 68 in Part V was by design and not by accident, then it would seem plausible to accept that different standards ought to be adopted depending upon who is involved in the transaction. However whether such an argument would attract judicial approval or indeed whether section 68(1) will be the subject of judicial scrutiny is another question.

A seller of securities is required by section 68(1) to have at the time of sale a presently exercisable and unconditional right to vest the securities in the purchaser. As to what is a 'presently exercisable and unconditional right', section 68(2) provides that,

> '...(a) a person who, at a particular time, has a presently exercisable and unconditional right to have securities vested in him or in accordance with his directions shall be deemed to have at that time a presently exercisable and unconditional right to vest the securities in another person; and (b) a right of a person to vest securities in another person shall not be deemed to be unconditional by reason only of the fact that the securities are charged or pledged in favour of another person to secure the repayment of money.'

It may be said that section 68(2) offers negligible assistance in the determination of what amounts to a presently exercisable and unconditional right to vest securities in a purchaser. Sub-paragraph (a) provides nothing more than a recognition of the distinction between legal and beneficial ownership of securities, whereas sub-paragraph (b) is of a little more assistance in that it enables securities to be used as a means of securing a debt without affecting any presently exercisable and unconditional right to vest securities in another.

Deutsch[45] has suggested that the meaning of the phrase may be determined by reference to section 68(3)(c) which deals with the case where a seller of securities had previously entered into a contract to purchase those securities. Section 68(3)(c) speaks of a,

> '...right to have those securities vested in him that is conditional only upon all or any of the following:
> (i) payment of the consideration in respect of the purchase;
> (ii) the receipt of him of a proper instrument of transfer in respect of the securities;
> (iii) the receipt by him of the documents that are, or are documents of title to, the securities;'

Thus it may be submitted that the presently exercisable and unconditional right is concerned with a proprietary right or interest in the securities. That this is so may be borne out by the meaning of short selling as the sale of securities by a person who does not own them at the time of sale.

The final element in the prohibition of short selling requires the securities to be sold. Section 68(6) provides that if a person,

> ' (a) purports to sell securities;
> (b) offers to sell securities;
> (c) holds himself out as entitled to sell securities; or
> (d) instructs a dealer to sell securities, he shall be deemed to sell the securities.'

45 R Deutsch, above n 12, 142, 146.

As to the effect of section 68(6), Deutsch commented that the, '... ambit of s68(1) is therefore expanded and appears to be too wide — some limits to s68(6) are required'.[46] This contention may be illustrated by reference to sub-paragraph (c) of section 68(6). In this instance the mere holding out by a person that that person is entitled to sell securities without any further positive action in relation to the securities constitutes the sale of those securities. It would seem evidence that the purpose of this sub-section is to cover transactions which in substance although not in form constitute sales of securities.

ii The Exceptions

A number of exceptions to the operation of the prohibition of short selling are contained in section 68(3). Short selling by odd-lot dealers and as part of arbitrage transactions are exempted from the prohibition by sub-paragraph (a) and (b) respectively. Sub-paragraph (c) allows a sale of securities by a person who does not own the securities at the time of sale but who has prior to the sale entered into a contract for the purchase of those securities.

Sub-paragraph (d) allows short selling in two further circumstances. An 'off-market' sale of securities is valid provided the seller is not associated[47] with the body corporate that issued the shares and arrangements had been made prior to the transaction effecting the sale which would enable the securities to be delivered within three business days to the purchaser. It is arguable that in this instance, the term 'arrangement' contemplates courses of action not necessarily governed by contracts, whereas the term 'transaction' is limited to contractual relations. Further the phrase 'delivery of securities' can be taken to mean the transfer of the requisite number of scrip. Sub-paragraph (d) also authorises 'on-market' short sales provided that the two conditions required for 'off-market' short sales are met and furthermore that the short sale does not occur on a falling market and the securities exchange is immediately informed that a short sale has been made in accordance with sub-paragraph (d).

