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COMPANY LAW ADVISORY COMMITTEE TO THE STANDING COMMITTEE OF ATTORNEYS-GENERAL

Fifth Interim Report

October 1970

On
the control of fund raising, share capital and debentures

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COMPANY LAW ADVISORY COMMITTEE
FIFTH INTERIM REPORT

SECTION A - INTRODUCTION.

1. In previous interim reports we have dealt with the Accounts and Audit provisions of the uniform Acts (17th October, 1968.) with Disclosure of Substantial Shareholdings and Takeovers (28th February, 1969) with the investigations provisions (2nd June, 1969) and with Insider Trading (20th February, 1970). After the preparation of our third report, we decided that, as it was some time since we had originally advertised for submissions, we would invite further submissions on particular topics, of which the first was the "control of fund raising (new capital and borrowings) including the form and content of prospectuses". Several further submissions were received, and these, together with those earlier submissions which were relevant to the subject matter, and other material assembled prior to the establishment of the Committee, have been taken into account in preparing this report. This report deals with the topic referred to above, and also with various matters which, although they have only an indirect relevance to the question of fund-raising, are, because of the grouping of the provisions in the Acts, or the inter-relation of the sections, most conveniently dealt with in this report.

SECTION B - THE PROTECTION OF INVESTORS IN RELATION TO FUND-RAISING OPERATIONS.

2. Whereas the accounts and audit provisions are directed towards ensuring that a shareholder is periodically informed as to the progress and profitability of the enterprise in which he has invested, a different set of provisions governs the initial investment in the company, either by an application for shares to be allotted by the company, or by an application for debentures, which is in effect a request to the company to accept a loan from the applicant, either secured or unsecured. Generally speaking, no provision is made in the Act* for the protection of an investor in relation to a purchase of shares from an existing shareholder, except that, in order to prevent evasion, section 43 provides, in effect, that if shares are allotted to a person with a view to their sale by that person to the public, the prospectus provisions become applicable.

Offers to the Public.

3. The method adopted by the Act of providing protection to investors at the time of their initial investment is to require the issue of a prospectus containing certain basic information,

to which the directors or promoters may add such additional material as they think fit. A prospectus is not, however, required unless the issue is offered to "the public ".

4. Where the offer is made to the public, the provisions relating to prospectuses not only ensure that basic information is provided in the prospectus, but also provide a more extensive remedy than the common law affords in cases of misrepresentation or non-disclosure. If the issue is not made to the public, a person who is deceived by false information is confined to his common law remedies, and cannot sue the directors or promoters for damages for non-disclosure, nor for a negligent but innocent misrepresentation unless he can establish a duty of care. He may, however, have a right to rescind the contract.

5. The decision of the legislature to confine the requirement of a prospectus (and the consequent enlargement of the remedies available) to issues offered to the public no doubt rests on the assumption that those who appeal publicly for funds should have imposed on them a duty of disclosure, and a duty of care which is not required where no such appeal is made. It may also depend on the consideration that compliance with such provisions necessarily involves considerable expense which would not be justified in respect of relatively small offerings. Difficulty arises, however, in defining "the public" for this purpose. In the United States of America, where a similar distinction is drawn, a recent study of Federal policies has conceded the difficulty of providing a precise test and suggested that "further efforts to develop a rule generally applicable to the distinction between a private and a public offering may well be productive and should be encouraged."("The Wheat Report" March 1969 page 157). No attempt has been made in the Australian legislation to define the term except in a negative and partial fashion. Section 5 (6)of the Act provides that a reference to offering shares or debentures to the public shall in the absence of a contrary intention be construed as including a reference to offering them to any section of the public whether selected as clients of the person issuing the prospectus or in any other manner; but that a bona fide offer or invitation shall not be deemed to be an offer to the public if it is (inter alia) made to existing members or debenture holders of the corporation.

** As in previous reports, references to "the Act" unless otherwise stated, are to the Victorian legislation.*

References to the General Revision Bill are to the rough draft of 21st May, 1969.

6. It will be seen that this sub-section both extends and limits the extent of the expression "the public ". These two aspects must be considered separately. As to the first, in In re South of England Natural Gas and Petroleum Company Ltd. (1911) 1 Ch. 573, a promoter marked the prospectus "For private circulation only" and sent it to three thousand shareholders in certain gas companies in which he was interested. Swinfen Eady J. held that this was an offer to the public, but he gave no reasons for his conclusion. On the other hand, in Sherwell v. Combined Incandescent Mantles Syndicate (1907) W.N. 110 at p. 111, it was said that an offer to the public must be "to any person who chose to come in and take them" and in Nash v. Lynde (1929) A.C. 158 at p. 169, Viscount Sumner said, "The point is that the offer is such as to be open to anyone who brings his money and applies in due form, whether the prospectus was addressed to him on behalf of the company or not." In Lee v. Evans (1964) 112 C.L.R. 276, the High Court had to consider a section of a South Australian statute which forbade offers to the public, but which did not contain any provision corresponding with section 5 (6). The majority of the Court held that for an offer to be made to the public it must be one capable of being acted on by the public generally, though the judges who took this view would appear to have accepted the possibility that if the offer were sufficiently widely distributed it might be considered as having been made to the public, even though each individual offer was in terms addressed to a specific person, and was not capable of being accepted by anyone else. In these circumstances, some extension of the scope of the words was obviously needed, but the method adopted in section 5 (6) leaves much to be desired. If the essence of an offer to the public is generality, it is obviously difficult to give a sensible meaning to a provision which says that the expression extends to an offer made to a section of the public, whether selected as clients of the person making the offer or in any other manner.

7. The Wheat Report, quoted above, rejected a numerical solution for the United States, because of the difficulty of taking account of subsequent resales of securities offered to the initial purchasers. The existence of the "over the counter" market in the United States creates special complications in that country which have no parallel here, and in our view, it is possible to find a solution in terms of a numerical limitation which will be workable under Australian conditions. We therefore recommend the fixing of an upper limit to the number of offers or invitations that can be made within a given period without issuing a prospectus. This suggestion is made in the light of our proposals with regard to the other aspects of the provision made by the sub-section, to which we now turn.

8. As mentioned above, the limiting provisions of section 5 (6) provide, inter alia, that "a bona fide offer or invitation with respect to shares or debentures shall not be deemed to be an offer to the public if it is ... made to existing members or debenture holders of a corporation and relates to shares in or debentures of that corporation". It seems desirable to consider whether this limitation on the expression is justified, either in whole or in part.

9. While the tendency of recent legislation has been to provide protection for debenture holders of a kind which formerly was not extended to lenders of money, debenture holders are still not entitled to information about the affairs of the company in the same way as shareholders are, and we do not see any reason why an offer of shares or debentures to existing debenture holders should be made without a prospectus. But even in the case of shareholders although they may be presumed (from receipt of annual reports and accounts) to know more about the affairs of the company than debenture holders, we think it is desirable that some increased protection should be afforded to them. In a prospectus issued to the public, the directors are required to bring the information in the last accounts up to date, and are also required to disclose whether they have any interest in any property proposed to be purchased. They are also required to indicate a figure for the minimum subscription which is in their opinion required for the success of the operation. An offer to existing shareholders should at least provide protection of this kind, except where they are few in number, in which case considerations of inconvenience and expense would be against imposing such a requirement.

10. If the foregoing conclusions are correct, the question arises as to how the Act should be modified. In our view, two steps should be taken. The first is to define the expression" the public" in terms of the number of persons to whom the offer or invitation is made. The second is to provide, while continuing to exempt offers or invitations to existing shareholders from prospectus requirements, that offers or invitations made to existing shareholders in excess of a certain number shall be attached to a circular (which we have called a "directors' proposal ") containing specified material of the kind referred to above.

11. We have considered what number should be fixed as the maximum number of persons who might be approached in respect of an issue without imposing on the offeror the obligation of submitting a prospectus for registration. The number should be fixed at a level which will not make the formation of small companies unduly expensive, but will nevertheless be low enough to ensure that it is unprofitable for fraudulent promoters to operate within the exemption. We think the limit can safely be set as high as fifty (as a combined total of offers and invitations issued during

any one period of three months), since fraudulent promoters are unlikely to obtain enough subscriptions from fifty invitations to make the operation of a fraudulent scheme worthwhile. In the case of an offer to existing shareholders, the same limit of number would exist but, instead of a prospectus, a directors' proposal would be required.

12. The directors' proposal, unlike a prospectus, would not have to be submitted to the Registrar before distribution, but its contents would be prescribed by the Act, and failure to include the statutory material, or the inclusion of false statements, would be an offence. We would add, also, that fraudulent directors or promoters operating within the limits so prescribed would still be subject to the sanctions of the criminal law and to civil liability, in respect of any fraudulent misrepresentation, and the common law remedies available for an innocent misrepresentation would still be available to a person misled by it.

Renounceable Rights Issues.

13. A question to which we have given considerable thought is that of issues which are offered to existing shareholders in a form which enables the shareholder either to take up the offering himself, or to renounce his rights in favour of another person. Such issues are usually made by listed companies whose shares are quoted at a premium on the market, and the dominant consideration in the mind of the shareholder is whether he wishes to make a further investment in that company, or whether he prefers to sell his rights for cash, either for reinvestment in some other form, or to use as ready money. Similarly, the dominant consideration for the purchaser of rights is whether, having regard to the market value of the shares, investment in the rights offers a cheaper means of entry into the company than a purchase of shares already issued.

14. The normal practice of companies making an issue of this kind is to send details of the offer to the shareholders in a circular which sets out the terms of the issue, and usually gives some information as to the progress of the company, plans for future expansion, and the like. It appears to be generally accepted that such a document is not a prospectus, and accordingly need not be in the form required by section 39. We have some doubt as to the correctness of this view. Sub-section (6) of section 5 says that a bona fide offer or invitation with respect to shares or debentures shall not be deemed to be an offer to the public if it is made to existing members. But if a company sends to its members a form of application and a form of renunciation, and tells the shareholders that they may transfer their entitlement to another person, who

will then be entitled to apply for and be allotted shares in the company, it is difficult to avoid the conclusion that the company has authorized the shareholder to invite the third party to whom the rights are sold to apply for shares in the company. Such an invitation is not made to the existing shareholder, but by him, with the authority of the company, and on this view would not be within the exemption conferred by sub-section (6) of section 5. Having regard to the fact that, as we have pointed out above, these offers are usually made by listed companies, and that the third party makes a choice between a purchase of issued shares, for which he would have no right to require a prospectus, and the purchase of rights, we do not think a prospectus should be required in such a case. But as we think that existing shareholders are entitled to a directors' proposal, in cases in which the offer is made to more than fifty of them, we think that a purchaser of rights is entitled to the benefit of the protection given to such shareholders. It is not unknown for the directors of ailing companies, whose difficulties have not yet become public knowledge, to invite their shareholders to subscribe for new shares or debentures, and if the shares are still at a premium on the market, they will almost certainly make an issue with renounceable rights. There are considerable difficulties in attempting to ensure that the third party receives a copy of the directors' proposal, since a large shareholder will often sell his rights in smaller parcels; but as long as the purchaser is given the same protection as the shareholder to whom the shares are offered we do not think it is important that the purchaser should actually receive the directors' proposal. Accordingly, we think it is sufficient to provide that the purchaser of rights is to be deemed to have subscribed for the shares on the faith of the directors' proposal. We have included a provision that the directors who issue such a proposal will be liable for false or misleading statements to the same extent as if it were a prospectus, so that if these provisions are adopted both shareholders and those who purchase rights from them will be entitled to the remedies available for false or misleading statements. We have deliberately omitted reference to non-disclosure of material facts; to require such disclosure in a directors' proposal would in effect convert such a document into a prospectus, and we have not seen any evidence that would justify the imposition of this additional burden on a company wishing to offer shares to existing holders, with or without a right to renounce in favour of a third party. If the form of directors' proposal recommended by us is adopted, it will be rarely that directors are able to make an offer without revealing facts of an adverse character, since the omission of them would in most cases make the facts stated misleading; but to require the disclosure of all material facts would be likely to compel directors to make a much fuller disclosure than necessary, in order to be on the safe side.

15. The detailed changes which should be made are contained in the draft attached to this report (Appendix "A ") and notes on the draft will be found in Appendix "B"

16. The essential features of our proposals are:

(1) A prospectus will be required where the offer or invitation in relation to shares or debentures is made to more than fifty persons unless it is confined to existing shareholders.

(2) An offer or invitation to more than fifty existing shareholders in relation to shares or debentures will require a directors' proposal.

(3) An offer of shares or debentures to existing debenture holders will no longer receive the benefit of the exemption contained in sub-section (6) of section 5, but a prospectus will not be required if the offer is confined to fifty persons or less.

(4) The present Fifth Schedule, which deals with the content of prospectuses, is to be substantially revised and rearranged.

(5) The provisions for a statement in lieu of prospectus will be repealed, and the Sixth Schedule will be amended to provide for the contents of the directors' proposal,

SECTION C - STATUTORY PROVISIONS RELATING TO PROSPECTUSES.

Advertisements and Prospectuses.

17. Section 40 provides that "every advertisement offering... shares in or debenture of a corporation ... shall be deemed to be a prospectus ... if it contains any information or matter other than the following .... " The implication of this section is that an advertisement which contains only the permitted information is not a prospectus. However, the definition of "prospectus" in section 5 (1) includes an advertisement inviting applications or offers from the public or offering to the public shares or debentures. Section 40 was really intended, we think, to achieve two purposes: first, to extend the prospectus provisions to advertisements "calling attention to" an offer or intended offer of shares, and secondly, to exempt from the prospectus requirements advertisements containing the limited information permitted by section 40 sub-section (1). While the present provisions seem to work out satisfactorily, our attention has been drawn to the confusion engendered in the minds of those who have to interpret them, and we have redrawn these provisions to avoid these difficulties.

18. There is, however, a more fundamental problem involved in the attempt to prevent the advertisement of prospectuses. Under modern conditions in which a company that wishes to raise money by a public

issue can promote its "image ", it is possible for a publicity campaign to engender such interest in a company that it is unnecessary to do more than announce that a prospectus is available. In some recent promotions of this kind, many pages of publicity have been printed in the press, including what appear to be" inspired "news items, and sometimes special supplements paid for by the promoters, before the prospectus has been approved by the Registrar, In some cases, press releases issued by the company or an associated corporation have contained material not included in the prospectus as finally issued. In such cases it is natural enough for the journalist who converts the press release into "copy" to add on his own initiative a reference to the fact that the company concerned is about to make a public issue, and that the prospecting will shortly be available. By the time the prospectus is in circulation, prospective investors are already convinced that the investment is a desirable one, and neither misrepresentation nor puffing is necessary in the prospectus itself. This situation presents a particularly difficult problem. There is not much point in trying to control the contents of the prospectus or of advertisements drawing attention to the prospectus if the same function is performed by news items which do not infringe the Act. In the United States the Securities and Exchange Commission has ruled that any document which is designed to procure orders for a security falls within the control exercised over offers and prospectuses, and that the Statute prohibits issuers underwriters and dealers from initiating a public sales campaign prior to registration (the "Arvida" case, cited in the Wheat Report pp. 129-132). Such a doctrine makes it necessary for a distinction to be drawn between the normal publicity which a company ordinarily gives to its affairs, and a sales campaign designed to promote a forthcoming new issue. In practice the distinction is often drawn in the course of informal discussions with officers of the Commission, who are accustomed to give prompt and definite answers to requests for a ruling. It would appear that some administrative control is exercised over ' pre-prospectus** publicity by refusing to abridge the waiting time imposed on an issuer who wishes to amend his registration statement; in the conditions prevailing in the United States, this is apparently an effective weapon, but since the decision depends on the discretion of the Commission there is on doubt a strong incentive to obtain advance rulings. The solution adopted in the United States is hardly appropriate in Australian conditions. Apart from the lack of an appropriate administrative sanction, the fact that companies operate under State legislation means that there is no single authority which can give a ruling on material which will in the nature of thinks be circulated beyond the borders of the STATE. For reasons stated elsewhere in this report, we feel that this sort of difficulty should be overcome by the establishment of a single authority, as we have already

recommended, in the case of accounts and audit requirements, in our first report. While the present situation exists, however, it is necessary to attempt to devise a legislative provision which will control publicity campaigns in the period before the prospectus and during its currency, but will leave a company free to continue its normal practices in relation to the communication of financial reports, announcements required by listing provisions, regular periodical journals and the like. We have attempted to frame a provision which will give effect to the views here expressed.

19. This provision appears in Appendix "A" as section 40A. It begins with a general provision prohibiting the publication of material which is likely to induce applications for shares or debentures, in cases where the person publishing the material is aware that a prospectus is in course of preparation or is current. Such a general prohibition would obviously be too wide, and in sub-section (2) a number of exceptions is made. The first is designed to protect press comment on current prospectuses, provided, of course, that the author owner and publisher receive no consideration for publishing the material. The second exception is intended to provide for cases in which the company wishes to make some announcement after a prospectus has been issued, or at a time when it is in contemplation, and enables it to obtain the protection of official approval of its action. The third exception relates to listed companies, which are required by the terms of their listing to make announcements to the Stock Exchange of matters specified in the listing requirements. It would be difficult to make the guilt or innocence of the person charged depend on whether he had correctly interpreted the rules of the Exchange, especially as the requirements are expressed in rather general terms. We are conscious that the more general exception we have drafted may in some cases lead to the publication, under the guise of an announcement to the Exchange, of material the real object of which is to promote the success of a share issue. Nevertheless, in view of the fact that the making of false statements to a Stock Exchange or an officer thereof will be an offence under new provisions already approved, the danger is not as acute as it might otherwise be, and in any case, it would be difficult to mount a large-scale campaign under the pretence of complying with the listing requirements.

20. The fourth exception is intended to cover the normal advertising of a company and also company journals regularly issued, or any other material which can be regarded as having been distributed in the ordinary course of carrying on the company's business. The fifth exception is designed to give a general

exemption for material which is published independently of the company and the promoters of the issue. It differs from the first exception in that it extends beyond comment on a registered prospectus so that it covers the period before registration as well as the period after it has been issued and during which it is still current. On the other hand, the conditions laid down are more stringent. Press comment on a registered prospectus may well be published at the instigation of the promoters, in the sense that the promoters furnish the prospectus to the press and invite comment on it. As long as the comment is bona fide and not published for reward, the press need not be concerned with the question of instigation. The fifth exception will only be available if it is entirely uninspired so far as the company and those interested in the success of the issue are concerned.

21. We are conscious that in this field it is difficult to strike a balance between the control of what is known in the United States as "gun-jumping" and the free circulation of independent comment, which we think is to be encouraged. In particular, we think it desirable that independent comment by the press on the merits of new issues should be available, as such comment can provide valuable protection to the public. We have therefore preferred to recommend rather less restrictive measures than might be thought necessary to ensure the elimination of "gun-jumping" so that while some control is obtained the flow of informed criticism is not interrupted.

22. A somewhat similar problem arises in relation to the circulars which brokers commonly send to their clients when forwarding a copy of a prospectus. We have seen a number of such circulars which contain material which is not included in the prospectus itself. Sometimes the statement is mere puffing, but in other cases profit projections or estimates of likely output have been included which may or may not have been derived from the company itself. In our view such circulars are advertisements calling attention to the prospectus, and the inclusion in them of any material not authorized by the terms of section 40 is a breach of that section. Nevertheless it is not by any means generally accepted that our view of the law is the correct one, and we think, it should be made clear that such a circular is subject to the provisions of section 40. We think, however, that a broker should be allowed to include in such a circular a recommendation to his client, provided that, if he is an underwriter or sub-underwriter of the issue, this is made clear in the same circular.

Offer of Debentures in Proposed Corporation.

23. A difficulty arises in relation to the terms of the existing section 38 of the Act, in that, although the section refers to an invitation to lend money to a "proposed corporation" paragraph (b) of sub-section (1) refers to "an undertaking by the corporation

". It has been objected that such an undertaking cannot be given by a "proposed corporation" We have in our draft used a form of expression which avoids this difficulty.

Description of Debentures.

