faith, fair dealing, natural justice and propriety were nonetheless applicable but that 'they are political standards enforceable by the political process' (at 24). He did not expand this notion which does not sit easily with his conclusion that Parliament's authorisation of the Governor in Council to approve the renewal of insurance companies' licences was intended to be an executive matter not subject to judicial review. He based this conclusion on the argument that no Victorian Act authorised judicial review of the Council's decision and stated, without giving reasons, that common law judicial review should not be available in such an area of executive government. He appeared to see a floodgate situation emerging from the availability of review of a Minister's recommendation to the Council. This, he said, had 'startling implications. Are recommendations by the Minister to Cabinet, and Cabinet decisions to recommend to the Council, also subject to declaratory orders? (at 24)

Justice Murphy did not refer to the doctrine which formed the basis of the majority's application of the principles of natural justice to the decision, namely, that of the 'legitimate expectation' of the grantee that approval would continue to be granted.

Justice Murphy has been perceived as a great reforming judge in relation to the rights of the little man in some arenas of the battle between the citizen and the state. However, in these cases he seemed to concede that the state may properly ignore the interests of individuals where it is exercising a statutory discretion. Yet the individual often needs the assistance of the law when dealing with the State's administrators.

insider trading

After such knowledge, what forgiveness?

TS Eliot, *Gerontion*

Imagine it in $1 bills, or better yet, in a pile of silver dollars. I wonder how tall that would be . . . it would be like Jacob's ladder, wouldn't it? A Jacob's ladder of silver dollars. Imagine – wouldn't that be an aphrodisiac experience, climbing to the top of such a ladder?

Ivan Boesky

Throughout 1986, the practice of insider trading was a major item of news in the financial world in the United States of America, the United Kingdom and Australia. Insider trading is the practice of dealing in shares or other securities of a company while in the possession of confidential information which will affect the value of those securities once it becomes known. The person who engages in insider trading thus has a greater opportunity to make a profit or avoid a loss than other participants in the market. Although some free market economists argue that the practice of insider trading incorporates available information into the price of a share more quickly than would otherwise be the case, there is a general consensus that the practice is undesirable, since it undermines public confidence in the equity of the share market and thus weakens the market.

wall street woes. 1986 saw a spectacular continuation of the crackdown on insider trading which has been under way in the United States of America for the past two years. At a news conference in May 1986, the United States Securities and Exchange Commission revealed that in the past two years, 50 individuals have been charged with criminal offences arising from insider trading schemes compared with only 11 charged in the whole of the previous history of the SEC (*Weekend Australian*, 31 May – 1 June 1986).

The year began 'quietly' enough with the SEC laying a charge against Joseph G Cremonese, a former Vice-President of a unit of Allied Corporation for insider trading in connection with Allied's acquisition of Instrumentation Laboratory in May, 1983. (*Australian Financial Review*, 20 January 1986). The SEC sought a permanent injunction from the court barring Cremonese from

future violations of the securities laws and requiring him to disgorge what was to prove, in the light of the year's later events, an almost insignificant $US11886 in alleged profits plus interest.

The next significant event was the charge laid by the SEC against the prestigious First Boston investment bank (*Weekend Australian*, 17-8 May 1986). First Boston, without admitting or denying the charges, consented to findings that it traded in stock and options of Cigna Corporation in early 1986 relying on non-public information. First Boston agreed to give up profits of $US132138 to help pay what was described at the time as a record $US264276 fine.

The next major insider trading prosecution to be launched was that against Dennis B Levine. Levine was a managing director of the investment bank Drexel Burnham Lambert Inc. He was charged with making $US12.6 million in illegal profits as a result of some 54 violations of United States federal securities laws (*Weekend Australian,* 17-8 May 1986). The charges arose from an elaborate scheme involving fictitious names, phony Panamanian corporations and a Bahamas-based broker. Although action against insider trading had been taking place for some time, this case came as a particular shock to Wall Street. As Ms Janine Perrett put it:

> Insider trading is thought to be as common on Wall Street as a takeover rumour, but never has such a high-level executive been accused of using such privileged information for so much personal gain over so long a period of time (*Australian*, 20 May 1986).

Again, the superlatives were applied to describe a case of insider trading, but again new records were still to be set.