However the most important exception to the prohibition of short selling is contained in sub-paragraph (e) which was inserted in section 68 in 1985. It is this sub-paragraph which enabled the commencement on the 7th April 1986 of regulated short selling on Australian securities exchanges. For a sale of securities to be outside the prohibition under sub-paragraph (e) three requirements must be met.

The securities must be of a class designated by the securities exchange (section 68(3)(e)(i)) and the sale has to be effected in accordance with the requirements of the business rules of the exchange (section 68(3)(e)(ii)). To meet these two requirements the ASX introduced a new Business Rule 6.18 which set out the rules under which regulated short selling was to operate and designated the securities of a number of listed companies as 'approved securities' for the purposes of Business Rule 6.18.[48] The final requirements states that at the time of the sale the person or his agent who is selling the securities must not be associated

46 R Deutsch, above n 12, 142, 147.
47 The expression 'associated persons' is defined in s6 of the Act.
48 The Stock Exchange of Adelaide Limited, *Commencement of Regulated Short Selling on Australian Stock Exchanges* Circular No 78/86, 1st April 1986, 1.

in relation to that sale with the body corporate that issued the securities (section 68(3)(e)(iii)).

Before beginning an analysis of Business Rule 6.18 it should also be noted that under section 68(4) where a person requests a licensed or recognised dealer to effect a sale of securities to which section 68(3)(b(d) applies, at the time of the request the dealer must be informed that the sale is a short sale. Furthermore section 68(5) requires that where a person effects on a stock market of a securities exchange a transaction to which section 68(3)(d) applies, any document which evidences the transaction which is to be given to the purchaser or his agent must contain an endorsement that the sale is a short sale.

The new Business Rule 6.18 allows short selling in 'approved securities' and 'public securities' as defined by the by-law. A security may be classified an 'approved security' by the Home Exchange of the issuer of the security only if a number of conditions have been met. Business Rule 6.18(14) states that a Home Exchange shall not designate security as an 'approved security' unless

> '...(a) 50 million shares or units of the class have been issued (excluding shares or units of the class issued but held by any entity which the Exchange considers is related to the issuer),
> (b) the market capitalisation of the shares or units of the class on issue is not less than $100 million,
> (c) in the opinion of the Exchange there is sufficient liquidity in the market for the securities of the class, and
> (d) the Exchange considers that the security should be designated as an 'Approved Security' for the purposes of these By-laws.'

It may be said that the adoption of such criteria based on concepts of capitalisation and marketability[49] are consistent with the recommendations of the Campbell Committee. Although it may even be agreed that the use of these concepts is admirable if a form of regulated short selling is to be achieved, nevertheless a number of problems may be foreseen from the attempted implementation of these notions as provided for by the Business Rule.

The use of notions like capitalisation and marketability in Business Rule 6.18 may result in criticism of decisions made by the Home Exchanges. That this might be so is due to the subjective nature of the concepts. It is extremely doubtful to assume that there will be unanimous agreement as to whether a minimum market capitalisation of $100 million is appropriate, although it can be appreciated that some figure had to be adopted. The same case can be made out for the requirement that there must be 50 million shares or units of a security.

A problem may arise in that the Business Rule does not stipulate as to whether there is to be strict compliance with these arbitrary figures. The Business Rule provides that a Home Exchange may from time to time designate a security an 'approved security' which implies that such a designation may be withdrawn from a security. If this is to be so, the ASX ought to provide guidelines as to the permissible degree of leeway to be allowed and appropriate time limits to review a security's designation. For to do so otherwise would impose an unnecessary degree of inflexibility on regulated short selling.