24. Paragraph (c) of section 38 (1) sets out three kinds of description, one of which must be given to any document acknowledging or evidencing the indebtedness of the corporation in respect of a debenture. It is to be noted that all three fall within the definition of" debenture" in section 5 of the Act, although the term "debenture" cannot be used in relation to the document unless some security is given (see section 38 sub-sections (3), (4) and (5)). Although this anomaly malt give rise to some confusion, we do not think that it is productive of such difficulty as would call for the extensive redrafting of the Act which would be required to remove it.

25. A difficulty has arisen, however, in relation to the extent to which additional words may be used to describe debentures or certificates of debenture stock. For some time the Registrars took the view that the Act impliedly prohibited the use of such descriptions as "Debenture Stock (First Ranking)" The practical objection to such a description was that it might imply a priority of such stock over all other liabilities, whereas in many cases such stock may be postponed to charges (usually over specific assets) created pursuant to a power reserved in the debenture trust deed, On the other hand, companies often wished to create more than one series of debentures, having different priorities. A proposal was embodied in the General Revision Bill (section 5 (e)) which would have enabled the addition of words indicating a lower priority (e.g., "second ranking") but not a higher priority. We would have regarded such a proposal as containing inherent disadvantages but it is in any event now clear that there have been too many cases of departure from the strict view originally contended for by the Registrars for the proposed solution to be adopted. We recognize, however, the force of the contention of the Registrars that such an expression as "first ranking" without more, may give a wrong impression to the lender, if a borrowing corporation desires to use such a description, we think the [Registrars]* should have power to require the addition of words which will draw attention to the possibility of prior charges, or which are otherwise necessary to prevent the attachment of misleading descriptions. We therefore recommend that, in lieu of the amendment proposed in the General Revision Bill, the following words be added to the relevant sub-section:

"... without any addition to or qualification of the name by which the document is described or referred to, other than such addition indicating its priority as the [Registrar] may approve or require."

Later in this Report we make suggestions as to the inclusion in prospectuses of information as to the priorities of liabilities in respect of borrowings. It is of course impracticable to include in the description of the document a complete statement of its relative priority but such a statement should be given in the prospectus which invites the public to lend.

Exemption of Prescribed Corporations.

26. Sub-section (7) of section 38 exempts a "banking corporation" as defined by section 5, and gives the Governor in Council power to exempt other "prescribed corporations" from the obligation to issue a prospectus in connection with an invitation to the public to deposit money. Section 5 (g) of the General Revision Bill proposes to extend the power to exempt to a corporation that has no members other than banking corporations. This proposal in itself appears to do no more than enable a consortium of banks to operate in the same way as an individual bank. If, however, the object is merely to enable such a consortium to invite deposits from the public as part of the general business of banking, the consortium would need authority under Part II. of the Banking Act to carry on banking business, and if it had such authority it would be covered by paragraph (a) of sub-section (7). The amendment would cover cases in which the consortium proposed to carry on limited banking business for which it could obtain an exemption under the Banking Act, but it would also cover cases in which the consortium proposed to carry on non-banking business. If a consortium wishes to raise money by inviting deposits from members of the public for the purposes of (say) a mining venture, we see no reason why the public should not have the protection of a prospectus.

Replacement of Debenture Certificates.

27. As stated above, section 38 restricts the description which may be attached to a debenture, according to whether there is security, and if secured, according to the nature of the security. Sub-section (10) requires that these provisions be observed in respect of documents issued after the commencement of the Companies (Public Borrowings) Act 1963, even though the existing debenture or trust deed may in terms require some other description. It has been represented to us that

** Note: We have used the term Registrar throughout this report and the draft legislation in Appendix "A" to refer to the authority having the function of registering prospectuses and the like As will be seen from Section G of this report, consideration of the prospectus provisions of the Act has strengthened our conviction that many of the present functions of the Registrars, including those here dealt with, should be committed to a single Companies Commission. Square brackets have been used, as above, to indicate that the function involved is of this kind.*

doubt exists as to whether, in the case of a new certificate being issued on transfer or transmission, or to replace a lost certificate, the original description used on a certificate issued before the relevant date can be used on the certificate issued after the relevant date. In our view, it should be permissible to describe a new certificate, issued in substitution for one issued before the relevant date, in the same terms as the original certificate which it replaces, and we recommend an amendment to provide for this. We have also provided for a certificate which has been destroyed.

Amendments of Section 39.

28. Two amendments of section 39 are proposed in the General Revision Bill, section 5 (h). In paragraph (c) of section 39 (1), it is proposed to substitute for the words" so lodged" the words "lodged with and registered by the Registrar"; and in paragraph (g) of the same sub-section, for the words "any statement made by an expert and contained in what purports to be" it is proposed to substitute the words "what purports to be a statement made by an expert or ...." the former amendment is necessary to take account of the fact that Registrars now have power to refuse registration of prospectuses; the latter restates more accurately what must have been the intention of the original draftsman. In our first Report we indicated (by not seeking a reservation of the proposal for further consideration) that we had no objection to these amendments, but for the sake of completeness we are repeating our approval in the present report. We propose to follow the same course with respect to other proposals which we did not seek to reserve in our first report, but without necessarily drawing specific attention to our earlier approval.

Omission of Section 39 (1) (e).

29. Section 39 (1) (d) requires that a prospectus shall set out the reports specified in Part II. of the Fifth Schedule. Paragraph 31 of the Fifth Schedule requires that where the persons making such a report consider adjustments in figures of profits or losses or assets and liabilities to be necessary, they shall either indicate by way of note the adjustments which appear to be necessary, or make the adjustments and indicate that adjustments have been made. If the second course were followed, a prospective investor would have no way of knowing either the amount of the adjustment, or the reasons for making it. In the former case, while the amount would be known, the reasons need not have been stated. Section 39 (1) (e) is an attempt to overcome the deficiency, but it still leaves open alternative methods and the statement required

by the section need not appear in the same part of the prospectus as the figures to which it relates. In our view, in such cases, the person making the report should be required to make the adjustments in the report itself, but should also be required to state by way of note to the figures the details of the adjustment made and the reasons therefor. We have included in our draft of the Fifth Schedule a provision giving effect to this view, and if it is accepted, paragraph (e) of sub-section (1) of section 39 can be omitted.

30. A similar question arises in relation to the adjustments contemplated by clause 22 of the existing Fifth Schedule, and a corresponding provision is made in the draft.

Currency of Prospectus.

31. Section 39 (1) of the Act requires that a prospectus shall contain a statement that no shares or debentures shall be allotted on the basis of the prospectus later than six months after the date of the issue of the prospectus, and section 48 (9) imposes a penalty for allotment after the period of six months has expired. Since the accounts on which the prospectus is based may be nine months old (or with the consent of the Minister, twelve months old) we have considered whether a currency of six months might be considered too long. The difficulty about shortening the time is that it leaves a company little flexibility in choosing the most suitable time to approach the public. There are provisions in clause 23 of the Fifth Schedule for a report by directors bringing the information as to the affairs of the company up to date, and these provisions are the subject of proposals for amendment by the General Revision Bill, to which we have added further suggestions. These provisions, together with additional provisions for half-yearly accounts, will, we think, sufficiently provide for the risk of staleness.

32. We have considered the further question whether, notwithstanding these provisions, some machinery is required to deal with changes of circumstances which may occur after the issue of the prospectus and before its currency expires. After careful consideration we have come to the conclusion that it would be undesirable to attempt to provide any further remedy than the law now provides to deal with such a situation. The courts have long recognized that a representation made in the course of negotiations prior to the making of a contract has a continuing operation. If it is true when it is made but a subsequent change of circumstances renders it untrue before the contract comes into existence the party making it is bound to inform the other party of this change. Rescission of contracts to take up shares has often been granted by the courts on the ground of innocent misrepresentation of this type in the prospectus (see and Anderson's Case (1881) 17 Ch. D. 373, and Re The Kent County Gas Light and Coke Company; ex parte Brown (1906) 95 L.T. 756).

Rescission is available even after allotment of the shares has taken place (see Grogan v. "The Ascot" Limited (1925) 25 S.R. (N.S.W.) 409), but the right to it is lost in the event of delay, any set of adoption of the contract, or the commencement of the winding up of the company. doctrine is applied to fraudulent misrepresentations is shown by Briess v. Woolley [1954] A.C. 333, where it was held that a representation fraudulently made by an agent of the defendants, at a time before he became their agent, was to be treated as continually operative until the making of the contract. The representation in this case was as to the accounts of the company for a period the agent made the representation. We believe that this doctrine of the continuing operation of representations is adequate to deal with any problems of this nature that may arise. Accordingly, we do not think there is any necessity to devise additional machinery, which would necessarily be elaborate, and would impose further burdens on companies seeking funds, for the purpose of dealing with changes of circumstances arising after the issue of the prospectus.

Amendment of Section 39 (2).

33. Sub-section (2) of section 39 of the existing Act contains two provisions. The first of these relieves a foreign company from the obligation imposed by paragraph (i) of sub-section (1) of the section in cases in which the foreign company issues a prospectus more than two years after the day on which the company is entitled to commence business. One difficulty about this provision is that it is not clear whether the provision is referring to the commencing of business in the State, or in its country of origin. If it refers to the country of origin, it is difficult to see why the foreign company should be exempted from a provision designed to provide information about the constitution of the company and the law under which it is incorporated. If it refers to the commencing of business in the State, it is based on a misapprehension. A foreign company is entitled to commence business in Victoria (or any other State or Territory) from the moment of its incorporation, or at least from the time at which it is entitled to commence business in its country of origin. Section 346 of the Act requires a foreign company, within one month after it establishes a place of business or commences to carry on business within the State, to lodge various documents with the Registrar, so that it is clear that lodgment of these documents is not a pre-requisite to the commencement of business. In the case of a foreign company which has been established in its place of origin for more than two years, therefore, it must also have been entitled to carry on business in Victoria for more than two years, and would be entitled to the exemption provided by sub-section (2), even though it had never carried on business in Victoria, and was making its first appeal

to the public, so far as that State was concerned. But, in fact, we can see no valid reason why a foreign company should not include in each prospectus which it proposes to issue in Victoria the information referred to in sub-paragraphs (i) (ii) and (iii) of paragraph (i) of sub-section (1). Whether the company has been carrying on business in the State for two years or not, it seems to us desirable that a person contemplating investment in the company should be able to inspect the company's constitution, and the enactment's under which the company is incorporated. We therefore propose that this part of sub-section (2) should be omitted.

34. The other provision made by sub-section (2) is designed to deal with the case in which a foreign company does not have articles of association. In the existing Fifth Schedule reference is made to articles, and sub-section (2) of section 39 directs that that reference shall have effect as if a reference to the constitution of the company were substituted for the reference to the article. In the draft we have made of the Fifth Schedule, there are references both to the articles and to the memorandum, and we have modified the terms of sub-section (2) of section 39 accordingly.

Over-subscription of Debenture Issues.

35. Section 41 of the Act forbids the retention of over-subscriptions in any debenture issue unless the prospectus specifies:

(a) that the corporation expressly reserves the right to accept or retain over-subscriptions; and

(b) a limit on the amount of over-subscriptions that may be retained.

The General Revision Bill proposes to amend the second of these conditions by requiring the limit to be expressed as a sum of money. It also proposes the addition of a new sub-section (1A) limiting over-subscriptions to 25 per cent of the amount of the issue as disclosed in the prospectus, and also a new sub-section (3) which is a penalty section in standard form. The last of these amendments is not open to objection. The proposed sub-section (1A), however, raises a wider question. It has been objected to on the ground that borrowing corporations, if this proposal is adopted, will be compelled to make more frequent issues thereby increasing the expenses incurred in soliciting funds from the public. We have examined the prospectuses of debenture issues of a number of large corporations and have found that the margin between the "amount of the issue"

and the maximum amount which the corporation reserves the right to accept in terms of section 41 (1) is normally very wide. Out of eight cases examined, the total amount which the company was prepared to accept ranged from twice the nominal amount of the issue up to eight times ($1m. with over-subscriptions of $7m.). In such cases it would seem that the corporation is really aiming at an amount much larger than the nominal target, but is taking no chances on the issue being under-subscribed. The nominal amount of the issue in such a case seems to be little more than a figure chosen to enable the corporation to claim that its issue has been over-subscribed, a claim of doubtful value when the corporation is prepared to accept, and therefore presumably desires to borrow, an amount many times larger than the nominal target. In our opinion the correct approach to this subject, so far as the legislation is concerned, is to require a borrowing corporation to state a maximum amount which it will accept, to prohibit it from accepting more, and to require it to show the asset backing and interest cover in relation to that maximum amount. If the corporation chooses to indicate that it will be content with a less amount, it should be free to do so. The important thing for the investor is that he should be told how he will stand in relation to security, asset backing and interest cover if, as the corporation presumably hopes, it obtains the maximum amount which it is permitted to accept.

Statements as to Assets Backing.

36. Section 41 (2) of the Act provides that where a corporation reserves the right to retain over-subscriptions it shall not make any reference to asset backing for the issue other than a reference to the total assets and the total liabilities of the corporation; and that the prospectus shall contain a statement or reference as to what the total assets and total liabilities of the corporation would be if over-subscriptions to the limit specified in the prospectus were accepted or retained. These requirements are expressed to be "subject to the provisions contained in the Fifth Schedule ". These words were introduced (in Victoria) by Act No. 7089 in December, 1963, when the Fifth Schedule was amended to require a statement of (inter alia) the tangible assets available as security for a charge, but subject to various adjustments specified in the Fifth Schedule.

37. The effect of section 41 has been to eliminate from a prospectus in which the right to retain over-subscriptions is reserved, any statement of asset backing in the form of a ratio, although the total figures from which the ratio can be calculated are given. Both the aggregate figures and the ratio can, however, be very misleading in certain circumstances. For example, if secured

borrowings are to be used to pay off unsecured liabilities, it would be misleading to add the whole amount to be raised by the debenture issue to the assets side of the computation. The point is well illustrated in section 10 of the report of the Inspectors who investigated the affairs of Latec Investments Ltd. in which an asset cover stated in the prospectus at £614 for each £100 would have dwindled to just over £200 on two assumptions, viz., that over-subscriptions were accepted to the amount contemplated by the directors, and that the proceeds were used to pay off unsecured liabilities. Nevertheless, so long as appropriate safeguards are provided for in the legislation, we see no reason why investors should be denied the benefit of arithmetical calculations of ratios. The safeguards required are first, that all such calculations should be made on the assumption that the maximum subscription is received, and secondly that due allowance should be made for prior and equal-ranking charges, and for the possibility that the funds raised will be applied in a manner which will not increase the asset backing. The second safeguard is more appropriately made in the Fifth Schedule and will be dealt with in a later part of this report (see paras. 75-76 below). The first safeguard can be achieved by amending section 41 (2) to require that any statement as to asset backing, however expressed, is to be made on the basis that the maximum amount sought by the prospectus has been obtained.

Statements as to Interest Cover.

38. The General Revision Bill (section 5 (j)) proposes a new section (41A) which would prohibit a reference to the ratio of profits to interest unless the amount of interest by reference to which the ratio is calculated is the interest payable on existing debentures plus the interest payable on the proposed issue including over-subscriptions, and unless the prospectus contains a statement that nothing has occurred of which the directors are aware (other than the liability to pay interest on the new issue) which would materially affect the capacity of the corporation to make profits at least equal to those by reference to which the ratio is calculated. Read literally, this section would appear to require a comparison between profits and total interest including interest which had already been deducted in arriving at those profits, a comparison which might in some circumstances produce a figure for interest in excess of the profits of the year in question. In our view, it should be made clear that if the total interest figure is to be taken, the interest paid out before ascertaining the profits should be added back. With regard to the statement as to the capacity of the corporation to make Profits it would seem that the section would prohibit any statement of ratios in relation to interest Unless the directors can, in effect, assert that the profits for the future (before deducting interest on the new issue) will be as high as they have been in the past. Such a statement

may in some cases be inadequate (e.g., although gross earnings will be maintained, the additional funds cannot be

profitably employed) and in others may require too much (e.g., if, although profitability is expected to decline, there is still ample cover for the interest payable). We think that the only provision necessary in the Act itself is to ensure that any reference to interest cover is based on the assumption that the maximum amount is obtained under the current issue. This can be done by including a reference to interest cover in section 41.

Registration of Prospectus.

39. Section 42 (1) of the Act requires registration of a copy of a prospectus before its issue circulation or distribution. Sub-section (2) provides that the Registrar shall not register a copy of a prospectus unless certain conditions are complied with, as set out in paragraphs (a), (b), (c) and (all of the sub-section. Paragraph (a) relates to signature of the copy. Paragraph (b) relates to compliance with the requirements of the Act. Where the Registrar is satisfied that the prospectus of a foreign company incorporated in another State or Territory has been approved or is acceptable for registration in the State or Territory of incorporation, the obligation to decide whether the prospectus "appears to comply" with the requirements of the Act does not arise.

40. Paragraph (c) relates to the lodgment of copies of consents required by section 45.

41. Paragraph (a$^{t)}$ (added to the Victor/an Act by No. 7391, section 11 (2)) requires the Registrar to refuse registration unless he "is of opinion that the prospectus does not contain any statement or matter which is misleading in the form or context in which it is included" (except where the prospectus of a foreign company incorporated in another State or Territory has been registered by or is acceptable to the Registrar of that other State or Territory).

42. It has been objected by one Registrar that, read literally, this provision implies that the Registrar has a duty to form an opinion that nothing in the prospectus is misleading in the form or context in which it is included, and accordingly that he must make such inquiries as may be necessary to enable him to form such an opinion. The reference to "the form and context in which it is included" was probably intended to confine the Registrar to perusal of the materials placed before him, but it is doubtful whether the words achieve this result. We think it can be said that, generally speaking, the Registrars do not have an organization which is equipped to make independent inquiries as to matters stated in the prospectus, nor (for reasons stated below) do we think that such a function should be imposed on them. The difficulty arises in part from the attempt to fit paragraph (d) into the framework of

sub-section (2) of section 42. We think the solution to the problem is to remove paragraph (d) from sub-section (2) and insert a new sub-section (2n), in the following terms:

"Where after perusing a copy of a prospectus and any documents submitted therewith in accordance with sub-section (2), the [Registrar] is not satisfied that the prospectus does not contain any statement or matter which is misleading in the form or context in which it is included, he may if he thinks fit refuse to register a copy of the prospectus."

43, The Registrar for the Territory of Papua and New Guinea has suggested that the provision now under discussion should be converted into a positive provision in the terms already contained in sub-section (2a) of the relevant section of the Territory of Papua and New Guinea Ordinance, viz., "a prospectus shall not contain any statement or matter which is misleading in the form or context in which it is included." We do not agree with this suggestion. Section 47 already creates offences in relation to untrue statements or willful non-disclosure, which are the subject, of recommendations to which we refer in paragraph 61 below. The suggested provision would subject persons to a criminal liability if, after the prospectus had passed the scrutiny of the Registrar, a court formed the opinion that the words used were misleading. Insofar as this conclusion was based on falsity or non-disclosure, it would already be provided for in the provisions to which we have referred. If it depended merely on an innocent but misleading juxtaposition of words, it should not be made a criminal offence.

44. The Registrar of the Territory of Papua and New Guinea has also suggested that, as statements which might not appear to be misleading in the "home State" might be recognized to be so in another place, the obligation to accept registration in the home State should be taken out of the Statute and left to administrative arrangements. While we recognize the force of the point, which is perhaps especially likely to arise where a company is formed on the mainland to conduct operations in the Territory of Papua and New Guinea, we think it is of great importance to the business community that they should only have to satisfy one Registrar as to the registration of a prospectus. While, we would hope that problems of uniformity would be solved in the manner suggested by us in Section G of this report, we see no reason why, under present circumstances, the "home State" Registrar should not consult his colleague in another jurisdiction to ascertain whether local knowledge in that other jurisdiction throws any light on the question he has to decide.

45. It is to be noted that paragraph (d) of section 42 (2) has not yet been adopted in Queensland or South Australia. The result is that a prospectus registered in either of those States, although not subject to the operation of paragraph (d), obtains exemption from its operation when presented for registration in another State. It is obviously desirable that the proposed sub-section (2A) which we have recommended above should be in force in all the jurisdictions concerned. If it is not adopted in those two States, we think the exemption should not be available in respect of prospectuses registered in those States.