After the action against Levine, the SEC took action against five young professionals against whom evidence was obtained after a colleague invited one of them to a Sabbath dinner, ostensibly to meet a young woman, but actually to make a secret tape recording for SEC investigators (*Australian Financial Review*, 5 June 1986). The SEC also charged two former investment bankers with involvement in an insider trading scheme in the course of the investigation of the Levine case (*Australian Financial Review*, 3 July 1986).

The biggest shock, however, was yet to hit Wall Street. That shock came when the prominent arbitrager, Ivan F Boesky admitted insider trading and agreed to pay a record penalty of $US100 million, half of which represented illegal profits and half a civil penalty. That record still stands. Boesky will also be barred for life from participating in the US securities industry. He was given a year and a half to wind down his operations. The insider trading engaged in by Boesky was part of the Dennis Levine insider trading ring (*Australian Financial Review*, 17 November 1986). The SEC said Levine had told Boesky about at least four pending deals in exchange for 5% of any profits from insider trading based exclusively on that information and 1% on trades where the information played a contributory role (*Sydney Morning Herald*, 17 November 1986).

The repercussions of the Boesky affair are likely to be felt for some time. The SEC is investigating the relationship between Boesky and at least 10 other individuals. Reports indicate that Boesky's conversations implicating some of Wall Street's top professionals were tape recorded (*Australian Financial Review*, 19 November 1986). The Wall Street share market slid 43 points as a result of nervousness at the scope of the SEC investigation (*Australian Financial Review*, 20 November 1986).

Boesky is also faced with civil law suits filed by investors who allege that they have suffered damage due to his trading activities. A New Jersey man has filed suit in a federal court in Manhattan for $US50 million in damages claiming that Boesky artificially in-

flated the price of Northview Corporation stock. (*Canberra Times*, 23 November 1986).

As a result of the Boesky affair, the Democratic Party Chairman of the Senate Banking Committee, Senator William Proxmire said that he would launch an investigation into insider trading on Wall Street. He said that Congress should consider new controls on insider trading (*Australian*, 26 November 1986).

rumbles in the uk. The British Parliament has enacted more stringent provisions relating to insider trading as part of the new Financial Services Act. The provisions relating to insider trading were due to take effect in late January. However, the Trade and Industry Secretary, Mr Paul Channon, received papers concerning allegations that the former head of the equity trading division of Morgan Grenfell, Geoffrey Collier, had been involved in the largest insider trading transaction ever to have taken place in Britain. Less than 24 hours later, Mr Channon announced that the new wider powers for inspectors to investigate improper share dealings would come into effect from 15 November 1986 instead of late January as originally planned (*Australian Financial Review*, 17 November 1986). This action came less than three weeks after the lifting of restrictions on share dealings on the London Stock Exchange, part of the deregulation popularly known as the Big Bang. The new provisions have these features.

- The Secretary of State may appoint inspectors where it appears that there are circumstances suggesting that there may have been a contravention of the Company Securities (Insider Dealing) Act 1985.
- The inspectors can require persons to produce documents relating to the securities of the company, to attend before the inspectors and give all reasonable assistance possible.
- The inspectors may examine persons on oath.
- Failure to comply with an inspector's request, or refusal to answer any question put by the inspectors in relation to the suspected contravention may result in punishment as if for contempt of court.
- There are, however, provisions giving some protection to lawyers and bankers (CCH *British Company Law and Practice* para 35-825).

international action. The United States and United Kingdom have concluded an information sharing agreement designed to crack down on insider trading (*Australian*, 19 November 1986). The agreement was concluded by negotiators from the United Kingdom's Department of Trade and Industry and the United States SEC. It is designed to facilitate the exchange of information between the regulatory authorities within the two countries on illicit trading in their financial markets. The SEC has already passed details of its investigation of Ivan Boesky to the Department of Trade and Industry in accordance with the agreement (*Australian Financial Review*, 19 November 1986). A bilateral agreement was also reached between the United States and Japan in May 1986 (*Australian Financial Review*, 4 September 1986).