49 AASE and NCSC, *Joint Exposure Draft* 20.

Further complications arise in that it must also be in the opinion of a Home Exchange that there is a sufficient degree of liquidity in the market for the security. This criterion places a wide discretion on a Home Exchange, which in itself might not be a bad practice, if it were not for the total absence of guidelines that are to be used in the determination of such a decision. However, even if the numerical requirements are met and a positive decision has been reached in relation to liquidity, a Home Exchange may still decide not to designate a security an 'approved security'. Indeed the vagueness of the concepts and criteria relied upon may result in legal proceedings being commenced against decisions made by a Home Exchange. Nevertheless it must be said that the subsidiaries of the ASX are aware of the potential problems that may occur from these criteria in that it is acknowledged that the, '... criteria may need to be amended as experience is gained in the operation of the rule [by-law 6.18] and the exchanges see a need for flexibility in this matter.'[50]

In order to avoid another 'Antimony Nickel NL affair', Business Rule 6.18(4) restricts the aggregate short sales of an 'approved security' top 10 per cent of the total number of units of an 'approved security'. To ensure complicance with this requirement, short sales will be supervised by the subsidiaries of the ASX.

The aim of this supervision is to ensure that the market is kept informed as to the extent of short selling in any 'approved security'. Therefore in order to meet this end a national monitoring mechanism of uncovered short sales has been instituted on existing market information dissemination facilities.[51] However such a scheme will be of no value unless the information given to the market is accurate and to ensure this accuracy Business Rule 6.18 has imposed three prerequiisites that are to be fulfilled in all short selling transactions.

Business Rule 6.18(5) states that in a short sale of an 'approved security', an endorsement to that effect shall be on the sales slip lodged with the Exchange and on the contract note issued to the seller. Business Rule 6.18(6) requires Member Organisations of an Exchange to report any purchases or receipts of securities which were effected to cover subsisting short selling contracts by 3.30 pm of the day of the purchase or receipt. The purpose of this requrement is to enable the monitoring system to report the extent of uncovered short sales in an 'approved security' as at the close of trading the previous business day. Finally 6.18(7) imposes an obligation upon a seller to inform a Member Organisation acting on the seller's behalf, that the sale is a short sale.

It should be noted that the national monitoring scheme does not provide details as to whether particular transactions are short sales but rather only informs the market of the total short position in an 'approved security'. Furthermore these disclosure requirements do not specifically inform the buyer in a transaction as to whether it is a short sale. It may be submitted that such an omission is inconsistent with keeping the market informed if specific individuals are not informed as to whether they are involved in a short sale. The importance of such an omission may be further illustrated by the fact that the insertion of section 68(3)(e)

50 Ibid 21.
51 The Stock Exchange of Adelaide Limited, above n 48, 1, 2.

in the Act and the consequent introduction of a new by-law has resulted in the introduction of regulated short selling in Australia. It seems incongruous that in transactions under section 68(3) *caveat emptor* would seem to apply whereas in transactions under section 68(3)(d), the buyer is informed that the sale has been made short.

A major criticism of unrestricted short selling was that it enabled, '... the moneyless gambler to gamble; the man of straw to speculate and the innocent to expose himself beyond his means'.[52] 6.18(8) meets this criticism by requiring a short seller to provide an initial margin of cover of not less than 20 per cent of the contract price of the 'approved security' that was short sold. This amount is to be held in trust by the Member Organisation of the Exchange which acts on behalf of the short seller. The margin of cover is to be in cash or securities that are admitted to Official Quotation (which are not suspended) or a combination of both. Where securities are used to fulfill the margin requirement, these are to be valued at the lower of either 90 per cent of their market price or such value as the Member Organisation considers to be reasonable, taking into account the business carried on by the issuer of securities, the number of securities provided and the volatility in the market price of the securities over the previous 12 months.