46. In New South Wales, Western Australia and Tasmania a further paragraph has been added to section 42 (2), by which a prospectus inviting loans or deposits to a corporation that is a subsidiary of another corporation must state whether the holding corporation is under any liability to repay principal or to pay interest, and where such liability exists, particulars of its nature and extent, the circumstances under which it arose, and the manner in which it is to be discharged. In our opinion this is a desirable provision and should be included in the legislation of all States and Territories which do not already have it. It will be found in our draft of section 42. We would, however, suggest that it be made clear that the provision relates to contingent as well as absolute liabilities.

47. One practical difficulty which arises under the present legislation is that although the general form and content of the prospectus, when approved in the home State, can be regarded as acceptable in other States, it is still necessary to effect registration in the other States, and before this can be done, the Registrar in a State other than the home State must satisfy himself that the provisions of section 39 (1) (i) have been complied with and that copies of the documents referred to in section 42 (2) (c) have been lodged. The result is that a company planning to distribute a prospectus in more than one State must not only obtain approval in the home State, but must allow sufficient time for the Registrars in other States to satisfy themselves about the matters mentioned above. There does not seem to be any reason why the home State Registrar cannot certify as to the compliance with section 39 (1) (i) of the Act in force in another State; indeed, in some respects, he is in a better position to do so as the matters there referred to are matters of local law so far as he is concerned. The lodging of the documents referred to in section 42 (2) (c) involves no exercise of discretion. Accordingly we have drawn the relevant provisions in such a way that once the home State Registrar has accepted the prospectus and certified as to section 39 (1) (i), lodgment of the necessary documents in another State will

constitute automatic registration for the purposes of section 42 (1).

Investigation of Prospectuses.

48. We have stated above that we do not think the Registrars should have imposed on them the task of making independent inquiries as to the truth of matters stated in the prospectus. It is clear that under present circumstances, the resources of the Registrars in the States and Territories are in general not adequate to enable the truth of all prospectus statements to be investigated in depth. If the task were to be imposed upon them, it would be necessary to strengthen the staff of each registry by the addition of qualified investigators in various fields, and also to provide machinery to afford the company or its promoters the opportunity of a hearing, and perhaps also to afford a fight of appeal to a person whose application for registration is refused. If the function is to be exercised at all, it should in our opinion be exercised by a single authority with highly skilled staff and the resources to employ expert advisers as required. Such a single authority would either have to be set up by the exercise of federal power, or by a co-operative effort of the States, in the same manner as was envisaged by us when we made our recommendation for the establishment of a Companies Commission in our first interim report. It will be recalled that the primary function of that Commission, as set out in our first report, was to provide a dispensing power to relieve companies in cases in which strict compliance with the Statute would impose undue burdens on the company or its officers. We have not hitherto considered the question whether it should be part of the duties of such a body to investigate the truth or accuracy of statements contained in prospectuses, although when we made our recommendation we had in mind that some functions m relation to prospectuses could conveniently be assigned to such a body.

49. In order to reach a conclusion as to whether investigation of the truth or accuracy of prospectuses is desirable, we have made a study of the history of the past few years, as revealed by the reports of investigators, and by the records relating to prosecutions. We have also had the advantage of some inquiries made by Mr. Rodd in Washington, when he had the opportunity of discussions with the Securities and Exchange Commission and with private practitioners. In evaluating this material, some preliminary observations may be useful.

50. In the first place, some of the cases in which false statements have been discovered may be of a kind that is unlikely to occur again. In this category can be placed such cases as those in which companies were able to present a false appearance of prosperity by making use of accounting stratagems which have now been

precluded by subsequent amendments or proposed amendments of the accounts and audit provisions.

51. Secondly, in any system of investigations, unless much time is to be needlessly consumed, a decision will have to be made on surface indications as to whether the case warrants detailed investigation. The standing of some of the companies which failed in recent years was such that they might well have passed without investigation until their financial difficulties became public.

52. Thirdly, the misleading nature of some statements may not be discovered even if an investigation is carried out. For example, if a company is financially unsound because a senior executive has been systematically defrauding it, by a scheme which has deceived the auditors, an official investigation is unlikely to succeed when the auditors have failed. Even in the United States, some fraudulent prospectuses slip through the net.

53. Finally, against the saving to the community which results from the reduction in the incidence of fraud in this field must be set the trouble and inconvenience and possible financial loss suffered by innocent companies which are subjected to investigation, as well as the expense to governments of administering the system.

54. With these considerations in mind, we have examined the history of recent company failures as disclosed by the sources to which we have referred. It is clear that there are cases which illustrate each of the three propositions set out above. There are, in addition, some cases in which, if the Registrar had been charged with the responsibility of investigating the truth of the statements in the prospectus, it is probable that he would have discovered that the prospectus was fraudulent. Such cases, however, are relatively few in number, and even there, improvements in the standards of accounting and auditing practice, together with the amendments made and to be made in the legislation dealing with accounts and audit, and the amendments we propose in the prospectus provisions, should reduce the incidence of such cases still further. On the whole, although it is impossible to be precise in a matter of this kind, it is our feeling that the evidence does not justify imposing on the authority charged with the registration of prospectuses a duty to investigate the truth of the statements contained in them, if by this is meant that that authority should attempt to assume the moral (but not legal) responsibility of providing some assurance to the public that the statements are true. We do not however wish to suggest that the present practice by which explanation and elaboration is required of statements which on their face appear deficient or doubtful should be abandoned. Under the provisions of section 42 as they now exist, or as we propose that they should appear in the amended legislation, there is ample power to deal with cases of this kind. We would add that one of the most powerful guarantees of honesty in prospectuses

is a feeling in the community that there is a high probability that fraudulent statements will be discovered and their authors prosecuted. We believe that the events of the last few years have increased the probability to a substantial extent, and that for this reason alone, some of the cases which have been the subject of investigation would be unlikely to occur today.

55. We would also point out that it is almost impossible to define in legislation where to draw the line between the sort of investigation we envisage, and scrutiny of prospectuses so intensive that it would impose a burden on honest companies which would far outweigh the benefits that would result from the detection of incipient fraud. The complaint has been made in the United States that the warnings of risk which are now included in prospectuses in that country have become so terrifying that, if they were taken seriously, no one would invest their money, but that because such warnings have become commonplace investors take little notice of them. When sound ventures have to warn their prospective shareholders that they are taking a risk in investing their money, speculative ventures can do the same without adversely affecting their ability to obtain finance. It is in our view inevitable that some discretion should be reposed in the persons who are charged with the responsibility of examining prospectuses and we do not propose any limitation of that discretion.

56. On the other hand, having regard to the increasing awareness of the responsibilities of those concerned with issues to the public and the other factors to which we have referred, we are not persuaded that more extensive powers of investigation are required. We are, however, conscious that such research as we have been able to undertake cannot be regarded as exhaustive, and that others who pursue more extensive inquiries in this field may well be led to a different conclusion. We emphasize that we are doing no more than expressing our view that on the material available to us we do not feel impelled to make any further recommendations than are contained in this part of our report. We would add, to prevent misunderstanding, that our observations on the need for investigatory machinery are confined to the field of our own enquiry, that is to say, the investigation of the truth of statements contained in prospectuses presented for registration. We are not concerned with other aspects of the work of such bodies as the Securities and Exchange Commission in the field of market manipulation, securities trading and the like.

Allotment of Shares for Sale to the Public.

57. We have referred in paragraph 2 above to the provisions of section 43, which were introduced into the Act to prevent a means of evasion of the prospectus provisions which experience had shown to be available. If an allotment was made to a person or company

of the whole of a proposed issue, that person or company could 'sell the shares to the public without any prospectus,

since the original provisions of the Act only applied to cases in which the public were invited to apply to the company for shares. Section 43 was then introduced to require that when shares were allotted to a person "with a view to all or any of them being offered for sale to the public" the prospectus provisions should be complied with. The same difficulty of definition arises in relation to the use of the expression" the public" as in the prospectus sections themselves. It has therefore been necessary to reconsider the provisions of section 43, in order to avoid the retention of the same sort of uncertainty in that section as we have sought to eliminate from the other. The draft in Appendix "A" is the result of that consideration, it expresses our view of the best method of achieving the objective, but we are conscious that there are various options open to the draftsman and that others might evolve a different and perhaps simpler approach to the problem. In our proposal, sub-section (1) refers to allotment with a view to offers for sale "to other persons", instead of "to the public". This results in the imposition of a general restriction on the allotment of shares with a view to resale, unless the prospectus provisions are complied with. Although such a general restriction might not impose great hardship, we considered that provisions should be made for cases in which a person or group of persons or a company was prepared to take a firm allotment of shares, so as to provide the allotting company with immediate funds, on the basis that the allottee would thereafter approach a limited number of investors who might take the shares so allotted. For example, a broker or underwriter might be prepared to take such an allotment in the belief that he would be able to persuade institutions amongst his clients to take the issue off his hands. If the provisions were so framed that the limit of fifty offers within a limited time could not be exceeded, an exception for such cases would conform with the pattern set for issues by the company itself. Accordingly, a defence has been provided in the case where the defendant can show that not more than fifty offers were made by allottees in any period of three months which includes the date of the offer relied on. It is necessary, however, to go further, and to provide for the case in which the allottee makes more offers than fifty, thereby involving the company and its officers in liability for non-compliance with the prospectus provisions, and also for the case in which allotments are made by the company to more than one allottee with a view to resale, in which case one allottee might innocently infringe the prohibition in ignorance of the fact that other allottees had already made, or had thereafter made, more offers than were contemplated at the time of the allotment to him. These situations have been provided for by allowing a defence where the allotment with a view to sale to other persons has been made subject to undertakings which if observed would ensure that no

breach occurred, and by making the breach of such an undertaking an offence. Under these provisions, a company could make allotments to more than one person with a view to sale of the shares so allotted to others, as long as it obtained the appropriate undertakings, and a person taking an allotment could protect himself against the actions of other allottees by obtaining a suitable undertaking from the company.

58. We should add that there are provisions in section 374 of the Act with regard to persons who go from place to place offering shares for subscription or purchase, or who make offers in writing "to any member of the public" of any shares for purchase. We have not vet had an opportunity of examining these provisions in detail, although we are aware that they are in need of some attention. The former provision is in practice avoided by making an appointment to see the prospective subscriber, and before the appointment is kept, sending him a prospectus containing an offer together with an intimation that the representative who has sought the interview has no authority to make any offer. He is, on the view taken by those who operate in this way, not going from place to place offering the shares, but he is obviously just as free to exercise his powers of persuasion as if he were doing what the section expressly forbids. So far as the second provision is concerned, the question arises, what is meant by a "member of the public"? If the term is narrower than "any person ", the extent of the limitation should be made clear. If it is not, it would be better to say "any person ". We would suggest that these sub-sections should receive attention when the form of the provisions dealing with prospectuses has been settled.

59. We have included in the redraft of section 43 a minor amendment of paragraph (6) of sub-section (5) suggested in the General Revision Bill, which proposed the inclusion of the words "a copy of" where they appear in the draft in Appendix "A".

Statements with Regard to Listing.

60. Section 44 deals with the case of a prospectus which states or implies that an application has been or will be made for listing. Our attention has been drawn to a minor discrepancy between the wording of paragraph (a) of sub-section (1) (" the third day on which the Stock Exchange is open after the date of issue of the prospectus ") and of paragraph (b) of sub-section (9) ("within three days of the issue of the prospectus"). We recommend that the wording of sub-section (9) be brought into conformity with that of sub-section (1).

Liability for False Statements or Non-disclosure.

61. Sections 46 and 47 deal with civil and criminal liability for untrue statements and willful non-disclosure. When the Bill

amending the takeover provisions was prepared, the draftsman, in applying these sections to "Part A" statements, refrained the provisions, not only to adapt them to takeover offers, but also to eliminate several anomalies. We have redrafted the two sections into

one, following the pattern of section 1805 of the draft Bill, with such adaptations as are necessary to apply it to prospectuses. We have made one addition (sub-section (5) (b) (iii) of our draft) to relieve the director or other person of the obligation to give public notice of error or non-disclosure if he discovers the facts after the issue has been filled, or after the prospectus has ceased to be current, whichever first happens.

SECTION D - THE CONTENTS OF PROSPECTUSES.

62. The requirements of the Act as to the contents of prospectuses are for the most part contained in the Fifth Schedule. Some parts of this Schedule are of comparative antiquity, and others are more recent. Little attention has been given to logical arrangement, or to the desirability of matching the requirements as to the financial history of a company with the accounting requirements of the Ninth Schedule. Some of the provisions are drafted on the assumption that the company is already in existence, although a prospectus may be issued in respect of a proposed company.

63. Some of the deficiencies of the Fifth Schedule are sought to be remedied by section 57 of the General Revision Bill, but these proposals give rise to some difficulties of their own.

64. We have considered the existing Schedule, the proposals in the General Revision Bill, and various suggestions made in response to our invitation for written submissions, and we have also developed some ideas of our own. In the result we have come to the conclusion that the best way to deal with the matter was to prepare a fresh draft of the Schedule, which is annexed to this report as part of Appendix "A". In Appendix "B" we deal in detail with the clauses of this draft, and provide such explanations of their origins and the reasons for adopting them as are requisite. It is desirable to deal here with some of the more important matters of principle.

Sub-divisions of Existing Fifth Schedule.

65. The existing Fifth Schedule is divided into four parts, the first headed "Matters to be stated", the second "Reports to be set out", the third "Provisions applying to Parts I. and II.", and the fourth "Additional matters to be included in prospectus relating to invitation to the public to deposit money with or lend money to a corporation". The effect of these headings is to limit somewhat the freedom of the draftsman, since strictly speaking Part II. should relate only to reports, and it becomes difficult to maintain a logical arrangement if this sub-division is to be adhered to. Accordingly, in our draft, we have omitted the division of the

schedule into parts and have tried to re-arrange the provisions so as to follow, as far as possible, a logical order in relation to reports and provisions to be complied with in relation to the matters required to be stated in the prospectus.

Proposed Companies and Existing Companies.

66. The existing Fifth Schedule does not specifically distinguish between proposed companies and existing companies, and we have tried so far as possible to indicate which type of case is being dealt with in the clauses in question.

Minimum Subscription.

67. The present provisions relating to the minimum subscription are by no means adequate. While we do not think that the law should be altered to require an actual money sum to be stated as a minimum subscription in every case, we do think that some additional items should be included in the minimum subscription provision. We think also that a minimum subscription should be included in relation to debentures, since it seems anomalous that where a debenture issue is being made for a specific purpose the company can proceed to allotment without having obtained the full amount needed, but is liable to immediate call-up of the amount raised if the conditions set down in section 74H of the Act are not complied with. The Schedule should, we think, make provision for cases in which the proposal is to issue both shares and debentures and we have endeavoured to provide for a system under which, where there is such a joint issue, and a minimum amount is stated, the amount can be raised either from shares or debentures or both, provided that the minimum amount to be raised from the issue of shares is achieved. This means, in effect, that if more shares are applied for than the minimum, a corresponding diminution may be accepted in relation to the minimum amount sought to be raised from debentures.

68. The additional matters which we feel should be included amongst those enumerated for the purpose of determining the minimum subscription are:

(a) "the carrying out of any specific purpose or project the cost of which is to be defrayed in whole or in part from the proceeds of the issue";

(b) "the discharge of any liability due or to become due".

As to (a) it is, in our view, anomalous that where an issue is proposed to be made for the purpose of purchasing a property, the directors are required to state the minimum amount which, in the opinion of the directors, the company requires to raise for that purpose. On the other hand, if they already own a vacant block of land and are making an issue for the purpose of erecting a hotel or factory on that land they are not required to state any minimum amount. In our view, the same considerations are applicable in both cases.

69. With regard to (b), there are cases in which the minimum subscription is required for the purpose of discharging a liability of the corporation which must be met if the corporation is to carry on. It seems wrong to us that a company can seek additional funds to meet its liabilities and, in the case of either shares or debentures, accept a lesser sum which will immediately be applied in the partial discharge of those liabilities, but will still leave the company unable to carry on its business. We do not, however, as stated above, intend any change in the present position under which directors are in appropriate cases entitled to state that no minimum amount is required, and to proceed to allotment for whatever amounts are in fact forthcoming. There are cases in which no specific amount is required for any of the enumerated purposes, and if investors are willing to subscribe capital on the basis that the company is entitled to accept the amount subscribed, however small, they should, we think, be left to take such risks as are inherent in such a situation.

Personal Details Relating to Directors and Staff.

70. It has been represented to us, and we agree with the view, that a matter of great importance to an intending investor is to know not only the names of the directors or proposed directors but their ages, their occupations and the other companies with which they are or have recently been connected; and that it is also of value to know something about the senior employees of the company. We do not think that it is practicable to prescribe that information should be given as to the experience and ages of the most senior employees, since the determination of seniority may raise embarrassing questions within the staff of the company itself. We have therefore proposed that, in the case of employees, personal particulars should be given in relation to at least five employees of the company. The company can make whatever selection it chooses amongst its employees; we do not expect that it will content itself with details of the experience of its junior office staff.

Information as to Company and Subsidiaries.

71. We think that a prospective investor is entitled to know the nature of the business or intended business of the company and its subsidiaries or proposed subsidiaries, and the length of time for which the company and its subsidiaries have been carrying on business, unless such time exceeds six years. The information which will be required in relation to the company and its subsidiaries will include a statement of profits and losses for a five-year period and certain statements regarding earnings, interest paid, rates of dividend and assets and liabilities. We have endeavoured as far as possible to bring this information into line with the revised Ninth Schedule which is to be adopted by the various jurisdictions. We do not, however, feel that all the information ordinarily furnished to shareholders need be included in the prospectus. In particular, where there have been changes in the nature of the business, or where other details furnished in the annual reports or accounts might be material to a prudent and diligent investor, we do not think that the prospectus itself should be burdened with this kind of information, which, in many cases, may not have a very direct bearing on the proposed investment. We have therefore omitted various proposed amendments designed to provide some of the information which would ordinarily appear in the directors' annual report and accounts, but we have added a provision that the company must make available at its registered office or some other place within the jurisdiction copies of the annual reports and accounts for the period for which profits must be shown in the prospectus itself. Investors who desire to make an intensive analysis of the company's past history will be able to have access to these reports and we are including similar provisions in relation to companies which either have recently become or will become subsidiaries. Similarly, where it is proposed to acquire a business, we have included a provision to require the accounts of that business to be included as in the existing Schedule, and we have also included a provision to cover the case where a corporation which is being acquired was itself incorporated for the purpose of acquiring the assets of a business, within the five-year period.

72. One question relating to the contents of prospectuses has been the subject of considerable discussion. The question is not, however, one of principle so much as a question of the burdens and benefits which might be expected to accrue from adopting one course or the other. We consider that an investor should have available to him the latest profit and loss account and balance-sheet of the company. The question arises, however, whether the accounts for the last financial year should be reproduced in the prospectus itself. On the one hand, it is clear that this would add substantially to the bulk of a prospectus, especially in the case of a company with extensive interests, whose accounts might be accompanied by voluminous notes. On the other hand, it is equally

clear that a requirement to keep the documents available for inspection is less satisfactory

as a means of providing information of significance to an investor than a requirement that the information be shown in full in the prospectus itself. The draft of clauses 24 and '~5 of the Fifth Schedule which will be found in Appendix "A" gives effect to our ultimate conclusion. Under this draft, a complete statement of profits and losses in accordance with the Ninth Schedule will not be required in the prospectus, but comparative information in respect of a five-year period will be required covering earnings interest profits before and after tax, and the ratios of earnings and net profits to shareholders' funds. Similarly, assets and liabilities as at the end of the last year for which accounts have been made up are required to be set out under such categories as the auditor preparing the report considers most appropriate to present a summary of the state of affairs of the company at that date, having regard to the nature and any stated purposes of the issue of shares or debentures to which the prospectus relates. The provision referred to in paragraph 71, requiring annual reports and accounts covering five years to be kept at a place within the jurisdiction, will provide a means of obtaining access to the fuller details contained in those accounts.

Up-dating Provisions.

