Existing company law cannot be applied to property trusts, according to studies by Securities Institute committees. There may be a need for specific legislation.
recommendation, and it was left to Mullens & Co. to do so. Nevertheless, it cannot be said that accounting standards, even “with such adaptations as are necessary”, suit unit trusts either.

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

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

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

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

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

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

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

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

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

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

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

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

Strategies reminiscent of 1970s-style dirty tricks in the takeover game are being dusted off for use in struggles to control property trusts.