6.18(8) further stipulates that if the market price of the 'approved security' short sold rises to over 10 per cent of the contract price, the Member Organisation may call on the short seller to provide additonal cover so that the requirement of a 20 per cent margin of cover will be maintained. A Member Organisation may even require a short seller to provide a 100 per cent cover. It has been submitted that this would occur where there had been a substantial price movement in the securities the subject of the short sale and it is considered necessary by the Member Organisation to hold collateral for the client's entire exposure.[53]

6.18(8) also exempts a number of institutions from the 20 per cent margin requirement. These institutions have in common, a vast pool of funds to enable them to cover any short position in an 'approved security' and furthermore could be regarded as sophisticated investors more able to appreciate the risks involved in short selling, although cynics might describe these institutions as monied gamblers.

Another major criticism of unrestricted short selling is that it distorts the workings of the market by accentuating price movements in securities which result in the creation of false markets. There are a number of clauses in 6.18 that attempt to nullify this criticism. The general effect of 6.18(9) is to prevent short sellers from forcing the market price of an 'approved security' down at an Official Meeting. This may be compared to the situation in the United States where short selling is allowed either on an 'up-tick' (for a price higher than that of the previous trade on the exchange involved) or on a 'zero-plus tick' (for a price equal to that of the previous trade at a different price).[54] The adoption of the 'last sale' rule as distinct from the 'up-tick' and 'zero-plus tick' rules by the AASE came about after consultatin with the Toronto Stock Exchange (TSE). The AASE was informed by the TSE

52 M I McAlister, above n 5, 12, 13.
53 AASE and NCSC, *Joint Exposure Draft* 24.
54 These rules are commonly referred to as the New York Stock Exchange Rules.

that its rules were initially based on the rules of the New York Stock Exchange of which one was the more stringent 'up-tick' rule. This rule was implemented in response to bear raids that were prevalent in the United States in the late nineteenth century. In 1978 the TSE adopted the 'last sale' rule in response to a recognition that short selling was a legitimate method to increase market liquidity and that present market surveillance techniques were sufficient to control all types of market activity. The AASE agreed with the TSE and considered the amendments contained in 6.18 sufficient to dispense with the 'up-tick' rule.[55]

To maintain market orderliness and to prevent false signals being fed to the market, 6.18(10) prohibits short selling in 'approved securities' where the issuer of those 'approved securities' is the subject of a takeover bid. It is submitted that this clause was inserted to not only to enable undistorted market forces to determine takeover bids but so as not to add an excessive burden to the capabilities of the national monitoring system due to the increased turnover in the target company's securities.

Perhaps the most import clause in 6.18 which facilitates the workings of an orderly market is 6.18(13). This clause enables an Exchange to prohibit or restrict short selling in any approved or public security for any period of time. The AASE stated that the purpose of this clause was, '...to maintain an orderly market in those securities or to protect the interest of investors, without suspending conventional transactions in those securities'.[56]

iii The Consequences of a Breach

In the event that the prohibition in s68(1) is breached a criminal penalty is imposed upon the transgressor. For a first offence, the section imposes a fine of $2500 or a term of imprisonment for 6 months, or both, whereas for a second or subsequent offence, the penalty is $10,000 or a period of imprisonment of 2 years, or both.

An issue that arises for consideration is whether the statute provides for any civil remedies with respect to the breach of section 68(1). It has already been noted that in relation to other forms of market practices covered by the Act, in addition to criminal penalties a specific civil remedy has been provided in section 130. The absence of such a section has led to the suggestion that the legislature thereby intended that there should be no civil remedy arising from s68.[57] However there have also been suggestions that although no specific civil offence has been created by s68, this does not necessarily mean that no civil remedies can arise from a breach of the prohibition.

There has been argument[58] that section 149 of the Act would apply to a person who transgressed against the prohibition contained in s68(1). Section 149 enables a Supreme Court to grant an injunction against a person who has engaged, or is engaging, or is about to engage in conduct that would contrvene the Act on the application of either the NCSC or of any person whose interests have been, are, or would be

55 Ibid 53.
56 Ibid 31.
57 Baxt & others above n 37, 233.
58 For example, R Deutsch, above n 12, 142, 147.

affected by the conduct. The section also permits a Supreme Court to award damages either in addition to, or in lieu of an injunction.