73. We have included in the schedule provisions similar to those contained in the Ninth Schedule, providing the necessary information to bring the accounts up to date and requiring the directors to declare whether they are aware of circumstances which might render the accounts misleading. In view of the fact that the accounts may be up to nine months old at the date of issue of the prospectus, we have included provisions requiring a statement of the current amount of bank overdrafts and other borrowings as at a date not more than fourteen days before the date of a prospectus. A statement will also be required as to the name and place of incorporation of the company and its subsidiaries (if any) and details as to their capital. Where the directors are aware that the company is a subsidiary of another company, the name and place of incorporation of the immediate holding company must be given. A statement will also be required as to the ultimate holding company, as is required in the directors' report under section 162A (5) of the Bill relating to accounts and audit.

Mortgage Debentures.

74. Section 38 sub-section (4) in effect restricts the use of the term "mortgage debenture" or "certificate of mortgage debenture stock" to cases in which there is included in the prospectus a statement that the repayment of the money being borrowed is secured

by a first mortgage over land vested in the corporation or in any of its guarantor corporations and that the mortgage has been duly registered or is a registrable mortgage which has been lodged for registration. No provision is made for any certification as to the title of the corporation in which the land is vested, nor is there any requirement that the land shall be freehold land, although the term "land vested in the corporation" may perhaps carry such an implication. In our view this provision should be expressly confined to cases in which the mortgage is a first mortgage of freehold land, but it is not, in our view, important to limit its application to cases in which the interest mortgaged is land vested in the corporation or in any of its guarantor corporations. Indeed, in some cases, the land may be vested in either a subsidiary or in a holding company of the borrowing corporation. Accordingly, we propose an amendment of the relevant clause of the Fifth Schedule to confine the use of the term to cases in which the first mortgage is of freehold land, but not to limit the provision to freehold land vested in the corporation or a guarantor corporation. We also propose that there should be included a statement by a qualified legal practitioner that after due enquiry as to title he is of opinion that the mortgage is an effective security over the land. Under these provisions a holding company or subsidiary company or other related corporation can effectively pledge freehold land owned by it as security for borrowings by the corporation issuing the prospectus.

Debentures and Debenture Stock.

75. Section 38 (5) of the Act limits the use of the term "debenture" or "certificate of debenture stock" to cases in which certain statements are made and certain reports are furnished in relation to the tangible assets charged with the repayment of the amount borrowed in respect of debentures or debenture stock. We have made a number of adjustments to the existing provisions as to these statements and reports. These are dealt with in detail in Appendix" B" but we should point out here that under the existing Schedule, in ascertaining the tangible assets charged, there is a provision requiring the amount being borrowed be the current issue to be added in for the purpose of determining the aggregate value of the tangible assets. Such a procedure is, we think, only justified if the manner in which the proceeds will be applied (as stated in the prospectus) is such, that the tangible assets will be increased. For example, if the purpose of the issue of the debentures is to pay off unsecured loans, the effect of the application will not be to increase the tangible assets available as security at all, since the unsecured loans will merely be eliminated from the liabilities side of the balance-sheet without any corresponding increase in tangible assets. We have therefore provided that the amount to be raised by the issue can only be added in where, and to the extent that, the proceeds will be applied for a specific

purpose stated in the prospectus the effect of which will be to increase the tangible assets available as security for the charge.

Prior Charges and Priorities.

76. We have given lengthy consideration to the question whether it is possible in a prospectus to give an adequate indication to the prospective lender of the extent to which the assets charged are likely to remain available to provide funds with which to discharge the liability. The primary difficulty in the way, of course, is that in the case of a floating charge the company may diminish its assets by losses in the ordinary course of trading, so that it can never be predicted in such a case that the tangible assets which formed the security for the borrowing at the time when it was borrowed will remain available as security at the time when the charge falls to be repaid. The most that can be done, in our view, is to require a statement of the extent to which the assets taken into account are or can become subject to prior charges, and to what extent they are or can become charged in respect of liabilities ranking pari passu with the liability for the current borrowing. We also think, however, that there should be a statement as to any limitations which are imposed on the amounts of such prior charges or liabilities ranking pari passu, and that any document in which any such limitation is contained should be referred to in the prospectus. We have also included provisions for a statement as to asset backing and interest cover in respect of the amount being borrowed, but here again it is in our view impossible to do more than to state the position as at the time when the money is being borrowed. A company may reserve to itself the right to borrow further funds ranking pari passu with existing borrowings and when it comes to exercise that right it may have increased its tangible assets (by further increases in shareholders' funds or otherwise) in such a way that the security is in fact greater proportionately than when the original borrowing was made. On the other hand, a company may, as already stated, so diminish its assets by trading losses that the security becomes less favourable even without any such further borrowings. These possibilities are inherent in the nature of the operation of borrowing on floating charges.

Auditors.

77. In general, it is our view that the reports required to be made for the purposes of the prospectus should be made by the company's own auditors, or, in the case of a company proposed to be acquired or a business proposed to be acquired, by the person who has audited the accounts of that company or business (if he is a registered company auditor). We have, therefore, provided to this effect and have also provided that an auditor who makes a report may accept and rely upon a report of another registered company auditor.

78. We have considered the question how far the auditor who makes the report should be required to satisfy himself as to the accuracy of accounts which have not been audited. In most cases, they will have been audited under the provisions of the Act, but where a proprietary company or a business has been, or is being, acquired audited accounts may not be available. At the time when the auditor is asked to prepare his report for the prospectus it may be impossible to conduct a satisfactory audit, and in any event there would be cases in which the expense of doing so would not be justified. We have therefore included a provision requiring the auditor to draw attention to the fact that any accounts have not been subject to audit, and to indicate what steps, if any, he has taken to verify their correctness.

79. There may be cases in which it is impracticable to comply with these requirements (e.g., the company's auditor may be unavailable, or unable to prepare the report in the time available). In such cases the dispensing power referred to below can be availed of to overcome the difficulty.

Layout of Prospectuses.

80. A problem which has exercised our minds is that of the relatively unattractive presentation of material in most prospectuses. In an ideal system, and if time were no-object, it might be thought that the authority having power to register prospectuses should be required to devote attention, not only to the method of presentation of the material, but to requiring explanations and summaries of the statutory material, and to ensuring that the presentation was not such as to result in the most vital information not being read by the prospective investor. Some steps are already taken by Registrars to ensure that proper explanations accompany statements which might otherwise mislead, e.g., by insisting that references to the holding of a major shareholder of high financial standing are accompanied by a statement that that shareholder does not guarantee the liabilities. This is, however, rather an exercise of the power conferred by section 42 (2) (d) of the Act, than an attempt to ensure that the arrangement of material is informative rather than discouraging to the reader. It would not in our opinion be possible under present circumstances to lay down rules for the method of presentation of the statutory material or any added material, nor would a discretionary power given to the various Registrars be satisfactory as uniformity in this field would be almost impossible to achieve, even with frequent consultation between Registrars. A single authority might perhaps develop some principles for the presentation of prospectuses, especially in relation to those which follow a fairly standard pattern. In the meantime, perhaps some awards comparable with those made to companies for the presentation of annual accounts might stimulate desirable

competition in the search for clear and informative methods of presentation.

Dispensing Power.

81. In partial fulfilment of our recommendation contained in our First Report, the Standing Committee of Attorneys-General has accepted the position that the Registrars should be given power to dispense with the requirements of the Ninth Schedule in respect of annual accounts. We think a similar dispensing power should exist in relation to prospectuses. Such a power is already given in respect of the Seventh Schedule requirements, which apply to prospectuses relating to unit trusts and other similar interests. We have therefore recommended that a similar dispensing power should be included in the Fifth Schedule.

SECTION E - SPECIAL PROVISIONS RELATING TO SHARES.

Minimum Subscriptions.

82. As indicated in paragraph 67 above, we have made provision in the Fifth Schedule for minimum subscriptions to be stated in relation to debenture issues, as well as to shares. Section 48 of the Act prevents an allotment of shares unless the minimum subscription has been taken up, and provides that the minimum subscription shall be reckoned exclusively of any amount payable otherwise than in cash. We have redrafted the section to provide a reference to debentures and also to provide for cases in which a minimum subscript/on is provided for in a directors' proposal. There may be cases in which the plans of the company provide for the acquisition of some property in return for an allotment of shares. In accordance with the doctrines which have been developed by the courts (see paragraph 85 below) if there is an agreement for the purchase of property for cash and an agreement that the vendor will apply for shares payable in cash, and that the two amounts will be set off against each other, the shares are treated as having been paid for in cash. Accordingly, such shares can be counted in reckoning the amount subscribed in cash for the purposes of section 48. In view of the possibilities of abuse inherent in this situation, we recommend that a provision should be inserted in the definition section, requiring that in such circumstances the consideration should be treated as a consideration other than cash. If this is done, it becomes necessary to provide for the case in which a scheme is proposed which requires both a minimum subscription in cash, and an allotment of shares the consideration for which is a sale of some asset to the company. We therefore propose a new sub-section (2A), which will require that before the shares payable in cash can be allotted, the shares payable otherwise than in cash shall have been subscribed for. We have also made the provisions of the sub-section applicable to debentures.

Deposit of Moneys Prior to Allotment.

83. Section 49 provides that application moneys are until allotment held by the company or its promoters in trust for the applicants. The section does not expressly provide that the moneys are to be paid into a separate account, although, as it is the duty of a trustee to keep trust moneys separate from his own, such an obligation is probably implied. Nevertheless, we think it is desirable that this should be expressly stated in the section. It is to be noted that the section refers to the allotment of both shares and debentures. Having regard to the definition of the term "debenture ", and to the fact that any public invitation to lend money to a company gives rise to an obligation to issue a debenture if the money is accepted by the company, it seems desirable to provide some test for determining when a debenture is deemed to be allotted. We have therefore proposed a new sub-section (6A), to be included in section 5, which will provide the required test. Without some such provision, the references to allotment in Division 2 of Part IV. may not be applicable to debentures in respect of which no formal allotment is made. The effect of the provisions, in the case of a company that has not become entitled to commence business, is that although by virtue of sub-section (5) of section 52 the company can receive the moneys payable in respect of the debentures, it must keep those moneys in a separate bank account until it is so entitled, and can then accept the moneys as a loan, which will constitute the allotment.

Statement in Lieu of Prospectus.

84. The statement in lieu of prospectus was originally invented to provide a safeguard for investors in cases in which a company, instead of offering its shares to the public, allotted them to a person or company who in turn disposed of them to public. It was apparently thought that by requiring the directors to file in the office of the Registrar a statement containing the material which would have had to be included in a prospectus, the directors would be discouraged from putting forward an unsound proposition. The practice of allotting shares in this way is now dealt with by section 43 of the Act, to which reference is made in paragraph 57. The requirement that a statement in lieu of prospectus be filed has therefore become of minimal significance in relation to the practice in respect of which it was introduced, and the Jenkins Committee recommended that it should be abolished (see Jenkins Report, pp. 90-92). We also think that it could well be dispensed

with, especially as in many cases in which it is now required there is little relevant information in it. We therefore recommend that the provisions relating to statements in lieu of prospectus be omitted from the Act. Apart from sections 50 and 51, such statements are referred to in section 26 (conversion of a proprietary company into a public company) in sections 52 and 53, and in section 58 (disclosure of amount or rate of brokerage or commission). In the first three sections the requirement appears to be unnecessary, and in the last there is an alternative provided which can, with a slight amendment of the verbiage, be retained. Section 50 can then be repealed, but as our recommendations with regard to directors' proposals will require the form of such a proposal to be prescribed, a new section 50 can be inserted, with a reference to a new Sixth Schedule containing the requirements to be complied with in the case of a directors' proposal.

Return of Allotments.

85. Section 54 provides for a return of allotments to be made within a month of allotment. Provision is made for disclosure of cases in which shares have been allotted for a consideration other than cash. This provision has a long and unhappy history. Under the provisions of the United Kingdom Act of 1862, shares had to be paid for either in cash or in kind. By 1867, however, the practice of promoters receiving shares in return for an inadequate non-monetary consideration had apparently been felt to require some regulation, and section 25 of the Act of 1867 introduced a provision the injustice of which led the courts to adopt a liberal construction of the words "payment ... in cash ". Under that section, where a shareholder agreed to take shares in exchange for property or services, a contract evidencing his entitlement had to be filed at or before their issue. If it were not so filed, the Act required that the shareholder should pay cash for the shares. It often happened that an innocent shareholder, who had agreed to supply goods or equipment to a new company in exchange for shares of an equivalent face value, found himself in the position of having paid for his shares in kind, but still under an obligation to pay cash for them because the contract had not been filed as required. The harshness of this provision was, however, somewhat alleviated by the courts, who held that where a money value was placed on the goods or other consideration supplied by the shareholder, so that the transaction could be treated as creating a cash obligation on the part of the company, the parties need not go through the formality of passing cash to and fro, and the provisions of section 25 thus became inapplicable to such a case. As a result, the provisions of section 25 were easily avoided by those who wished to do so, since it was only necessary to fix a money value equivalent

to the face value of the shares, and to provide for the two amounts to be set off, though the set off was often effected by an exchange of cheques (see Messer v. Deputy Federal Commissioner of Taxation 51 C.L.R. 472 at pp. 479-480). It was still possible for a shareholder to be caught by section 25 if the parties failed to couch their bargain in the fight form, and it was eventually repealed and replaced by the provisions which now appear in sub-sections (3) and (5) of section 54. It was presumably the desire of the legislature that vendors to a company who were to receive shares in exchange should have to disclose that fact by an entry on the register, and one may assume that this desire was based on the considerations above referred to, namely that where promoters or other persons connected with the formation of a company have entered into such a transaction, there is a serious risk, in the absence of publicity, that allotments will be made which are excessive, having regard to the value of the property transferred. We agree with the policy which we have attributed to the legislature, but it is obvious that unless some appropriate amendment is made, the present section can be avoided by any competent draftsman. We therefore propose the addition of a provision (to be inserted as sub-section (6B) of section 5) which will require the filing of a contract or statement under section 54 in cases of this kind. Our proposed amendment will also be operative in respect of the provisions of sections 48 and 52. We have suggested a consequential amendment to section 48 (see paragraph 82 above).

86. Two further questions arise in relation to section 54. If it is, as we think, desirable that there should be a public record of transactions in which share are allotted without effective payment in cash, it is also desirable in cases in which an uncalled liability in respect of shares originally allotted for cash has been discharged by the company agreeing to accept a consideration other than cash. We recommend that there should be a provision that in such a case a record similar to that required on an original allotment for such a consideration should be filed. The other question concerns the provisions of paragraph (c) of sub-section (5). In this paragraph, the words "or where an account or reserve has been applied directly in paying up shares already issued" are inappropriate in a provision that deals with allotments, since it refers to shares already issued. The considerations applicable to such a case are similar to those which apply to the case in which the company accepts a consideration other than cash in discharge of an outstanding liability to pay cash for shares. We have drafted a provision to deal with both cases. We should point out that the second case was the subject of a proposed amendment in the General Revision Bill, the substance of which is dealt with in our draft.

Brokerage and Commission.

87. Section 58 deals with the question of payment of brokerage or commission for subscribing or agreeing to subscribe for shares, or procuring or agreeing to procure subscriptions. Sub-sections (1) (2) and (4) refer only to commissions, and allow a commission of up to 10 per centum, subject

to certain conditions. Sub-section (3) provides that nothing in the section is to affect the power of the company to pay such brokerage "as it has hitherto been lawful for a company to pay" subject to certain requirements as to disclosure. Such a provision is obviously unsatisfactory, since it is extremely difficult to advise anyone with certainty as to what rate of brokerage was lawful in the early years of this century, when the provision was first introduced. Prior to the introduction of section 58, it was held in Metropolitan Coal Consumers Association v. Scrimgeour (1895) 2 Q.B. 604, that payment to brokers of a reasonable commission for their services in procuring subscriptions was lawful, and it seems that the United Kingdom equivalent of sub-section (3) was proposed by Lord Halsbury to preserve the effect of that decision. The brokerage paid in that case was in fact 2½ per cent. The General Revision Bill proposes the repeal of sub-section (3) and the inclusion of a reference to brokerage where reference is made to commission elsewhere in the section. The form of the amendment would in our view leave room for doubt as to whether in some cases both. brokerage and commission at the rate of 10 per cent. each might not be allowable, and we would regard this as excessive, in view of the rates of brokerage provided for in respect of share issues of which we have knowledge. In the draft in Appendix "A" we have limited the total allowable for brokerage and commission to 10 per cent. but we do not feel that the subject is one on which our views are entitled to any special weight.

Reduction of Capital.

88. Section 64 of the Act deals with the reduction of capital, and a number of suggestions have been embodied in the General Revision Bill for its amendment. It is proposed, following a recommendation of the Jenkins Committee, to drop the provisions enabling the Court to require the company to add the words "and reduced ". We agree with this proposal, as the power, as pointed out by the Jenkins Committee, is rarely used. Similar considerations apply to the power to require the company to publish the reasons for the reduction, which it is also proposed to omit. It is also proposed to alter the provision for" lodging" in sub-section (6) to one for" registration ". We see no objection to this proposal.

89. The final proposal in respect of section 64 is to add a new sub-section (10A), in the following terms:

"Where a company reduces its share capital otherwise than in accordance with this Act the company and every officer who is in default shall be guilty of an offence against this Act.

Penalty: $1,000."

90. A provision in this form gives rise to a number of questions. As drafted, it proceeds on the assumption that a company can reduce its capital otherwise than in accordance with section 64, or some other provision of the Act. In the absence of any such provision, if the officers of the company were to pay out funds of the company by way of a purported return of capital to shareholders, the transaction would be contrary to the clear intention of the legislature, and the officers would be liable to misfeasance proceedings, and the shareholders to an action for repayment of money paid to them without the authority of the company. Whether and to what extent a shareholder might have a defence to such an action would &vend on the application of general principles of the common law. But since the company would almost inevitably have a claim against someone for repayment, its total assets would not have been diminished by the payment, even though cash had gone out and been transformed into a personal claim. If the transaction is to be treated as valid, as it must if a prosecution under the proposed sub-section (10A) is to succeed, the only remedy will be that provided by sub-section (10A) itself. Moreover, the sufferers from an unauthorized reduction of capital are likely to be the creditors. It will be small satisfaction to them to find that the assets of the company have been diminished by the imposition of a penalty on the company. The solution is, in our opinion, to provide in the sub-section that any person who is a party to or who assists in carrying into effect a transaction which if valid would have had the effect of reducing the capital of the company shall be guilty of an offence unless he proves that he did not know of the relevant circumstances.

Alteration of Rights Attached to Classes of Shares.

91. Section 65 provides for persons affected by a decision altering the rights attached to a class of shares to apply to the Court for relief. The General Revision Bill proposes the addition of three new sub-sections. Sub-section (1A) is designed to provide for cases in which rights are attached to shares otherwise than by the memorandum. The exception is based on the generally accepted view that if rights are so attached they cannot be altered unless there is some special provision for doing so. In cases to which the sub-section applies, it in effect writes into the articles of the company a provision for alteration. In the present state of the law, there is considerable doubt as to the power to alter rights attached to special classes of shares by the articles, unless the articles themselves make express provision for such alteration. The cases on the subject are

conflicting (see Fischer v. Easthaven Ltd. (1963) 80 W.N. (N.S.W.) 1155, and Crumpton v. Morrine Hall Pty. Ltd. (1965) 82 W.N. (N.S.W.) Part I., 456). In this state of the authorities, and having regard to the safeguard contained in sub-section (1), we agree with the principle of the proposed amendment, though we have suggested some modifications of the draft. The second new sub-section, (1B), deals with a related question, namely, whether, if the articles contain provisions for the alteration of rights, the operation of those provisions can be avoided by first altering the articles to remove the special provision, and then altering the rights by the ordinary procedure for altering the articles. Clearly to proceed in this way would defeat the purpose of the special procedure, and we agree that it should be made clear that the alteration of articles of this kind should be treated as an alteration of the rights themselves. This proposal should be read in conjunction with another proposal in the General Revision Bill, for the amendment of section 31. This proposal, following a recommendation of the Jenkins Committee, is to add a new sub-section (4) to section 31, to the effect that a company may not alter or add to its articles so as to affect rights attached to shares unless the alteration is made in accordance with a provision in the memorandum or articles for such alteration. This sub-section does two things : it prevents an alteration of rights if no provision has been made, and if provision has been made it prevents an alteration otherwise than in accordance with the provision. We agree with the proposal, but point out that as drafted it needs to be amended to include a reference to the proposed new sub-section (1A) of section 65, for if no provision for alteration of rights attached by the articles has been made the provision set out in that sub-section is deemed to be included. We have suggested an appropriate amendment.