A meeting called by Britain to increase international co-operation on insider trading and other abuses shows the determination to enforce the law in this area. Delegates from the United States, Canada, West Germany, France, Switzerland, Japan, Hong Kong and Australia were among those invited to attend the meeting in London (*Australian Financial Review*, 8 December 1986).

ncsc proposals. In 1981, the Final Report of the Committee of Inquiry into the Australian Financial System (the Campbell Report) recommended that the National Companies and Securities Commission should, as a matter of priority, review the insider trading provisions of the Securities Industry Act (para21.123). In October 1986, the NCSC released an Issues Paper prepared for the Working Party

on Insider Trading of the NCSC by Dr Phillip Anisman, a Canadian expert on corporate law.

The paper aims at formulating a detailed and coherent set of proposals to deal with both criminal and civil aspects of insider trading. The proposals have the following features.

- A comprehensive definition of an insider is given. It includes such persons as
  - a director, officer or employee of a company;
  - a substantial shareholder, that is, one who beneficially owns or exercises control over more than 10% of a class of voting shares;
  - a person who proposes to make a takeover bid;
  - the insider of a company which proposes to make a takeover bid;
  - a 'tippee', that is, a person who is informed of confidential information by an insider.

- In addition, the following persons are deemed to be insiders:
  - a licensed dealer, an investment adviser or a person who publishes investment advice on a regular basis in a newspaper or periodical that is generally available to the public otherwise than only on subscription and who proposes to publish advice relating to the securities of a company;
  - employees of the Crown who obtain confidential information, including information concerning general government policy or action, as a result of their position;
  - an officer or employee of a stock exchange who obtains confidential information as a result of his or her position.

- It would be an offence for a person who knows material confidential information to buy or sell securities, cause another person to buy or sell securities or convey the information to another person who may trade in the securities.

- The proposals contain the 'Chinese wall' defence. This defence is available to a company or a firm which can prove that it knows material information only by reason of the knowledge of one of its directors, partners or employees, provided that
  - the person who took the action which might be seen as insider trading is not the person who had the knowledge of the information and
  - effective arrangements have been made to ensure that the information was not communicated to the person whose actions would constitute a breach of the insider trading provisions if done with knowledge of the relevant information.

- The criminal penalties for trading or causing to trade would be a fine equal to any profit made with a futher power for the court to levy an additional fine up to twice the profit and to sentence to imprisonment for 10 years.
- The penalty for advising trading in a security while possessing confidential information concerning that security would be a mandatory fine of $20000 or the profit made, whichever is the greater, with the possibility of an additional fine of up to twice the profit and imprisonment.
- The penalty for 'tipping' (that is, conveying confidential information to another) is a mandatory fine of the greater of $30000 or the profit made from the use of the information with the possibility of a further fine of twice the profit and imprisonment.
- An insider contravening the law in a direct transaction is liable to the other party for the amount of the profit and

also to contribute to a statutory general fund.

- Fines imposed as a criminal sanction are also to be paid into the statutory general fund.
- An action in relation to an impersonal transaction (that is, one which takes place in the market) may be brought by the company a security of which was purchased or sold, the Commission or any person who dealt on the same day as the insider or on any day up until the time the information became public. The proceeds are paid into the statutory general fund.
- The amount in the statutory general fund is pro-rated among the persons who apply to be awarded compensation as persons to whom the insider is liable.
- An action must be commenced within two years of the time when the plaintiff becomes aware of the facts on which the action is based but no later than six years after the purchase or sale.

The Victorian Attorney-General, Mr Kennan, has strongly backed changes to the provisions of the Securities Industries Code concerned with insider trading. At the eighth annual conference of the Australian Society of Labor Lawyers in Hobart, Mr Kennan said:

> Insiders must be more clearly defined. Others to whom liability must attach must also be clearly defined. Heavier penalties must be imposed. Compensation for those suffering loss as a result of insider trading must be adequate and sufficient (*Age*, 20 October 1986).

enforcement of the laws. The effectiveness of either the existing laws on insider trading or the implementation of a reformed insider trading provision depends on the vigour with which the law is enforced. In this regard the executive director of the NCSC, Mr Ray Schoer, has confirmed that the Commission has been investigating three separate cases of possible insider trading (*Sydney Morning Herald*, 27 November 1986). However, comments made by the Chairman of the NCSC, Mr Henry Bosch, do not augur well for a determined application of the law. In a speech delivered to the Securities Institute of Australia held in Sydney, Mr Bosch said:

> Since the necessary investigations are complex and lengthy, and consume a great deal of scarce investigative resource, it has been concluded that unless a really clear cut case appears it would be an imprudent use of the available effort to put into cases of this type (*Age*, 26 November 1986).