However, of more particular relevance to the issue of civil remedies for breaches of s68 are ss14 and 42. This relevance arises from the fact that for a short sale to come within s68(3)(e), the sale must be effected in accordance with the business rules of the securities exchange.

Section 42 *inter alia* permits a Supreme Court in the case of a person obliged to comply with, observe, enforce or give effect to the business rules of a securities exchange but who fails to so do to make an order against that person concerning the compliance with, the observance or enforcement of, or the giving effect to, those business rules. There are two criteria which must be met before s42 can be of any use in relation to breaches of s68.

Before a Court is able to order compliance with the business rules of a securities exchange, there must be some person under an obligation to comply with, observe, enforce or give effect to the business rules. It would seem that the obligation imposed is statutory and not contractual.[59] In relation to business rule 6.18, it has already been shown that the by-law imposes upon the vendor and vendor's broker a number of obligations.

Those who have standing under s42 to apply for an order are the NCSC, the securities exchange and a person aggrieved by the failure. Thus it can be seen that s42 alters the common law doctrine of privity of contract by enabling persons other than the parties to a contract to enforce a contract. It would seem that a 'person aggrieved' would receive a liberal judicial interpretation[61] and that a purchaser, vendor and their respective agents would fall within that concept.

However s42 only permits a Supreme Court to make an order that would ensure compliance with the business rules. Further assistance may be derived from s14 which enables a Supreme Court in relation to a contravention of the business rules to make any order it thinks fit. The advantage of s14 is that it would enable a Court to make an order for compensation arising from any loss caused by a short sale akin to the compensation provision contained in section 130. The disadvantage of s14 is that a person aggrieved has no standing unlike s42 and unless the NCSC or securities exchange is willing to act, it is unlikely that a compensation order would be made.

Apart from the possibility of statutory civil remedies for a breach of s68, there also exists the possibility of common law remedies and in particular for breach of contract if loss occurs to a party in a short sale. This in turn raises for consideration the question of whether s68 renders contracts for short sales unenforceable.

An immediate difficulty that arises is that s68 is silent as to the civil rights of the parties. In such a situation the courts will consider whether the Act or section on its true construction intended to avoid all the consequences of such a contract. To aid this construction it must be asked whether, '...having regard to the Act and the evils against which it was intended to guard and the circumstances in which the contract

59 *Repco Ltd* v *Barton Pty Ltd* [1981] VR 1.
60 R Baxt & others, above n 37, 90.

was made and to be performed, it would in fact be against public policy to enforce it'.[61]

It has been suggested[62] that the public policy element in s68 was the protection of the capital market as a whole and that in the event of a contravention of s68, the short selling contract would be void. This in turn would indicate that the penalty imposed in s68 prohibits the practice of short selling and is not a mere charge imposed upon short selling.

However there are two matters which may lend support to an argument that s68 does not completely abrogate all civil remedies available to the parties to a short selling contract. The first is the result of s68A which refers to short selling under s68(3)(e). This section refers not only to the protection of the public interest but also to the protection of persons who might sustain financial loss. Thus it would not appear to be inconceivable that an innocent purchaser might be able to recover damages for breach of contract from a seller if it could be proved that the parties were not *in pari delicto.*

Furthermore it may be argued that s68 acts only to abrogate the civil remedies available to a vendor. This argument gathers its strength from the fact that the prohibition is worded from a seller's viewpoint. Thus it may be said that the legislation on short selling involves an implied recognition that both parties to such a contract are not equally at fault and that the seller's civil remedies are not to be preserved. However the issue of whether s68 renders unenforceable short selling contracts will not be settled until a Court conclusively decides the point.

Section 68A

The insertion of s68(3)(e) in the Securities Industry Act resulted in the introduction of regulated short selling on the Australian securities markets. If it were not for the enactment of s68A, it could have been said that the new short selling regime was totally self-regulated by the securities exchanges. However the existence of s68A ensures that the NCSC has an important role in the new regime.