92. The proposed sub-section (1C) of section 65 raises a different point. Where rights are attached to shares by the memorandum, and the memorandum states that those rights can be altered by a method set out in the memorandum, it is well established that the rights can be altered in the manner set out. The same position applies where the memorandum states that the rights can be altered by a method set out in the articles (In re Welsbach Incandescent Gas Light Co. (1904) 1 Ch. 87). Two Scottish cases have held that where, at the time of registration of the memorandum, articles registered contemporaneously with it provided for the alteration of rights attached to shares, rights attached by the memorandum could be altered by the method set out in the articles. Tit, Jenkins Committee thought that these cases produced a reasonable result, and that the Act should be amended to make it clear that the rule so laid down was applicable in both England and Scotland. This

proposal illustrates the tendency of lawyers to try to make a fixed rule out of a decision that depends essentially on the intentions of the parties. If rights are attached by the memorandum, and there is no provision in the articles attaching special rights, but the articles contain provisions for the alteration or abrogation of rights, it is a fair inference that the provision in the articles was intended to apply to the rights attached by the memorandum. But if some rights are attached by the memorandum and others by the articles, the inference is probably the other way, since one would normally expect to find all classes of special rights dealt with in one document or the other. But it must always be a question of intention, and the possible variations of verbiage are infinite. We do not disagree with the proposal, so long as it is made clear that the suggested rule only applies in the absence of a contrary intention. As the sub-section appears in the General Revision Bill, it would apply even where a contrary intention had been expressly stated.

93. A further question is raised by the proposed sub-section. It provides that if the conditions are satisfied, the alteration can be made in accordance with the articles as they exist at the time of the alteration. In the case of alterations made after the new amendments have become law, there is no difficulty. The safeguards to be incorporated in the Act will be applicable. But if the articles have been altered since the incorporation of the company, and before the new sub-sections come into effect, the shareholders whose rights are in question may have opposed the alteration, or may have allowed the alterations to be passed on the assumption that their rights, being conferred by the memorandum, could not be affected by the alteration. We have proposed a formula which will allow an alteration to be made in accordance with articles which have been altered after the new provisions come into effect, but not in cases in which an alteration has been made before that date. If the articles have not been altered since the company was incorporated, no difficulty arises.

Dealings by a Company with its own Shares.

94. Section 67 of the Act poses a problem which is in some respects similar to that with which we have dealt in relation to section 64. Section 67 provides that, with certain exceptions, a company shall not give financial assistance in relation to the purchase of, or subscription for, its own shares or shares in its holding company, or in any way purchase deal in or lend money on its own shares. Sub-section (3) provides that if there is a contravention of the section, the Company and every officer who is in default shall be guilty of an offence. In Victor Battery Co Ltd. v. Curry's Ltd. (1946) Ch. 242, Roxburgh J. pointed out that for the company to be guilty of the offence of "providing security" for the purchase of its own shares, there must be a valid security. Accordingly he concluded that transactions forbidden by the section are not

thereby rendered invalid. On the other hand, in Dressy Frocks Pt),. Ltd. v. Bock (1951) 51 S.R.N.S.W. 290, it was held that a company could not sue a person to whom it had lent money to finance

the purchase of shares in the company, on the ground that the contract was illegal, and both parties being in pari delicto neither could have any remedy against the other. In Shearer Transport Co. Pty. Ltd. v. McGrath (1956) V.L.R. 316, O'Bryan J., while purporting to follow the Dressy Frocks case, in fact reached a different result, since he held that no officer of the company could have authority to pay out the money of the company pursuant to such an arrangement, and accordingly the money could be recovered from the person who received it. The draftsman of the General Revision Bill has attempted to deal with the problem by a new sub-section providing that the section shall not operate to prevent the company from recovering the amount of any loan made or any loss or damage suffered by it by reason of the giving of financial assistance in contravention of the section, or any amount for which it becomes liable on account of any financial assistance given in contravention of the section. We have given this matter a great deal of thought, and have come to the conclusion that a more radical approach is required. In the first place, we do not think it is right that other shareholders or creditors should suffer because of the action of the officers of the company, especially as the result of the decision in the Dressy Frocks case was to confer an undeserved benefit on the other party to the transaction. Accordingly, we think that no penalty should be imposed on the company itself, but that the liability of officers of the company should be retained. We also think that, generally speaking, the company should be entitled to recover money paid out from the company's coffers in respect of a transaction forbidden by the section. It is necessary, however, to provide some exceptions. Cases can be imagined in which a person becomes the holder of a security given by the company in ignorance of the fact that it was given to finance the purchase of shares in the company itself. We have accordingly provided that a contract which contravenes the section is voidable at the option of the company, but not where the interests of innocent third parties are affected. In such cases the company should have a remedy against the persons responsible for the loss, if any, suffered by the company.

Shares Held in Trust for a Company.

95. While a company cannot hold formal title to its own shares it has been held that there is nothing contrary to the Act in shares being vested in a trustee to hold them on the company's behalf'. The General Revision Bill proposes that such shares should carry no voting rights while they are so held. We agree with this proposal, and with the draft contained in the General Revision Bill.

96. The draft in Appendix "A" embodies our recommendations with regard to the matters dealt with in this section of our report, together with various minor changes which are either consequential on these recommendations, or have been suggested in the General Revision Bill or by others, but which do not raise any significant questions of principle.

SECTION F - SPECIAL PROVISIONS RELATING TO DEBENTURES.

97. Division 4 of Part IV. of the Act contains a number of provisions relating to debentures. Some of these date back to the first Uniform Act or, earlier, but several others were introduced by the Companies (Public Borrowings) Act 1963, which was passed in Victoria on 10th December, 1963, and came into force on 1st February, 1964. The occasion for the enactment of these provisions was the failure of a number of companies which had borrowed from the public on a large scale, in circumstances the dangers of which became apparent only after their failure. We have received comments on these provisions from a number of sources, and we have considered these as well as some proposals contained in the General Revision Bill. We have also submitted these provisions to a critical scrutiny of our own.

98. The General Revision Bill (draft of 21st May, 1969, section 7 (e)) proposes a new section 70A empowering a company to keep a branch register of debenture holders outside the State in which it is incorporated. We see no objection to this proposal.

99. Section 71 provides that a contract with a company to take up and pay for any debentures of the company may be enforced by an order for specific performance. There may be some doubt whether this provision would be available if the contract had to be enforced in a State or Territory other than that of the incorporation of the company. We therefore recommend that the word "corporation" should be substituted for the word "company" wherever appearing in this section.

100. Section 74D of the Act, which is one of the sections introduced in 1963, provides that where a corporation offers debentures to the public for subscription in the State, the debenture or the relevant trust deed "shall contain a limitation on the amount that the borrowing corporation may pursuant to those debentures or that deed borrow ". The section, however, does not give any indication as to the kind of limitation that must be included, and it has become the practice for borrowing corporations to formulate limitations which give a flexible limit. In most cases

these limitations are determined with reference to the tangible assets of the company, or the shareholders' funds, or both. Sometimes, in the case of finance companies, the calculation of tangible assets is expressly stated to include unearned income and charges for services not yet rendered. In these cases, if the percentage of tangible assets is high enough, each time the company lends out the funds raised from a debenture issue the amount which it is able to borrow is increased by a greater amount. It may be doubted whether a formula of this kind complies with the provisions of section 74B, which seems to have been intended to place an upper limit on the amount which could be borrowed under the terms of any deed. The same considerations apply, though perhaps with less force, to cases in which the limitation is expressed as a multiple of shareholders' funds. Such a limitation may be thought to prevent the company's borrowings from exceeding a safe limit, but it will still be true that the limit is a variable amount capable of indefinite expansion. We have given earnest consideration to the question whether there is any way in which this requirement could be expressed so that it would provide a real safeguard for debenture holders, In particular we have considered whether it should be compulsory for the borrowing corporation to state a maximum money amount which can be borrowed under the trust deed, or whether the limitation should be expressed in terms of shareholders' funds, paid-up capital, tangible assets or some other measure. We have concluded that it is not possible to specify a measure which will be appropriate for all companies at all times, and that, as the present form of the section does not appear to provide any real safeguard, the best course to follow is to eliminate the requirement from the section. This does not mean that we do not think that there is any virtue in limitations of this kind. On the contrary, we think that the fact that many companies include more than one kind of limitation in their debenture trust deeds shows that informed lenders pay a good deal of attention to these limitations. But unless it is possible to define the limitation in a way that will impose a real restriction on borrowers, we think the choice of limitations should be left to the borrower himself. As we have said we do not think that such a definition is possible, and if, as is usually the case, the borrower is anxious to obtain funds from institutional lenders, it will frame the limitation in such a way that the lenders have confidence that proper limits will not be exceeded. Borrowers who are seeking funds from less experienced lenders will, as now, express the limitation in a way that provides no real safeguard, or will omit the provision altogether. In either case the investor will be no worse off than at present.

101. In addition to the amendment involved in the above recommendation we think the rather involved drafting of section 74B (1) could be simplified by providing that the trust deed (if any) and the debentures should be deemed to contain the following covenants:

(a) covenants by the borrowing corporation with the trustee in terms of paragraphs (a) and (b) of the sub-section;

(b) a covenant by the borrowing corporation with the trustee and each. debenture holder in terms of paragraph (c), subject to the modifications suggested below.

102. With regard to paragraph (c), we do not see any particular reason why the last annual accounts should be singled out for special mention, especially in the light of the fact that borrowing corporations are now required to present half-yearly accounts to the trustee. Nor do we see why a meeting of debenture holders should be empowered to give directions to the trustee. No indication is given in the legislation as to the status of any such direction. If such a direction is given, can the trustee act on it and rely on the direction as an answer to a claim for breach of trust by a debenture holder who was not at the meeting? It is possible to imagine cases in which the meeting could be dominated by persons who were anxious that proceedings should not be taken by the trustee, yet the object of having trustees is to ensure that the interests of individual holders of debentures are protected. It is to be noted that in section 74E (2) it is contemplated that the Court may order a meeting to be called for the purpose of obtaining the "advice" of the debenture holders. In our view, the trustees should be required to exercise their own discretion, and should not be in a position to pass the responsibility back to the persons whom it is their duty to protect. On the other hand there may be circumstances in which the advice of the debenture holders would be of assistance, and we would see no objection to the provision if it were limited to the giving of advice. We therefore recommend that for the words "to consider the accounts and balance sheet which were laid before the last preceding annual general meeting of the borrowing corporation and to give to the trustee directions" there should be substituted the words "to consider any matters arising in connection with the performance of the functions of the trustee or any question in relation to the interests of the holders of debentures and to give to the trustee advice .... "

103. Sub-section (2) of section 748 provides for a penalty in the case where the debenture or the trust deed does not contain the limitation on borrowing or the covenants referred to in sub-section (1). If, as we have suggested, the reference to limitations on borrowing is removed, there does not appear to be any need for the creation of this offence, since the covenants are to be deemed to be included, if they are not expressly included.

104. Section 74D (1) imposes a number of obligations on the trustee for the holders of debentures. Amongst these obligations are to exercise reasonable diligence to ascertain whether any breaches of the trust deed have been committed and to do all such things as it is empowered to do to cause the borrowing corporation to remedy any breach, the section does not in terms impose an obligation on the trustee to take all such steps as are reasonably open to it to recover the amount owing to the debenture holders, although it is possible to interpret the provision mentioned above as extending to action directed to making good the default of the corporation, and thus as including action taken to recover the money where it is out of the power of the borrowing corporation to remedy the breach in a literal sense. We think that it should be expressly stated in the section that the trustee is under a duty to take all such steps as are reasonably open to it to protect the interests of the debenture holders, which would clearly cover not only cases where a breach had occurred which the corporation could make good, but cases in which the corporation could no longer repair any default, and the trustee's action would have to be directed to recovering the money of the debenture holders by whatever means were available. The section does not impose any penalty for default on the part of the trustee, nor does it state that debenture holders are entitled to a remedy against the trustee in the event of its failure to carry out its obligations under the section. We would assume that the intention of the legislature was that debenture holders should have a right of action against the trustee for breach of statutory duty, but unless this is expressly stated in the section it is highly probable that arguments will be advanced against the proposition. We therefore recommend that a sub-section be added to the section making it clear that a debenture holder who suffers loss as a result of the failure of the trustee to carry out its obligations under the section has a right of action against the trustee.

105. Section 74D, sub-section (1) (b), requires a trustee to satisfy itself that each prospectus relating to the debentures does not contain any matter which is inconsistent with the terms of the debentures or with the relevant trust deed. No time is stated within which this obligation is to be performed. Section 39 provides that the name of a trustee shall not be included in a prospectus unless it has consented so to act and a copy of the consent has been lodged with the Registrar. There is, however, no provision requiring that the name of the trustee be disclosed in the prospectus. Section 74 requires that, in the case of an offer of debentures to the public for subscription, provision should be made in the debentures or in a trust deed for the appointment of a trustee, and also requires that the appointment should be made and the consent of the trustee obtained before the allotment of any of those debentures. It seems

to us that there should be a requirement that the name of the trustee should be disclosed in the prospectus, and we have included a provision to this effect in our draft of the Fifth Schedule. This will bring into play the provisions of section 39, to which we have referred above. Paragraph (b) of section 74D (1) can then be amended to read "shall before consenting to act as trustee in relation to that prospectus satisfy itself .... "

106. In paragraph (f) of sub-section (1) we think the word "directions" in the last line of the paragraph should be altered to "advice" for the same reasons as we have given in relation to section 74B (1) (c). We make the same recommendation in relation to the word "directions" where first appearing in paragraph (a) of sub-section (4).

107. Sub-section (7) of section 74D provides that a trustee may rely on a certificate or report given or statement made by a solicitor, auditor or officer of the borrowing corporation or guarantor corporation if it has reasonable grounds for believing that such solicitor auditor or officer was competent to give the certificate or to make the statement. The object of this provision is by no means clear. In the ordinary course of events, a trustee would have reasonable grounds for believing that a solicitor or auditor carrying on his profession was competent to make statements about matters within his professional sphere. In the case of an officer of the corporation it would not be difficult for the trustee to establish a reasonable belief in his competence. But except in the case of an auditor, as to which special considerations apply, there would seem to be no good reason to allow the trustee to rely implicitly on the word of a person who might be vitally interested in deceiving the trustee. In the case of the solicitor for the corporation, unlike that of the auditor, there is nothing in the Act to prevent him from being a director or otherwise actively engaged in the affairs of the corporation. In the case of the auditor, there are provisions in the Act designed to maintain the independence of the auditor from the management, and we do not think that the same considerations apply, at all events so far as the acceptance of the auditor's report on the accounts is concerned. The repeal of sub-section (7) is proposed in the General Revision Bill draft of 21st May, 1969, as a result of a suggestion made by the N.S.W. Registrar in an unpublished report on a N.S.W. company. The Registrar suggested at the same time that the benefit of section 365 of the Act should be extended to trustees for debenture holders. Although at the present time a trustee for debenture holders is entitled to the protection of section 85 of the Trustee Act of N.S.W. (section 67 of the Victorian Act) those provisions apply only to the liability of the trustee for breach of trust, and would not be applicable to an action against the trustee for breach of statutory duty under section 74D (2). Of course, a professional trustee is not likely to be as sympathetically received as an amateur in an application for relief under legislation of this

kind, but we think it is reasonable to extend the benefit of section 365 in

the manner proposed. Subject to tiffs change being made, we would agree with the proposal to repeal sub-section (7), but we think some provision should be made to enable the trustee to rely on the auditor. If it cannot do so, the result may be in some cases to force the trustee to employ another auditor to do the work over again. We therefore think that sub-section (7) should be replaced by a new sub-section providing that the trustee may rely on any report statement or certificate of the auditor of the borrowing corporation or of a guarantor corporation with respect to any matter falling within the scope of his functions as auditor, unless the trustee has reason to doubt the accuracy of the report statement or certificate. We should add that nothing we have said is intended to cast doubt on the ability which the general law confers on a trustee to employ and pay agents to perform acts which require expert qualifications, or to seek and act on expert advice in cases in which a prudent man of business would do so in the conduct of his own affairs. Our objection to the sub-section rests on the fact that it empowers the trustee to rely implicitly on the word of a person who is employed by the party whose failure or default the trustee is employed to guard against, subject only to the trustee having reasonable grounds for a belief in his competence. We should also add that apart from any statutory provision, there may be occasions on which a trustee, acting as a prudent man of business, would accept the word of a debtor or of an employee of a debtor. In such a case, the trustee would not be liable for breach of trust if it turned out that he had been deceived, and the repeal of sub-section (7) would not alter this position.

108. The General Revision Bill proposes to insert a new sub-section (1A) in section 74F, to provide that sub-section (1) shall not apply to any borrowing corporation in respect of which a receiver has been appointed. The Institute of Chartered Accountants has suggested that similar provision should be made in relation to directors of a company that is in liquidation, or of which a receiver and manager has been appointed. We agree with this suggestion, but think that the new sub-section should extend also to the provisions of sub-sections (3) and (4). In all these cases, it would seem to be pointless to require compliance with provisions that are designed to keep the trustee informed about the affairs of the company, since by the time this stage has been reached, the trustee is likely to know more about the affairs of the company than the directors.

109. The proposed amendment refers only to the "borrowing corporation ". The question arises whether in the case of a guarantor corporation which is under receivership or in liquidation, or of which a receiver and manager has been appointed,

relief should be given from the obligations imposed by sub-sections (3) and (4) of section 74F. We think that similar considerations apply. We are of course aware that in the case of both borrowing corporations and guarantor corporations the receiver would not necessarily have been appointed by the trustee for the debenture holders. He may have been appointed by a holder of a prior charge. In such a case, the trustee for debenture holders will no longer receive the information which the directors are required to furnish under section 74F, and we have considered whether a receiver appointed by someone other than the trustee should be required to supply the information. On the whole, however, we do not think any great advantage would be gained, and we do not see any justification for placing this additional burden on a receiver who is acting at the behest of the holder of a prior security.

110. In the light of the foregoing we think the proposed sub-section (1A) should read as follows:

"Sub-sections (1) (3) and (4) of this section shall not apply in respect of a borrowing corporation or a guarantor corporation which is being wound up or in respect of which a receiver or receiver and manager has been appointed and has not ceased to act under that appointment."

As a matter of drafting, the new sub-section should probably be inserted after sub-section (4) rather than after sub-section (1).

111. Sub-section (2) of section 74r deals with the contents of the quarterly report of the directors. It requires them to "set out in detail any matters adversely affecting the security or the interests of the holders of the debentures and, without affecting the generality of the foregoing ... "to state various specific matters, one of which is expressed in the following terms:

"(d) whether or not any circumstances affecting the borrowing corporation, its subsidiaries or its guarantor corporations or any of them have occurred which materially affect any security or charge included in or created by the debentures or any trust deed and if so, particulars of those circumstances."

Read literally, the introductory words of the sub-section would require the directors to give details of all the adverse events of the quarter, however trivial, and however strongly they may have been counterbalanced by favourable factors. No doubt directors of borrowing corporations have been able to survive the rigours of this requirement by taking a "broad" view of the intentions of the legislature, but we do not think that legislation should be drafted in such a way

that necessity compels it to be ignored. In our view, in the light of the specific requirements of paragraph (d), the introductory words should be omitted altogether, so that the sub-section would read:

"(2) The report referred to in sub-section (1) of this section shall be made in accordance with a resolution of the directors and shall be signed by not less than two of them and shall state with respect to the period covered by the report - (a) .... "

It is to be noted that the report is to be signed by two directors. In the case of the annual report of the directors, it is to be provided by the amending Bill that their report must be made in accordance with a resolution of the directors and signed by not less than two of them. At the present time one of the State Registrars requires that in the absence of a resolution of the Board, a report under section 74F shall be signed by all the directors, but other States do not require this. We think that this section should be made to conform with the provisions relating to annual reports in this respect, and the draft set out above provides for this.

