

## editorial

### Letter of the Law

One of the repercussions of the "dawn raid" on Consolidated Goldfields shares has been the publication of yet another DOT consultative document – "Disclosure of Interest in Shares" (see p 253, post) which draws heavily on the recommendations of the Inspectors who inquired into the raid.

This recognises that the rigidly drawn definition of a disclosable interest in shares contained in the 1967 Companies Act fails to catch many possible arrangements between parties acting in concert (as understood in terms of the Takeover Code). Is that so very surprising?

It has for long been recognised that company law disclosure provisions have a useful part to play in market regulation but that self-regulation can produce better standards of behaviour. A code of practice can require that the spirit of the code should be observed as well as its letter and the supervisory authority may quite justly impose sanctions for breach of the spirit. In the case of sanctions imposed by the courts however, precision of definition is quite properly insisted upon. This suggests that the answer here ultimately lies with the looser self-regulatory approach.

We would, however, suggest that if the self-regulatory system on the stock market is to achieve its full potential, changes of approach on two fronts will be necessary.

Firstly, where a breach of the spirit of market codes is found, the authorities should not shy away from rulings having a retrospective element. While in tax law, for instance, it has long been recognised, with some justification, that retrospective measures are undesirable, where market conduct is involved, retrospective declarations that actions were contrary to the spirit of the code are not open to such objections. Were this approach to be adopted, sanctions could be more effective, eg requiring the questionable transaction to be reversed (subject to protection of innocent parties). It has to

be said that, to the discredit of the market, sizeable financial empires have in the past been built by successions of acquisitions each of which exploited some new loophole in the takeover code, the stable door then being closed after the bidder concerned by detailed changes to the code, the bidder, however, being allowed to retain his spoils. This also encouraged an avoidance oriented approach among professional advisors.

Secondly, sanctions against unlawful or improper conduct must be made to bite. The new consultative document suggests one novel sanction where a shareholder fails to disclose to a company the identity of the beneficial owner of the shares – the cancellation of the shares. While this would obviously be draconian it could very well be the answer to many objectionable warehousing practices. However, the first reported reaction of The Stock Exchange to this was that this seemed to be contrary to the general undertaking requirement that all listed shares must be without let or hindrance.

Some doubts have been cast over the performance of The Stock Exchange in dealing with the aftermath of the Consolidated Goldfields affair and with dawn raids in general; first, a sub-committee of the Council produced a rather weak report (see *BLR*, August, p 210) and later the full Council took a different approach favouring a tender system. Happily the CSI has now taken a decisive stand in banning dawn raids – pending the publication of a code of conduct.

The legislation which will flow from the consultative document could be helpful in restraining unfair market conduct, particularly if the Government is willing to allow the statutory provisions to provide the sanctions behind a suitably strengthened system of self-regulation. The CSI will be meeting again on September 4 to consider the matter further. Their proposed code will clearly be awaited with some interest by the Department of Trade and the Government.