Section 68A(1) allows the NCSC to prohibit the short selling of securities under s68(3)(e) if the Commission forms the opinion that it is necessary to do so.

> '...in order to protect persons who might sustain financial loss if they were to buy or sell those securities in that manner or in order to protect the public interest...'

Section 68A(1) further states that the NCSC may give notice in writing to the relevant securities exchange stating it has formed that opinion and setting out the reasons for the formation of that opinion. Although the section says that the NCSC may give notice to the securities exchange, the Explanatory Memorandum to the 1985 Act states that the NCSC must notify the relevant securities exchange of its opinion.[63]

Section 68A(2) allows the NCSC, if no positive action is taken by the securities exchange to give further notice in writing to prohibit short

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61 A G Guest (general ed), *Chitty on Contracts — General Principles* (1983), 618.
62 R Deutsch, above n 12, 142, 149.
63 Attorney-General's Dept, *Companies and Securities Legislation (Miscell-aneous Amendments) Bill 1985 — Explanatory Memorandum*, 195.

selling in relevant securities for a period of up to 21 days. If notice under sub-section (2) is given to a securities exchange, s68A(3) requires the NCSC to provide the Ministerial Council with a written report setting out the reasons why the notice was given and this report is also to be sent to the securities exchange. The Ministerial Council is empowered by sub-section (4), if it thinks fit to direct the NCSC to revoke the notice issues under sub-section (2).

An immediate point that arises for discussion in relation to s68A is whether the opinion of the NCSC or decision of the Ministerial Council is subject to review. This is an important issue for otherwise the NCSC has the ability to in effect prohibit short selling. The Administrative Decisions (Judicial Review) Act 1977 has no application to the decisions of either the NCSC or the Ministerial Council[65] and thus it would seem that at best a person wishing to challenge a decision of either body would have to resort to the common law prerogative writs. It is submitted that this is not an appropriate state of affairs because recourse to the common law involves much time and expense and is incompatible with the workings of the securities exchanges. Thus it would seem that the NCSC would need merely to hint to a securities exchange that it has formed an adverse opinion to short selling in a particular security for the exchange to act on its own powers under by-law 6.18(13) to ban short selling in those securities. It may therefore be seen that s68A confers upon the NCSC another wide power which in theory could be exercised to the detriment of regulated short selling. Nevertheless it may be further submitted that this would not so occur in practice as the NCSC, '... has shown adequate restraint in its activities and has achieved respect from the industry in its role as corporate watchdog'.[65]

Moreover it may be submitted that s68A raises the issue of who is to be protected by this system of regulation. It does this by describing two considerations the NCSC is to take into account in the formation of its opinion under s68A(1).

The first factor to be considered by the NCSC is the protection of persons who might sustain financial loss if they were to buy or sell securities in the manner set out in s68(3)(e). This factor seems to be concerned with the protection of specific individuals that partake in the practice of short selling. It is worthwhile to highlight the point that this factor speaks of persons who might sustain financial loss and as such acts *ex ante* rather than as an *ex post* measure. Therefore this factor would seem to contemplate the existence of circumstances akin to those of the 'Antimony Nickel affair' where it was evident that stock market irregularities would affect a limited number of individuals.

However it may be submitted that the first factor is a sub-set of the second matter to be taken into consideration by the NCSC, that of the public interest. As to what, in this context, constitutes the nebulous concept of the public interest, some help may be derived from the formal agreement between the States and Commonwealth which led to the establishment of the co-operative scheme. A part of the preamble of the agreement stated that the objects of the scheme were to,

> '...promote commercial certainty and bring about a reduction

64 Schedule 1(m)(n).

65 M Burdon, *The National Companies and Securities Commission* (1986) paper MLS University of Adelaide (unpublished), 29.