112. Paragraph (a) of sub-section (2) of section 74F requires the directors to state "whether or not the limitations on the amount that the corporation may borrow have been exceeded ". It has been suggested in submissions made to us that this expression is ambiguous. In terms, it is wide enough to refer to any limitations, whether contained in the Memorandum or Articles of the corporation, or in the trust deed or debentures, or in some other document. Elsewhere in this report we have recommended that the prospectus should give details of any such limitations, as we think that lenders are entitled to know to what extent the borrowing powers of the corporation are subject to limitations, but it does not follow that the directors should be compelled to disclose every occasion on which the limits have been exceeded. For example, if the corporation had an agreement with its banker as to the limits of any borrowing on overdraft, we think that such a limitation should be disclosed in the prospectus, but we do not think the corporation should be compelled to report to the trustee every time it exceeded that limit, unless the excess involved some breach of the corporation's contractual obligations. In many cases, although the overdraft limit sets an agreed level above which the overdraft cannot go without prior consultation with the bank, it is understood that the corporation may exceed that limit with the consent of the branch manager, and sometimes the course of dealing between the corporation and the bank is such that such an excess is impliedly permitted even without such consultation. Unless the excess is in fact a breach of some contractual obligation, either

to the debenture holders, or to the bank, or under some other agreement limiting the amount that the corporation may borrow, we do not think it should be required to be reported under paragraph (a). We therefore recommend that paragraph (a) be amended to read:

"whether or not the corporation has been in breach of any agreement limiting the amount which it may borrow".

113. Sub-section (1) of section 74F refers to a "report that relates to that period", that is to say, the period of three months or less referred to in that sub-section. It is therefore to be assumed that the matters referred to in paragraphs (a) to (f) of sub-section (2) would be matters relating to that period. But some doubt is cast on this assumption by the wording of paragraph (e), which refers to changes, in the nature of the business of the corporation since the debentures were first issued to the public. The reason for this change of language seems to have been that it was thought that the business might have been subject to gradual changes which only became substantial over a period of time. Provision has been made in the draft bill prepared to give effect to our first report which will require the directors to disclose changes in the nature of the company's business in the annual report and we do not think there is any need to make provision for quarterly reports to disclose any changes other than those that have taken place in the period under review. We have considered whether the directors should be required to deal with matters arising up to the time when the report is actually signed by them, but in view of the fact that these reports are to be presented at frequent intervals, and that the collection of information for their preparation will necessarily take some time (a month is allowed by sub-section (1)) we think that all the paragraphs of sub-section (2) should be confined to the period referred to in sub-section (1). To make this explicit, we suggest that after the words "shall state", immediately preceding paragraph (a), the words "with respect to the period covered by the report" should be inserted, and that the words "since the debentures were first issued to the public which has not previously been reported on as required by this section" be omitted from paragraph (e).

114. Paragraph (f) of sub-section (2) was introduced in an attempt to provide some protection against the dangers involved in the practice of "on-lending". Debenture holders who had lent money on the security of a floating charge to some of the companies which failed in the early 1960's found that the money so lent had immediately been lent on without security to associated companies. The effect was to postpone the secured lender to the secured debts of the associated company, and if the associated company failed, the original lender found that his security worthless. Paragraph (f) requires the directors of the borrowing corporation to give details of amounts lent to "related corporations", but excludes the need for disclosure if the related

corporation has guaranteed the repayment of the debentures of the borrowing corporation and has secured the guarantee by a charge over its assets in favour of the trustee. The provision made by the paragraph relates only to the giving of information in the report, and does not attempt to control "on-lending" as such. It may therefore be regarded as an inadequate solution of the difficulty sought to be dealt with. It is however not easy to see what can be done to deal with such a situation, since the danger to which the debenture holder is subjected can arise not only where the borrowing corporation lends to related corporations, but where it lends to companies or individuals who do not fall within the definition of related corporation, and also because it is impossible to define in advance the conditions under which such lending would be proper or improper, which is no doubt the reason why the provision is confined to the requirement of giving information to the trustee. Despite the inadequacy of the provision, we think there is merit in requiting the borrowing corporation to make this disclosure, since "on-lending" of this kind may often be a symptom of financial trouble. We do not agree, however, with the exclusion of secured loans from the requirement. A guarantee secured by a charge over the assets of the related corporation may or may not be an adequate protection for the debenture holders, and we see no reason why, if any disclosure is to be made, it should not extend to all forms of assistance rendered to related corporations, whether secured or not. We would therefore recommend the omission of all the words in paragraph (f) from "but not including any deposit" to the end of the paragraph.

115. It is proposed in the G.R.B. draft of 21st May, 1969 to add a new sub-section (2A) to section 74v, requiring the report furnished pursuant to sub-section (1) to state, where appropriate, that a corporation has become or ceased to be a guarantor corporation and where a guarantor corporation has changed its name, to give particulars of the change.

116. The definition of guarantor corporation speaks of "a corporation that has guaranteed or has agreed to guarantee the repayment .... " Strictly speaking, therefore, a corporation which has ceased to be liable under its guarantee is still a "guarantor corporation" as defined. While it would be unusual for a guarantor to cease to be liable under its guarantee without the knowledge of the trustee, it is not impossible. In any case, the report referred to in sub-section (1) is not intended solely for the information of the trustee, as it also has to be filed with the Registrar. Subject to the amendment of the proposed sub-section to overcome the drafting difficulty referred to above, we would

be in favour of the adoption of the amendment. The following draft is suggested:

"(2A) Where during the period to which any report referred to in sub-section (1) relates:

(a) a corporation has become a guarantor corporation;

(b) a guarantor corporation has ceased to be liable for the payment of the whole or part of the moneys for which it was liable under the guarantee; or

(c) a guarantor corporation has changed its name:

the report shall so state and shall give particulars of the matters so stated."

117. Sub-section (4) of section 74F is the subject of amendments proposed by section 8 (e) of the G.R.B. of 21st May, 1969. Under the present legislation, guarantor corporations are required to furnish half-yearly accounts, but unless they are incorporated within the jurisdiction, or are subject to an obligation to file annual accounts as foreign companies under section 348 of the Act, they are not obliged to file annual accounts. This is obviously a gap in the legislative scheme, which these amendments are designed to correct. We agree with the amendments, subject to the comment that it would now appear to be unnecessary to refer back to the provisions of the Companies (Public Borrowings) Act 1963 in paragraph (b) of sub-section (4). Indeed, as the accounts required will m future have to comply with the revised provisions of Part VI. Division 2, we think that paragraph (b) should provide that the obligation to file such accounts should only come into force in relation to a period beginning with the commencement of the first full year after the amendment comes into operation, but that in the meantime accounts should be furnished as required by the existing section.

118. Sub-section (5) of the existing section 74F applies various provisions of sections 162 and 167 to the half-yearly accounts, with such adaptations as are necessary. In the draft Bill prepared to give effect to the recommendations of our first interim report, references to the appropriate sub-sections of the new sections 162, 162A, 162C, 167 and 167C have been substituted. We agree with the proposed amendment (Victorian Bill, section 12, N.S.W. Bill, section 6(1) (c)), but we think a reference to sub-section (4) of section 167 should be included. This sub-section entitles an auditor to access to the records of the company anal to "such information and explanations as he desires for the purposes of audit ". As the audit here spoken of is the annual audit, it would, we think, be desirable to make it clear that the same provision is applicable to an audit of half-yearly accounts.

119. We should add that we have considered two questions which arise in relation to the incorporation by reference of the provisions of section 162 and 162A. The incorporation of section 162 does not extend to sub-sections (5) and (6). This means that a borrowing or guarantor corporation which is a wholly owned subsidiary of another corporation, but which itself has

subsidiaries, will have to produce group accounts for the purposes of section 74F, although., if it were not a borrowing or a guarantor corporation, it would not be required to produce group accounts if its parent was incorporated in a State or Territory of the Commonwealth.

120. We consider that a borrowing corporation or a guarantor corporation should be required to produce group accounts covering themselves and their subsidiaries, as group accounts prepared by the parent company will not provide the trustee with the information required.

121. The second question relates to the form of the report which by virtue of section 162A must be attached to the accounts. It is proposed that the half-yearly report of the directors will take the same form as the annual report, with necessary adaptations. We do not disagree with this proposal, though we are conscious that the new provisions will make the annual report a somewhat longer document than it now is and will require more time and effort for its preparation. We note, however, that section 162c, which gives power to relieve in cases of hardship, has also been made applicable in respect of half-yearly reports.

122. Sub-section (5) of section 74F allows a guarantor corporation incorporated in the United States of America or the United Kingdom, with the consent of the trustee for debenture holders, to lodge certified copies of the accounts lodged with the S.E.C. or the Board of Trade, in lieu of the accounts required by the section. In the case of a foreign corporation carrying on business in a State or Territory, section 348 requires lodgement of a balance-sheet and such. other documents as the company is required to prepare by the law of the place if its incorporation or origin. It does not seem to us that any great harm is likely to ensue if foreign guarantor corporations which are not otherwise required to lodge accounts in the form required by Australian legislation, are permitted to supply annual and half-yearly accounts for the purposes of section 74F in the form required by their local law. In some cases the obligation to reframe the accounts of a guarantor corporation (not incorporated in the United Kingdom or United States of America) so as to comply with section 74F would impose a very heavy burden on the foreign guarantor. We recommend that sub-section (5) be amended to give effect to the views expressed above.

123. Section 74H was inserted by the Companies (Public Borrowings) Act 1963 to provide for cases in which a company had raised money by means of a debenture issue for a particular purpose or project, and the purpose or project has not been achieved or completed. Where the purpose or project has not been achieved or completed within

the time stated in the prospectus or within a reasonable time, the trustee is given power, subject to certain limitations, to call up the money for immediate repayment. This enables the trustee to act without waiting for breach of the trust deed, by which time the borrowed funds may have been dissipated. Provision is made, however, for cases in which the company has notified a change of plans to the debenture holders, and they have not requested the repayment of their money. We suggest two amendments to the section. In sub-section (5) the words "the purpose or project for which the moneys would in fact be used" are confusing, standing by themselves, since the purpose or project specified in the prospectus would literally fulfil the requirement. We have in our draft added words to make the meaning clear. The second amendment results from what seems to be a typographical error in setting out the sub-section. It seems to us that the words at the end of sub-section "and that person had not ..... in writing demanded ..... "should relate not only to the circumstances referred to in paragraph (b) but also to the situation envisaged in paragraph (a). In Appendix "A" we have set out the section so as to make it clear that sub-paragraph (ii) ends with the word "debentures" and that the remaining words apply to paragraph (a) as well as to paragraph (b).

124. Section 75 is, we think, in need of some revision. It seeks to make void provisions in a trust deed or in a contract with debenture holders which would have the effect of exempting a trustee from or indemnifying it against liability for breach of trust "where it fails to show the degree of care and diligence required of it as trustee having regard to the provisions of the trust deed or contract conferring on it any powers, authorities or discretions". The effect of tiffs provision seems to be that the trustee cannot be exempted from the consequences of a breach of trust, but that the question whether it has committed a breach of trust will depend on the terms of the document from which the exempting clause has been debarred. A clause entitling the trustee to rely on the word of the borrowing corporation as to whether there had been a breach of the trust deed, for example, would enable the trustee to avoid any active investigation of the position of the borrowing corporation, so far as its obligations under the deed were concerned. But presumably the obligations of the trustee under section 74D would be unaffected by any term of a contract or deed, so that in fact the trustee would not get any real protection from such a clause. If section 74D is amended in the manner proposed by us in paragraph 104 above, we do not think it matters very much what obligations are imposed on the trustee by the deed, or what exemptions from those obligations are conferred. We have therefore redrawn section 75 (1) to make it clear that the trustee cannot be relieved from its statutory obligations under section 74D, leaving the position under the deed or contract unregulated.

125. As we have suggested above (paragraph 107) a trustee who has acted honestly and reasonably ought to be entitled to the protection of section 365 of the Act in a proper case, and we have recommended in that paragraph that this change be made.

SECTION G - PROPOSAL FOR A COMPANIES COMMISSION.

126. In paragraphs 41 to 53 of our first interim report, we made proposals for the establishment of a Companies Commission, which would exercise various functions with respect to the provisions relating to accounts and audit, with which we were then dealing. In paragraph 47 of that report we indicated that, although we had not yet examined in detail other provisions of the legislation, there were other parts of the Act in which the inevitable rigidity of the legislative requirements would in our view require that some provision be made for relief against the strict requirements.

127. The preparation of the present report has strengthened our feeling that the establishment of a Companies Commission is necessary, if the legislation is to operate smoothly and equitably. We have drawn attention in the course of this report to situations in which it could operate, but it is perhaps desirable to refer to some of them again here. The most important field in which such a Commission could operate is the examination of prospectuses, to which we have referred in paragraphs 39 to 56 above. We recognize that under existing conditions the Registrars are able to promote uniformity of treatment for a particular company throughout the Commonwealth, by the operation of the provisions of section 42, whereby the acceptance for registration in one State ensures the acceptance of the prospectus in other States. We have in fact made suggestions for improving the operation of this system, so that in effect a promoter need not submit the prospectus for scrutiny in any other State before going ahead with the float. The difficulty about these provisions, however, is that the decisions of one Registrar may not be based on the same views as those of another, and if it is found that a particular State takes a less strict attitude than another, there is likely to be a tendency for those who wish to form a company to do so in the State in which the prospectus is most likely to pass through the net. We recognize that machinery has been set up by the Standing Committee for regular consultation between the Registrars, with a view to achieving uniformity in matters of this kind, but in our view such consultation can never be an adequate substitute for the exercise of control by a single authority. Once it is felt that the Registrar of a particular State takes a more lenient view than others, companies which propose to operate across State boundaries will tend to register in that State, and companies which are already

registered in another State will feel that their operations are being unduly hampered by the stricter standards of their "home" Registrar. Consultation between the Registrars can alleviate this situation, but we do not think it can overcome the difficulties altogether.

128. A second area in which we think the establishment of a Companies Commission would be valuable is that connected with the exercise of dispensing power in respect of prospectuses. This power already exists in the case of the prospectuses of unit trusts (see section 82 (2) of the Act). We have recommended that a similar power should be conferred in relation to the prospectuses of companies. Here again, it is important, not only that a dispensation in favour of a company should be operative in every State in which the company proposes to circulate the prospectus, but that there should not be differential treatment of companies Operating in the same States, but having different places of original registration. Our reasons for advocating a single authority in this field are the same as those we advanced in the case of the dispensing power for accounts, except that it may well be said that the possible variations in the contents of prospectuses are greater than in the case of accounts.

129. As stated elsewhere in this report (paragraphs 18-22 above) the control of "pre-prospectus" publicity, and of information released during the currency of a prospectus, presents a particularly difficult problem. The same considerations as we have already put forward apply in this field, if this sort of activity is to be controlled by the exercise of a discretion on the part of an official or official body. Although we have attempted to define the kind of publicity which should be permitted in such circumstances, we have felt it to be necessary to provide an escape clause for cases which cannot be defined in advance (see the draft of our proposed section 40^ in Appendix "A "). It is to be noted that the authors of the Wheat Report said (at p. 132) that they could see no effective substitute for the system of informal rulings which operates in the United States. Many of the difficulties of the situation could, we think, be resolved if there were a single body able to speak for the whole of the Commonwealth, and to give general rulings which would guide companies as to the amount of publicity which would be permitted to a company contemplating a share or debenture issue.

130. In the light of the considerations here set out, we renew our recommendation that a Companies Commission be set up on the lines indicated in our first interim report. That recommendation was referred to a sub-committee of the Standing Committee for further consideration, and some discussions have taken place between the sub-committee and this

Committee. Our purpose in raising the matter again in this report is to stress the importance which we attach to the recommendation, and to urge the Standing Committee to proceed with all possible speed to implement our earlier recommendation. We-should add that, as in our previous reports, we have framed our recommendations in tiffs report in such a way that they can be implemented with the machinery that now exists. This has to some extent inhibited us in framing what we would regard as the ideal provisions, having regard to our feeling that a single expert body should be established, if such a body were in existence it would be possible to adopt a different approach to some of the problems that we have encountered in preparing tiffs report.

131. As we pointed out in our first interim report, one of the great advantages which would flow from the establishment of a Companies Commission would be that there would exist a permanent and responsible organization which would develop a fund of knowledge as to the practical operation of the legislation. The analysis of applications for exemption from the requirements of the Act would enable such a body to develop general rules for dealing with such applications, and ultimately to establish different requirements for prospectuses issued by different kinds of companies. Such a development would be capable of affording substantial economies for companies raising new capital, besides improving the protection of the public in cases in which it became apparent that the existing form of prospectus was in need of improvement.

SECTION H - CONCLUSION.

132. We have not attempted to compile a detailed list of recommendations in this report. It will be appreciated that the framing of our proposals has involved a careful examination of the inter-relation of a large number of sections of the Act, and that it is in many cases impossible to treat the recommendations as independent of each other. Because of this inter-relation, we have found it necessary, as we did for the purposes of our first report, to prepare drafts of the sections with which we were concerned, and ultimately to compile a complete draft of the parts of the Act in which those sections are contained. As far as possible, we have endeavoured to provide for the consequential amendments which will be necessary in other parts of the Act than those with which we have been directly concerned, but no doubt the draftsman will discover other areas in which the adoption of our recommendations will necessitate further amendment. Nor do we wish to suggest that the drafts which we have put forward are necessarily the last word in perfection of literary or legal style. In the case of our previous reports, the completion of a final draft Bill brought to light various possibilities of improvements, and we would like to

place on record the fact that there has been close and friendly co-operation between tiffs Committee and the State and Federal officers concerned with the company law and the draftsmen who have had the task of translating the recommendations previously made by us into a form suitable for presentation to Parliament.

133. We conclude with a general recommendation that the proposals in the draft sections and schedules contained in Appendix "A" be adopted by the Standing Committee.

R. M. EGGLESTON,

J. M. RODD,

P. C. E. COX.

12th October, 1970.

APPENDIX "A"

DRAFT SECTIONS AND SCHEDULES.

1. Sub-section (6) of section 5 is to be repealed and replaced by the following new sub-sections:

"(6) For the purposes of this Act, every offer to allot shares or debentures in a corporation or proposed corporation, and every invitation to subscribe for shares or debentures in or to deposit money with or to lend money to a corporation or proposed corporation, shall be deemed to be an offer or invitation to the public unless:

(a) it is made to a person whose ordinary business it is (whether as principal or agent) to buff or sell shares or debentures, or to underwrite the issue of shares or debentures or to lend money;

(b) it is made to existing members of a company within the meaning of section 270 or any corresponding enactment of another State or Territory and relates to shares in the corporation within the meaning of that section or enactment;

(c) it is made to existing members of a corporation and relates to shares in or debentures of that corporation, whether the rights to the issue are renounceable or not;

(d) the total of all offers and invitations (other than offers or invitations referred to in paragraph (e) of this sub-section) issued circulated or distributed in respect of shares or debentures (as the case may be) of that corporation or proposed corporation within any period of three months which includes the date of the offer or invitation does not exceed fifty; or

(e) the offer or invitation is made in conjunction with an offer to which section 180c (1) applies or an invitation to which section 180C (5) applies.

(6A) Where an invitation is made to the public to deposit money with or to lend money to a corporation or proposed corporation or an offer is made to the public to accept a deposit with or loan to a corporation, the acceptance as a deposit or loan of any money received pursuant to such invitation or offer shall be deemed to be an allotment of a debenture.

(6B) Where shares or debentures are allotted in consideration of a money sum, but by virtue of any contract agreement or arrangement

payment for those shares or debentures is or is to be effected directly or indirectly by a set-off against amounts owing or to become owing by the company to the allottee or to any other person, those shares or debentures shall to the extent to which payment is or is to be so made be deemed to have been allotted for a consideration other than cash and for an amount paid or payable otherwise than in cash."

2. Divisions 1 to 4 of Part IV. are to be repealed and the following new Divisions substituted:

'Division 1 - Prospectuses.

37. (1) Where an invitation or offer in respect of shares or debentures is made to the public, a person shall not issue circulate or distribute any form of application for those shares or debentures unless the form is attached to a prospectus a copy of which has been registered by the [Registrar].

Penalty: $2,000.

(2) Where a prospectus has been issued in respect of any shares or debentures, a corporation shall not allot any of those shares or debentures unless the person to whom they are allotted has signed a form of application issued in accordance with sub-section (1).