Another issue is the means by which insider trading offences might be investigated. In his speech to the Securities Institute, Mr Bosch pointed out that the United States SEC has access to complete records of the phone calls made by those they are investigating (*Australian Financial Review*, 26 November 1986). Mr Bosch raised the tapping of telephones in Australia as a possible aid to enforcement but did not actually advocate such a course of action (*Sydney Morning Herald*, 26 November 1986). It is, however, interesting to note that the NCSC has used Telecom records of the time telephone calls were made between particular phone numbers in a recent takeover investigation (*Australian Financial Review*, 20 January 1987).

The resources available for the regulation of corporate activity represent a perennial problem. A recent book by Peter Grabosky and John Braithwaite entitled *Of Manners Gentle: Enforcement Strategies of Australian Business Regulatory Agencies*, published by Oxford University Press, deals, in its chapter relating to corporate affairs, with the resources available for corporate affairs regulation. The authors of the book conducted detailed interviews with personnel of business regulatory agencies throughout Australia in order to compile the data for their book. The authors make the following points in relation to corporate affairs regulation.

- Information storage and retrieval systems at the time the authors visited the various Corporate Affairs Commis-

sions were at least fifteen years out of date. There is neither a national data base nor comparability across the Corporate Affairs Commissions.

- Monitoring of company activity is an unattainable ideal.
- Rather than preventing corporate crime or responding to it as it occurs, corporate affairs investigators tend to deal with companies which are defunct.
- Even with their limited role as 'corporate undertakers', the Corporate Affairs Commissions visited by the authors were hopelessly backlogged and only able to investigate a fraction of the cases of serious wrongdoing called to their attention. (This finding supports the view expressed by Mr Bosch.) The Victorian Corporate Affairs Commission was forced to drop over 500 matters from its investigative files leaving it with a backlog of 150 cases.

As noted above, the NCSC proposals allow for a measure of civil litigation by way of private enforcement of the insider trading provisions. Grabosky and Braithwaite, in an analysis of the various types of regulatory behaviour examined in their book, which covers such diverse areas as environmental protection, occupational health and safety regulation, radiation control, food standards, prudential regulation and anti-discrimination policy, conclude that encouraging civil litigation as a means of corporate regulation has not traditionally had support among Australian regulatory agencies. Nevertheless, if the reluctance to follow up anything other than the most clear cut of cases evidenced by Mr Bosch persists as a result of lack of resources, private enforcement may turn out to be the most effective way of enforcing a reformed law on insider trading.

complaints against police

Mankind may be divided into two races, those who acquiesce and those who growl. I am on the side of the growlers, always and everywhere; because I remember what I owe to them.

Sir Walter Murdoch, *Collected Essays*

genesis of the police complaints authority. In July 1986 the latest addition to the burgeoning ranks of statutory watchdogs was born. But if the gestation of the Victorian Police Complaints Authority had been a troubled one, its early months were to prove even more difficult.

The Victorian PCA is a direct descendent of the Australian Law Reform Commission's Reports *Complaints Against Police*, ALRC1 and *Complaints Againts Police (Supplementary Report)*, ALRC9 which recommended the creation of internal investigation departments within the police forces and the use of the Ombudsman as 'neutral territory' for the receipt of complaints, as investigator of last resort and as public guardian to require certain public complaints to be scrutinised in a public forum. Ironically, the ALRC recommended against the establishment of specialist police complaints authorities. 1985 and 1986, though, saw the creation of Australia's first two police complaints authorities in South Australia and Victoria respectively. Their role is to oversee the investigations undertaken by police internal investigations departments. In limited circumstances they can also undertake investigations themselves where they have received complaints from members of the public about police conduct or police practices. Thus at least potentially, their facts are of a case-work nature and they have an auditing role over the general performance and practices of the police forces over which they are watchdogs.

A Commissioner involved in both of the ALRC reports on complaints against police was John Cain, now the Premier of Victoria. The head of the PCA is Hugh Selby, a Sydney barrister and former Senior Assistant Ombudsman in Canberra, while its Manager is Ian Freckelton, formerly Senior Law Reform Officer at the ALRC.