> in business costs and greater efficiency of the capital markets and that the confidence of investors in the securities market should be maintained through suitable provisions for investor protection...'[66]

It may be argued that the public interest in this regard relates to the capital market as a whole.[67] Furthermore in the context of the stock exchange[68] it may be said that two of the functions of the capital market are to provide liquidity to both investors and issuers of securities and to ensure that investment is channelled towards more profitable and efficient enterprises. There always exists the possibility in a regime of unregulated short selling that either function could be adversely affected. In relation to the liquidity function, a bout of widespread short selling could deter investors and thus impinge upon the liquidity position of issuers of securities. Whereas in regard to the allocative function, unrestricted short selling could interfere with the price mechanism so as to deflect investors from ventures that are efficient and profitable. Hence, it may be suggested that the public interest would be best served if short selling proceeded upon a basis that would not interfere with the workings of the capital market in such a manner as to seriously damage investor confidence.

Further Regulation

Regulations 33 and 34 of the Securities Industry Act are specific exemptions from s68. These exemptions are limited to:

i. a sale of securities that is effected by the giving or writing or an option that is registerd with Options Clearing House Proprietary Limited (Regulation 33)

and

ii. a sale of shares to which the vendor does not, at the time of sale, have a presently exercisable and unconditional right to vest in the purchaser, if the vendor is, at the time of the sale, able to obtain, by exercising exchange traded options, shares equal in number to, and of the same Class as, the total number of shares of that classified by the vendor -
   (a) in that sale; and
   (b) in previous sales that have not been completed by the transfer of shares to the purchaser, being sales of shares to which, at the time of the sale referred to in paragraph (a), the vendor does not have a presently exercisable and unconditional right to vest in the purchaser (Regulation 34).

Conclusion

It may be submitted that the concern caused by short selling is a reaction to the possible adverse effects on the workings of the capital market that may result from the practice. Thus if the premise that short selling must be regulated to ensure the protection of the capital market

66 National Companies and Securities Commission (1979) (Cth), Schedule.
67 R Deutsch, above n 12, 142, 148.
68 P J Drake and R L Matthews, 'The Securities Markets' in R R Hirst & R H Wallace (ed). *The Australian Capital Market* (1974), 3-10.

is accepted, then the efficacy of the regulation must be examined to see whether this goal has been achieved.

In the consideration of this issue, it may be further suggested that such a task is akin to sailing into unchartered waters due to the paucity of judicial interpretation on the regulation. This matter is further complicated by the number of areas that require either judicial comment or a classification of the issues involved. Nevertheless it may be contended, that in time, the problems that have been previously discussed will be overcome, but to be replaced no doubt with other problems. However, irrespective of the present difficulties it must be said that the regulation does attempt to meet the problems that may arise from unrestricted short selling.

The efficacy of the present system could be challenged on the basis of its structure. In regard to this point the Australian system of capital markets regulation may be contrasted to that of its American counterpart. The United States Congress has delegated to the Securities Exchange Commission the task of the regulation of short selling. It may be postulated that an advantage of the American system is that it enables regulation to keep pace with new developments in the capital market. Furthermore it enables the rectification of problems to occur at a quicker pace than if amendments to primary legislation were required. This may be compared with the Australian system which is heavily dependent on the use of primary legislation and thus open to the charge of failing to maintain parity with developments in the capital markets. Nevertheless it could be also be argued that the Australian system allows for a more complete approach to be undertaken in regard to regulation of the capital markets, whereas the American system has adopted a 'patchwork' approach.

Irrespective of the merits of either system of regulation it may be stated that the reintroduction of short selling will and has resulted in a number of 'teething' problems which will require fine tuning of the present system. However the point should be made that this will necessitate not more regulation but better regulation. Indeed for the benefits of short selling to accrue to the Australian capital markets future regulations may do well to heed the so-called 'golden rule' of regulation namely that, 'Regulators with power to regulate *will* regulate incessantly, indiscriminately and incomprehensively'.