Penalty: $1,000.

(3) This section does not apply to an offer or invitation made to a person whose ordinary business it is (whether as principal or agent) to buy or sell shares or debentures, or to underwrite the issue of shares or debentures, or to lend money, nor to the allotment of shares or debentures to any such person.

(4) It is a defence to a charge under sub-section (1) that the person charged did not know and had no reason to believe that offers or invitations had been issued circulated or distributed or were intended by any person to be issued circulated or distributed to more than fifty persons within a period of three months including the date on which such offer or invitation was issued circulated or distributed.

(5) Where an allotment of shares or debentures is made in contravention of any of the provisions of this section, such allotment shall not by reason only of that fact be voidable or void.

38. (1) An invitation to the public to deposit money with or lend money to a corporation or proposed corporation shall not be issued circulated or distributed by the corporation or by any other person unless:

(a) a prospectus in relation to the invitation has been registered by the Registrar; and

(b) the prospectus contains a statement that the corporation or proposed corporation will within two months after the acceptance of any money as a deposit or loan from any person in response to the invitation issue to that person a document which acknowledges or evidences or constitutes an acknowledgment of the indebtedness of the corporation in respect of that deposit or loan.

APPENDIX "A" - continued.

(1A) The document referred to in sub-section (1) shall be described or referred to in the prospectus and in any other document issued in connection with or in relation to the invitation (including the document itself) as:

(a) an unsecured note or an unsecured deposit note;

(b) a mortgage debenture or certificate of mortgage debenture stock; or

(c) a debenture or certificate of debenture stock:

in accordance with the provisions of sub-sections (3) (4) and (5) of this section, and without any addition to or qualification of the name by which the document is described or referred to, other than such addition indicating its priority as the [Registrar] may approve or require.

(2) Where pursuant to an invitation referred to in sub-section (1) a corporation has accepted from any person any money as a deposit or loan the corporation shall within two months after the acceptance of the money issue to that person a document which:

(a) acknowledges or evidences or constitutes an acknowledgment of the indebtedness of the corporation in respect of that deposit or loan; and

(b) complies with the other requirements of this section.

(3) The document shall be described or referred to as an unsecured note or an unsecured deposit note unless pursuant to sub-section (4) or sub-section (5) it is and may be otherwise described.

(4) The document may be described or referred to as a mortgage debenture or certificate of mortgage debenture stock if, and only if, there are included in the prospectus the statements and valuation referred to in clause 44 of the Fifth Schedule.

(5) The document may be described or referred to as a debenture or certificate of debenture stock if, and only if:

(a) pursuant to sub-section (4) it may be (but is not) described as a mortgage debenture or certificate of mortgage debenture stock; or

(b) there are included in the prospectus the statement and summary referred to in clause 45 of the Fifth Schedule.

(6) Nothing in this section shall apply to a prescribed corporation and nothing in this Act shall require a prospectus to be issued in connection with any invitation to the public to deposit money with a prescribed corporation.

(7) In sub-section (6) of this section, "prescribed corporation" means:

(a) a banking corporation;

(b) a corporation that is declared by the Governor in Council by notice in the Government Gazette to be an authorized dealer in the short term money market;

(e) a corporation that:

(i) is a pastoral company in respect of which an exemption granted under section 11 of the Banking Act 1959 of the Commonwealth, or that Act as amended from time to time, is in force;

(ii) is registered under the law of the Commonwealth relating to life insurance or is a corporation the whole of the issued shares of which are held beneficially by a corporation so registered; or

(iii) is a subsidiary of a banking corporation or of a pastoral company referred to in sub-paragraph (i) of this paragraph, if the repayment of all existing and future deposits with and loans to the subsidiary are guaranteed by the banking corporation or pastoral company:

and is declared by the Governor in Council by notice in the Government Gazette to be a prescribed corporation for the purposes of this section.

(8) The Governor in Council may, by notice in the Government Gazette:

(a) specify terms and conditions subject to which sub-section (6) of this section shall have effect in relation to a corporation specified in paragraph (c) of sub-section (7) of this section; or

(b) vary or revoke any declaration or specification made under this section.

(9) Every corporation or other person that contravenes or fails to comply with any of the provisions of this section and every officer of a corporation who is in default shall be guilty of an offence against this Act.

Penalty: Imprisonment for six months or $2,000.

(10) Where a document acknowledging or evidencing the indebtedness of a corporation issued before the commencement of the Companies (Public Borrowings) Act 1963 is replaced by a new document issued by reason of the transfer transmission loss of destruction of the first-mentioned document the new document may be in the same form as the document which it replaces, but save as aforesaid the provisions of this section shall apply to every such document issued after the commencement of that Act, notwithstanding any provisions m any existing debenture or trust deed.

APPENDIX "A " - continued.

(11) For the purposes of this section a document issued by a borrowing corporation certifying that a person named therein is in respect of any deposit with or loan to the corporation the registered holder of a specified number or value:

(a) of unsecured notes or unsecured deposit notes;

(b) of mortgage debentures or certificates of mortgage debenture stock; or

(c) of debentures or certificates of debenture stock:

issued by the corporation upon or subject to the terms and conditions contained in a trust deed referred to or identified in the certificate, shall be deemed to be a document evidencing the indebtedness of that corporation in respect of that deposit or loan.

39. (1) To comply with the requirements of this Act a prospectus:

(a) shall be printed in type of a size not less than the type known as eight point Times unless the [Registrar], before the registration of the prospectus, certifies in writing that the type and size of letters are legible and satisfactory;

(b) shall be dated and that date shall, unless the contrary is proved, be taken as the date of issue of the prospectus;

(c) shall as to one copy be lodged with the [Registrar] as required by this Act and shall state that a copy of the prospectus has been lodged with and registered by the [Registrar] and shall also state immediately after such statement that the [Registrar] takes no responsibility as to its contents;

(d) shall, subject to the provisions of the Fifth Schedule, contain the statements and reports required by that Schedule;

(e) shall contain a statement that no shares or debentures or no shares and debentures (as the case requires) shall be allotted on the basis of the prospectus later than six months after the date of the issue of the prospectus;

(f) shall, if it contains what purports to be a statement made by an expert or a copy of or extract from a report memorandum or valuation of an expert, state the date on which the statement report

memorandum or valuation was made and whether or not it was prepared by the expert for incorporation in the prospectus;

(g) shall not contain the name of any person as a trustee for holders of debentures or as an auditor or a banker or a solicitor or a stockbroker or share broker of the corporation or proposed corporation or for or in relation to the issue or proposed issue of shares or debentures unless that person has consented in writing before the issue of the prospectus to act in that capacity in relation to the prospectus and, in the case of a company or proposed company, a copy verified as prescribed of the consent has been lodged with the [Registrar]; and

(h) shall where the prospectus offers shares in or debentures of a foreign company incorporated or to be incorporated, in addition contain particulars with respect to:

(i) the instrument constituting or defining the constitution of the company;

(ii) the enactments or provisions having the force of an enactment by or under which the incorporation of the company was effected or is to be effected;

(iii) an address in the State where such instrument, enactments or provisions or certified copies thereof may be inspected;

(iv) the date on which and the place where the company was or is to be incorporated; and

(v) whether the company has established a place of business in the State and, if so, the address of its principal office in the State.

(2) In the application to a foreign company of the Fifth Schedule any reference in that Schedule to the memorandum or articles of a corporation shall have effect as if a reference to the constitution of the company were substituted therefore.

(3) A provision purporting to require or bind an applicant for shares in or debentures of a corporation to waive compliance with any requirement of this section or to affect him with notice of any contract document or matter not specifically referred to in the prospectus shall be void.

(4) Where a prospectus relating to any shares in or debentures of a corporation or proposed corporation is issued and the prospectus does not comply with the requirements of this Act, each director of the corporation and other person responsible for the prospectus shall be guilty of an offence against this Act.

Penalty: $2,000.

(5) In the event of non-compliance with or contravention of any of the requirements set out in this section, a director or other person responsible for the prospectus shall not incur any liability by reason of the non-compliance or contravention, if:

(a) as regards any matter not disclosed, he proves that he was not cognizant thereof;

(b) he proves that the non-compliance or contravention arose from an honest mistake on his part concerning the facts; or

APPENDIX "A " - continued.

(c) the non-compliance or contravention was in respect of a matter which in the opinion of the court dealing with the case was immaterial, or was otherwise such as ought, in the opinion of that court, having regard to all the circumstances of the case, reasonably to be excused.

(6) In the event of failure to include in a prospectus a statement with respect to the matters specified in clause 17 of the Fifth Schedule, no director or other person shall incur any liability in respect of the failure unless it is proved that he had knowledge of the matters not disclosed.

(7) Nothing in this section shall limit or diminish any liability which a person may incur under any rule of law or any enactment or under this Act apart from sub-section (4) of this section.

40. (1) A person shall not issue circulate publish disseminate or distribute any notice circular or advertisement offering or calling attention to any offer or intended offer for subscription or purchase of shares in or debentures of a corporation or proposed corporation or to any invitation to subscribe for or purchase shares in or debentures of a corporation or proposed corporation or to any prospectus.

(2) This section shall not apply to a notice circular or advertisement calling attention to a prospectus which has been registered by the [Registrar] if it contains no information or matter other than some or all of the following:

(i) The number and description of the shares or debentures concerned;

(ii) The name and date of registration of the corporation and its paid-up share capital;

(iii) The general nature of the main business or proposed main business of the corporation;

(iv) The names addresses and occupations of:

(A) the directors or proposed directors;

(B) the brokers or underwriters to the issue; and

(C) in the case of debentures, the trustee for the debenture holders;

(v) The name of the Stock Exchange of which the brokers or underwriters to the issue are members;

(vi) Particulars of the opening and closing dates of the offer and the time and place at which copies of the full prospectus and forms of application for the shares or debentures may be obtained; and

(vii) A statement that the person issuing the same recommends the investment to which it relates (together with the additional statement, if any, required by sub-section (9)):

and states that applications for shares or debentures will proceed only on one of the forms of application attached to a printed copy of the prospectus.

(3) This section shall not apply to:

(a) the issue circulation publication or distribution of a directors' proposal issued in connection with an offer or invitation made only to the shareholders of the corporation to which it relates (whether renounceable or not);

(b) a notice or circular which relates to an offer or invitation not made to the public.

(4) This section shall apply to notices circulars or advertisements published or disseminated in the State by newspaper, broadcasting, television, cinematograph or any other means whatsoever.

(5) A person who contravenes this section, and every officer of the corporation concerned, or other person, who knowingly authorizes or permits the act which constitutes the contravention shall be guilty of an offence against this Act.

Penalty: $1,000.

(6) Where a person who has issued circulated published disseminated or distributed any notice circular or advertisement which contravenes this section has before so doing obtained a certificate signed by two directors of the corporation or by two proposed directors of the proposed corporation that that notice circular or advertisement complies with the provisions of sub-section (2), the person who obtained the certificate shall be deemed not to have issued circulated published disseminated or distributed the same, but the corporation and each person who signed the certificate shall be deemed to have published such notice circular or advertisement.

(7) Any person who has obtained a certificate referred to in the last preceding sub-section shall when so requested by the Registrar forthwith deliver the certificate to the Registrar.

Penalty: $1,000. Default penalty.

(8) Nothing in this section shall limit or diminish any liability which any person may incur under any rule of law or under any enactment or under this Act apart from this section.

(9) Where any circular notice or advertisement contains a recommendation in accordance with paragraph (vii) of sub-section (2) made by a person who has underwritten or sub-underwritten the issue to which it relates, the circular notice or advertisement shall also state that the person making the recommendation is interested in the success of the issue as underwriter or sub-underwriter as the case may be.

APPENDIX "A " - continued.

40A. (1) A person who is aware that a prospectus in respect of an issue of shares or debentures is in course of preparation by or on behalf of a corporation or proposed corporation for registration in any State or Territory of the Commonwealth, or has been issued by or on behalf of a corporation or in respect of a proposed corporation and is still current, shall not issue circulate publish disseminate or distribute any written material (other than a prospectus which has been registered or a circular notice or advertisement which complies with sub-section (2) of section 40), or any material which is broadcast by means of radio or television, which is likely to induce applications for those shares or debentures.

(2) This section shall not apply to the issue, circulation, publication, dissemination or distribution of:

(a) bona fide comment on any prospectus which has been registered in any State or Territory of the Commonwealth in any newspaper or periodical if no consideration is received in respect thereof by the author or by the owner or publisher of the newspaper or periodical from any person interested in the success of the issue;

(b) an announcement made on behalf of a corporation or its directors or the proposed directors of a proposed corporation issued with the consent in writing of the [Registrar];

(c) a statement made by or on behalf of a corporation listed on a prescribed Stock Exchange to that Stock Exchange or an officer thereof, and relating to the affairs of that corporation;

(d) any material issued circulated published disseminated or distributed by or on behalf of a corporation which is of a kind ordinarily so issued circulated published disseminated or distributed by or on behalf of that corporation in the Course of carrying on its business;

(e) any material which is not issued circulated published disseminated or distributed by or on behalf of the corporation, or at the instigation of, or by arrangement direct or indirect with, the corporation, the directors or proposed directors or promoters of the corporation or proposed corporation, or any person interested in the success of the issue, if no consideration is received from any such person by the person who issues circulates publishes disseminates or distributes the same.

41. (1) Where a prospectus has been issued in relation to debentures, a corporation shall not accept or retain subscriptions in respect of that issue of debentures in excess of the maximum amount stated in the prospectus in pursuance of clause 46 of the Fifth Schedule.

(2) Subject to the provisions contained in the Fifth Schedule, a prospectus shall not contain any reference to asset backing or interest cover in respect of any debenture issue otherwise than in relation to the maximum amount so stated.

(3) If default is made in complying with any provision of this section the corporation and every officer of the corporation who is in default shall be guilty of an offence against this Act.
Penalty: $2,000.

42. (1) A prospectus shall not be issued circulated or distributed by any person unless a copy thereof has first been registered by the [Registrar].

(2) The [Registrar] shall not register a copy of any prospectus unless:

(a) the copy signed by every director and by every person who is named therein as a proposed director of the corporation or by his agent authorized in writing is lodged with the [Registrar] on or before the date of its issue;

(b) the prospectus appears to comply with the requirements of this Act;

(c) there are also lodged with the [Registrar] copies verified as prescribed of any consents required by section 45 to the issue of the prospectus and of all material contracts referred to in the prospectus (or in the case of such a contract not reduced into writing, a memorandum giving full particulars thereof verified as prescribed); and

(d) in the case of a prospectus pursuant to which the public is to be invited to deposit money with or lend money to a corporation which is a subsidiary of another corporation:

(i) the prospectus contains a statement as to whether or not that other corporation is under any liability (whether absolute or contingent) to repay those moneys or to pay any interest thereon; and

(ii) where that other corporation is so stated to be under any such liability, the prospectus also gives full particulars of the nature and extent of that liability, of the circumstances under which that

liability arose and the manner in which that liability is to be discharged.

(2A) Where after perusing a prospectus and any documents submitted therewith in accordance with sub-section (2) the [Registrar] is not satisfied that the prospectus does not contain any statement or matter which is misleading in the form or context in which it is included, he may, if he thinks fit, refuse to register a copy of the prospectus.

APPENDIX "A" - continued.

(2B) Where a prospectus relating to a corporation incorporated or to be incorporated in another State or Territory of the Commonwealth is lodged for registration with the following documents:

(a) a certificate by the [Registrar] of that State or Territory that the prospectus has been registered or is acceptable for registration in that State or Territory and that in his opinion the prospectus complies with the requirements of paragraph (h) of sub-section (1) of section 39 of this Act; and

(b) copies verified as prescribed of all documents referred to in paragraph (c) of sub-section (2) of this section:

that prospectus shall, notwithstanding the provisions of sub-sections (2) and (2A) be deemed to be registered for the purposes of sub-section (1).

(3) If a prospectus is issued circulated or distributed without a copy thereof having been so registered the corporation and every person who is knowingly a party to the issue circulation or distribution of the prospectus shall be guilty of an offence against this Act.

Penalty: $500.

(4) Every corporation shall cause a true copy of every document referred to in paragraph (c) of sub-section (2) of this section and of any other document referred to in the prospectus in respect of which the corporation is required by this Act to indicate in the prospectus a place where it is available for inspection, to be deposited within seven days after registration of the prospectus at the registered office of the corporation in the State (if any) and at the address in the State specified in the prospectus for that purpose, and shall keep each such copy, for a period of at least six months after the registration of the prospectus, for inspection by any person without fee.

43. (1) Where a corporation allots or agrees to allot to any person any shares in or debentures of the corporation with a view to all or any of them being offered for sale to other persons, any document by which the shares or debentures are so offered for sale shall be deemed to be a prospectus issued by the corporation and all enactments and rules of law as to the contents of prospectuses and to liability in respect of statements and non-disclosure in prospectuses, or otherwise relating to prospectuses, shall apply and have effect accordingly as if the shares or debentures had been

offered to the public by the corporation, and as if persons accepting the offer in respect of shares or debentures were subscribers therefor, but without prejudice to the liability (if any) of the person by whom the offer is made, in respect of statements or non-disclosures in the document or otherwise.

(2) For the purposes of this Act it shall, unless the contrary is proved, be evidence that an allotment of, or an agreement to allot, shares or debentures was made with a view to the shares or debentures being offered for sale to other persons if it is shown that offers to sell those shares or debentures or any of them were made by the allottee to more than twenty persons within three months after the allotment or agreement to allot.

(2A) For the purposes of this section an invitation to make an offer shall be deemed to be an offer.

(3) The requirements of this division as to prospectuses shall have effect as if the persons making an offer to which this section relates were persons named in a prospectus as directors of a corporation.

(4) In addition to complying with the other requirements of this division the document making the offer shall state:

(a) the net amount of the consideration received or to be received by the corporation in respect of shares or debentures to which the offer relates; and

(b) the place and time at which a copy of the contract under which the shares or debentures have been or are to be allotted may be inspected.

(5) Where an offer to which this section relates is made by a corporation or a firm, it shall be sufficient if the document referred to in sub-section (1) of this section is signed on behalf of the corporation by two directors of the corporation or not less than half of the members of the firm, as the case may be, and any such director or member may sign by his agent authorized in writing.

(6) In any proceedings in which this section is relied on by the prosecutor or plaintiff, it shall be a defence if the defendant proves that the total number of offers made by persons to whom shares or debentures (as the case may be) were allotted with a view to sale to other persons within any period of three months which includes the date of the allotment to the person by whom the shares or debentures were offered for sale did not exceed fifty.

(7) In any proceedings in which this section is relied on by the prosecutor or plaintiff, it shall be a defence if the defendant proves:

(a) that at the time of the allotment the corporation had given an undertaking to the person to whom the allotment was made that it had not made and would not thereafter make any allotment to any other person with a view to those shares or debentures (as the case may be) being offered for sale, except subject to undertakings given by those other persons which (if observed) would ensure that offers for sale of the shares or debentures so allotted to all such persons would not exceed fifty within any period of three months which included the date of allotment to the first-mentioned person; or

Appendix "A" - continued.

(b) that all relevant allotments made by the corporation with a view to sale to other persons had been made subject to undertakings which would ensure that offers of the shares or debentures so allotted to all such persons would not exceed fifty within any period of three months which included the date of such allotment:

and that he did not know and had no reason to believe at the time when the offer relied on in the proceedings was made that any such undertaking had been broken or that the offer constituted a breach of the undertaking.

(8) Any person who knowingly commits or assists in the commission of a breach of any such undertaking as is referred to in sub-section (7) shall be guilty of an offence against this Act.
Penalty: $500.

(9) An offer or invitation made in contravention of this section shall be deemed to be an offer to the public.

44. (1) Where a prospectus states or implies that application has been or will be made for permission for the shares or debentures offered thereby to be listed for quotation on the official list of any Stock Exchange, any allotment made on an application in pursuance of the prospectus shall, subject to sub-section (3) of this section whenever made, be void if:

(a) the permission is not applied for in the form for the time being required by the Stock Exchange before the third day on which the Stock Exchange is open after the date of issue of the prospectus; or

(b) the permission is not granted before the expiration of six weeks from the date of the issue of the prospectus or such longer period not exceeding twelve weeks from the date of the issue as is, within the said six weeks, notified to the applicant by or on behalf of the Stock Exchange.

(2) Where the permission has not been applied for, or has not been granted as aforesaid, the corporation shall, subject to sub-section (3) of this section, forthwith repay without interest all moneys received from applicants in pursuance of the prospectus, and if the money is not repaid within fourteen days after the corporation so becomes liable to repay it then in addition to the liability of the corporation the directors of the corporation shall be jointly and severally liable to repay that money with interest

at the rate of five per centum per annum from the expiration of such fourteen days.

(3) Where in relation to any shares or debentures:

(a) permission is not applied for as specified in paragraph (a) of sub-section (1) of this section; or

(b) permission is not granted as specified in paragraph (b) of that sub-section:

the Minister may by notice published in the Government Gazette on the application of the corporation, made before any share or debenture is purported to be allotted, exempt the allotment of the shares or debentures from the operation of this section.

(4) A director shall not be so liable under sub-section (2) of this section if he proves that the default in the repayment of the money was not due to any misconduct or negligence on his part.

(5) Any condition requiring or binding any applicant for shares or debentures to waive compliance with any requirement of this section or purporting to do so shall be void.

(6) Without limiting the application of any of its provisions this section shall have effect:

(a) in relation to any shares or debentures agreed to be taken by a person underwriting an offer thereof contained in a prospectus as if he had applied therefor in pursuance of the prospectus; and

(b) in relation to a prospectus offering shares for sale as if:

(i) a reference to sale were substituted for a reference to allotment;

(ii) the persons by whom the offer is made, and not the corporation, were liable under sub-section (2) of this section to repay money received from applicants, and references to the corporation's liability under that sub-section were construed accordingly; and

(iii) for the reference in sub-section (7) of this section to the corporation and every officer of the corporation who is in default there were substituted a reference to any person by or through whom the offer is made and who knowingly and wilfully authorizes or permits the default.

(7) All money received as aforesaid shall be kept in a separate bank account so long as the corporation may become liable to repay it under sub-section (2) of this section; and if default is made in complying with this sub-section, the corporation and every

officer of the corporation who is in default shall be guilty of an offence against this Act.

Penalty: $1,000.

APPENDIX "A " - continued.

(8) Where the Stock Exchange has within the time specified in paragraph (b) of sub-section (1) of this section granted permission subject to compliance with any requirements specified by the Stock Exchange, permission will be deemed to have been granted by the Stock Exchange if the directors have given to the Stock Exchange an undertaking in writing to comply with the requirements of the Stock Exchange, but if any such undertaking is not complied with each director who is in default shall be guilty of an offence against this Act.

Penalty: Imprisonment for three months or $1,000.

(9) A person shall not issue a prospectus relating to any shares in or debentures of a corporation if it includes:

(a) an untrue statement that permission has been granted for those shares or debentures to be dealt in or quoted or listed on any Stock Exchange; or

(b) any statement in any way referring to any such permission or to any application or intended application for any such permission, or to dealing in or quoting or listing the shares or debentures on any Stock Exchange, or to any requirements of a Stock Exchange unless that statement is or is to the effect that permission has been granted or that application has been or will be made to the Stock Exchange before the third day on which the Stock Exchange is open after the date of issue of the prospectus.

Penalty: Imprisonment for six months or $1,000.

(10) Where a prospectus contains a statement to the effect that the memorandum and articles of the corporation comply or have been drawn so as to comply with the requirements of any Stock Exchange, the prospectus shall, unless the contrary intention appears from the prospectus, be deemed for the purposes of this section to imply that application has been, or will be, made for permission for the shares or debentures offered by the prospectus to be listed for quotation on the official list of the Stock Exchange.

45. (1) A prospectus relating to shams in or debentures of a corporation and including a statement purporting to be made by an expert or to be based on a statement made by an expert shall not be issued unless:

(a) the name of the expert and his qualifications are disclosed in the prospectus;

(b) he has given, and has not before delivery of a copy of the prospectus for registration withdrawn, his written consent to the issue thereof with the statement included in the form and context in which it is included; and

(c) there appears in the prospectus a statement that he has given and has not withdrawn his consent.

(2) If any prospectus is issued in contravention of this section the corporation and every person who is knowingly a party to the issue thereof shall be guilty of an offence against this Act.
Penalty: $1,000.

46. (1) Where there is false or misleading matter in a prospectus, or any material matter is omitted from a prospectus, a person to whom this section applies is, subject to this section, guilty of an offence against this Act.
Penalty: $2,000 or imprisonment for one year, or both.

(2) A person to whom this section applies is, in the circumstances referred to in sub-section (1), whether he has been convicted of an offence under that sub-section or not, liable, subject to this section, to pay compensation to a person who subscribes for or purchases shares or debentures on the faith of the prospectus for any loss or damage sustained by reason of the false or misleading matter or by reason of the omission.

(3) The persons to whom this section applies are:

(a) a director of the corporation at the time of the issue of the prospectus;

(b) a person who authorized or caused himself to be named and was named in the prospectus as a director or as having agreed to become a director either immediately or after an interval of time;

(c) a promoter of the corporation;

(d) a person who authorized or caused the issue of the prospectus; and

(e) an expert who has given his written consent to the issue of the prospectus as required by section 45.

(4) A person referred to in paragraph (e) of sub-section (3) is guilty of an offence under sub-section (1), and liable to pay compensation under sub-section (2), only in respect of false or misleading matter in the statement in respect of which his consent was required, or an omission of material matter from that statement.

(4A) The inclusion in a prospectus of a name of a person as a trustee for debenture holders, auditor, banker, solicitor or stock or share broker shall not for that reason alone be construed as an authorization by such person of the issue of the prospectus.

APPENDIX "A " - continued.

(5) It is a defence to a prosecution of a person for an offence under sub-section (I) if the person proves:

(a) that when the prospectus was issued, he:

(i) believed on reasonable grounds that the false matter was true;

(ii) believed on reasonable grounds that the misleading matter was not misleading;

(iii) in the case of an omission, believed on reasonable grounds that no material matter had been omitted; or

(iv) in the case of an omission, did not know that the omitted matter was material; and

(b) that:

(i) when he was charged with the offence, he so believed or did not so know;

(ii) before he was charged with the offence, he ceased so to believe or came to know that the omitted matter was material, and forthwith gave reasonable public notice containing such matters as were necessary to correct the false or misleading statement or the omission; or

(iii) he did not cease so to believe, or did not come to know that the omitted matter was material, until more than six months after the date of issue of the prospectus, or until allotment of all the shares or debentures offered for subscription (whichever first happened).

(6) It is a defence to an action under sub-section (2) if the defendant proves:

(a) any matter referred to in paragraph (a) of sub-section (5); and

(b) that:

(i) at the time when the shares or debentures were allotted or sold to the plaintiff the defendant believed as mentioned in sub-paragraph (i) (ii) or (iii) of paragraph (a) of sub-section (5) or did not know that the omitted matter was material; or

(ii) before the shares or debentures were allotted to or sold to the plaintiff, the defendant ceased so to believe or came to know that the omitted matter was material, and forthwith gave reasonable public notice containing such matters as were necessary to correct the false or misleading statement or the omission.

(7) Nothing in this section affects any cause of action existing apart from this section.

Division 2 - Restrictions on Allotment and Commencement of Business.

48. (1) Where a minimum subscription is stated in any prospectus or directors' proposal, no allotment shall be made of any shares or debentures to which such minimum subscription is applicable unless:

(a) the minimum subscription has been subscribed; and

(b) the sum payable on application for the shares or debentures so subscribed has been received by the company:

but if a cheque for the sum payable has been received by the company, the sum shall be deemed not to have been received by the company until the cheque has been paid by the bank on which it is drawn.

(2) The minimum subscription shall be calculated on the nominal value of each share or debenture, but where shares are issued at a premium on the nominal value of, and the amount of the premium payable on, each share; and shall be reckoned exclusively of any amount payable otherwise than in cash.

(2A) Where a prospectus or directors' proposal states that part of the consideration for any contract, purchase or other transaction in respect of which the funds to be raised by the issue are required is to be satisfied by an allotment of shares or debentures for a consideration other than cash, no allotment of shares or debentures to which the minimum subscription is applicable shall be made unless those shares or debentures for which a consideration other than cash is to be furnished have been subscribed for.

(3) The amount payable on application on each share offered to the public except in the case of a no liability company shall not be less than five per centum of the nominal amount of the share.

(4) If the conditions referred to in paragraphs (a) and (b) of sub-section (1) and in sub-section (2A) of this section have not been satisfied on the expiration of four months after the first issue of the prospectus, or in the case of a directors' proposal,

within four months after the date of that proposal, all money received from applicants for shares or debentures shall be forthwith repaid to them without interest, and if any such money is not so repaid within five months after the issue of the prospectus or the date of such proposal the directors of the company shall be jointly and severally liable to repay that money with interest at five per centum per annum from the expiration of the period of five months but a director shall not be so liable if he proves that the default in the repayment of the money was not due to any default or negligence on his part.

APPENDIX "A " - continued.

(5) An allotment made by a company to an applicant in contravention of the provisions of this section shall be voidable at the option of the applicant which option may be exercised by written notice served on the company within one month after the holding of the statutory meeting of the company and not later, or, in any case where the company is not required to hold a statutory meeting, or where the allotment is made after the holding of the statutory meeting within one month after the date of the allotment, and not later, and the allotment shall be so voidable notwithstanding that the company is in course of being wound up.

(6) Every director of a company who knowingly contravenes or permits or authorizes the contravention of any of the provisions of this section shall be guilty of an offence against this Act and shall be liable in addition to the penalty or punishment for the offence to compensate the company and the allottee respectively for any loss damages or costs which the company or the allottee has sustained or incurred thereby, but no proceedings for the recovery of such compensation shall be commenced after the expiration of two years from the date of the allotment.

(7) Any provision purporting to require or bind any applicant for shares or debentures to waive compliance with any requirement of this section shall be void.

(8) No company shall allot, and no officer or promoter of a company or a proposed company shall authorize or permit to be allotted, shares or debentures to the public on the basis of a prospectus after the expiration of six months from the issue of the prospectus.
Penalty: $1,000.

(9) Where an allotment of shares or debentures is made on the basis of a prospectus after the expiration of six months from the issue of the prospectus, such allotment shall not by reason only of that fact be voidable or void.

49. (1) All application and other moneys paid prior to allotment by any applicant on account of shares or debentures shall until the allotment of such shares or debentures be held in a separate bank account by the company, or in the case of a proposed company by the persons named in the prospectus as proposed directors and by the promoters, upon trust for the applicant, but there shall be no obligation or duty on any bank or third person with whom any such moneys have been deposited to inquire into or see to the proper application of such moneys so long as such bank or person acts in good faith.

(2) If default is made in complying with this section every officer of the company in default, or in the case of a proposed company, every person named in the prospectus as a proposed director and every promoter who knowingly and wilfully authorizes or permits the default shall be guilty of an offence against this Act.

Penalty: $1,000.

50. (1) Where the number of shareholders in a company exceeds fifty, the company shall not offer shares in or debentures of the company to those shareholders or any of them or invite applications for shares or debentures from them or any of them except pursuant to a resolution of the directors stating whether the shares or debentures are to be offered to all the shareholders or to some only of them and if so to which of them or to how many of them.

(2) Where the number of shareholders to whom shares or debentures are to be offered or from whom applications are to be invited pursuant to any such resolution exceeds fifty, each such offer or invitation shall be attached to a directors' proposal which complies with the provisions of the Sixth Schedule.

(3) Where a company allots shares and no prospectus has been issued in relation to those shares there shall be lodged with the return of allotment made pursuant to section 54 a statement signed by not less than two directors (or in the case of a proprietary company having only one director, by that director) stating:

(a) that for reasons set out in the statement no directors' proposal was required to be prepared in connection with the allotment; or

(b) that a directors' proposal (a copy of which is attached to the statement) was prior to the allotment delivered or sent to each shareholder to whom an offer was made or an invitation to apply for shares issued.

(4) For the purposes of this section, an invitation to shareholders to lend money to or to deposit money with the company shall be deemed to be an offer of debentures in the company.

(5) If default is made in complying with this section every officer of the company who is in default shall be guilty of an offence against this Act.

51. Where there are false or misleading statements in a directors' proposal, the directors shall be liable therefor in the same manner and to the same extent as if such statements had been contained in a prospectus, and as if the person to whom shares or debentures were allotted in consequence of any offer or invitation attached to such directors' proposal had applied for those shares or

debentures on the faith of those statements, whether or not they were communicated to him.

APPENDIX "A " - continued.

52. (1) Where a company having a share capital has issued a prospectus in respect of any shares or debentures the company shall not commence any business or exercise any borrowing power:

(a) if any money is or may become liable to be repaid to applicants for any shares or debentures offered for public subscription by reason of any failure to apply for or obtain permission for listing for quotation on any Stock Exchange; or

(b) unless:

(i) shares and debentures held subject to the payment of the whole amount thereof in cash have been subscribed for to an amount not less than the amount stated in the prospectus as the minimum subscription in respect of such shares and debentures respectively;

(ii) every director has paid to the company on each of the shares taken or contracted to be taken by him, and for which he is liable to pay in cash, a proportion equal to the proportion payable on application and allotment on the shares offered for public subscription; and

(iii) there has been lodged with the Registrar a statutory declaration by the secretary or one of the directors of the company in the prescribed form verifying that the above conditions have been complied with.

(2) Where a public company having a share capital has not issued a prospectus in respect of any shares or debentures, the company shall not commence any business or exercise any borrowing power unless:

(a) every director has paid to the company on each of the shares taken or contracted to be taken by him, and for which he is liable to pay in cash, a proportion equal to the proportion payable on application and allotment on the shares payable in cash; and

(b) there has been lodged with the Registrar a statutory declaration by the secretary or one of the directors of the company in the prescribed form verifying that the provisions of this sub-section have been complied with.

(3) The Registrar shall on the lodging of the statutory declaration in accordance with this section certify that the company is

entitled to commence business and to exercise its borrowing powers and that certificate shall be conclusive evidence thereof.

(4) Any contract made or ratified or adopted before the date at which it is entitled to commence business shall be provisional only and shall not be binding on the company until that date, and on that date it shall become binding.

(5) Where shares and debentures are offered simultaneously by a company for subscription nothing in this section shall prevent the receipt by a company of any money payable on application for the debentures, but the company shall not allot any debentures until the Registrar has certified in accordance with sub-section (3).

(6) If any company commences business or exercises borrowing powers in contravention of this section every person who is responsible for the contravention shall be guilty of an offence against this Act.

Penalty: $400. Default penalty: $100.

53. A company shall not before the statutory meeting vary the terms of a contract referred to in the prospectus unless the variation is made subject to the approval of the statutory meeting.

Division 3 - Shares.

54. (1) Where a company makes any allotment of its shares or any of its shares are deemed to have been allotted under sub-section (6) the company shall within one month thereafter lodge with the Registrar a return of allotments stating:

(a) the number and nominal amounts of the shares comprised in the allotment;

(b) the amount (if any) paid, deemed to be paid, or due and payable on the allotment of each share;

(c) where the capital of the company is divided into shares of different classes the class of share to which each share comprised in the allotment belongs; and

(d) subject to sub-section (2), the full name or the surname and at least one other christian or other name and other initials and the address of each of the allottees and the number and class of shares allotted to him.

(2) The particulars mentioned in paragraph (d) of sub-section (1) need not be included in the return:

(a) where the shares have been allotted for cash by a no liability company; or

(b) where a company to which the provisions of sub-section (1) of section 160 apply has allotted shares:

(i) for cash; or

(ii) for a consideration other than cash and the number of persons to whom the shares have been allotted exceeds five hundred.

APPENDIX "A " - continued.

(3) Where shares have been allotted or deemed to have been allotted as fully or partly paid up otherwise than in cash and the allotment is made pursuant to a contract in writing the company shall lodge with the return the contract evidencing the entitlement of the allottee or a copy of any such contract certified as prescribed.

(4) If a certified copy of a contract is lodged the original contract duly stamped shall if the Registrar so requests be produced at the same time to the Registrar.

(5) Where shares are allotted or are deemed to have been allotted as fully or partly paid up otherwise than in cash and the allotment is made:

(a) pursuant to a contract not reduced to writing;

(b) pursuant to a provision in the memorandum or articles; or

(c) in satisfaction of a dividend declared in favour of, but not payable in cash to, the shareholders or in pursuance of the application of amounts standing to the credit of an account or reserve in paying up or partly paying up unissued shares to which the shareholders have become entitled:

the company shall lodge with the return a statement containing such particulars as are prescribed.

(6) For the purposes of this section any shares which the subscribers to the memorandum have agreed to take shall be deemed to have been allotted to such subscribers on the date of the incorporation of the company.

(6A) Where shares have been allotted subject to payment in cash in whole or in part and thereafter any agreement is made whereby the amount so payable is to be directly or indirectly set off against any liability incurred or to be incurred by the company or the amount so payable is satisfied by the application of moneys standing to the credit of an account or reserve, the company shall lodge a return in the prescribed form giving particulars of that agreement or of the manner in which the amount so payable is satisfied.

(7) If default is made in complying with this section every officer of the company who is in default shall be guilty of an offence against this Act.
Penalty: $400. Default penalty: $100.

55. A company if so authorized by its articles may:

(a) make arrangements on the issue of shares for varying the amounts and times of payment of calls as between shareholders;

(b) accept from any member the whole or part of the amount remaining unpaid on any shares although no part of that amount has been called up; and

(c) except in the case of a no liability company pay dividends in proportion to the amount paid up on each share where a larger amount is paid up on some shares than on others.

56. A limited company may by special resolution determine that any portion of its share capital which has not already been called up shall not be capable of being called up except in the event and for the purposes of the company being wound up, and thereupon that portion of its share capital shall not be capable of being called up except in the event and for the purposes of the company being wound up, but no such resolution shall prejudice the rights of any person acquired before the passing of the resolution.

57. (i) A company shall not issue any share warrant.

(2) Any share warrant issued before the commencement of the Companies Act 1938 shall have effect subject to section 197 of that Act.

58. (1) A company may pay a brokerage or commission to any person in consideration of his subscribing or agreeing to subscribe whether absolutely or conditionally for any shares, or procuring or agreeing to procure subscriptions, whether absolute or conditional, for any shares in the company, if:

(a) the payment is authorized by the articles;

(b) the total amount of brokerage and commission does not exceed 10 per centum of the price at which the shares are issued or the amount or rate authorized by the articles, whichever is the less;

(c) the amount or rate of the brokerage or commission is:

(i) in the case of shares offered to the public for subscription, disclosed in the prospectus; and

(ii) in the case of shares not so offered, disclosed in a statement in the prescribed form lodged before the payment of the commission with the Registrar; and

(d) the number of shares for which persons have agreed for a brokerage or commission to subscribe absolutely is disclosed in like manner.

Appendix "A" - continued.

(2) Except as provided in sub-section (1) of this section, no company shall apply any of its shares or capital money either directly or indirectly in payment of any brokerage commission discount or allowance to any person in consideration of his subscribing or agreeing to subscribe whether absolutely or conditionally for any shares or procuring or agreeing to procure subscriptions whether absolute or conditional for any shares in the company, whether the shares or money are so applied by being added to the purchase money of any property acquired by the company or to the contract price of any work to be executed for the company, or the money is paid out of the nominal purchase money or contract price or otherwise.

(3) (To be repealed).

(4) A vendor to, promoter of, or other person who receives payment in money or shares from, a company shall have power to apply any part of the money or shares so received in payment of any brokerage or commission the payment of which if made directly by the company would have been lawful under this section.

(5) If default is made in complying with the provisions of this section relating to the lodging with the Registrar of a statement in the prescribed form, the company and every officer of the company who is in default shall be guilty of an offence against this Act.
Penalty: $100. Default penalty.

59. (1) Subject to this section a company may issue shares at a discount of a class already issued
if:

(a) the issue of the shares at a discount is authorized by resolution passed in general meeting of the company, and is confirmed by order of the Court;

(b) the resolution specifies the maximum rate of discount at which the shares are to be issued;

(c) at the date of the issue not less than one year has elapsed since the date on which the company was entitled to commence business; and

(d) the shares are issued within one month after the date on which the issue is confirmed by order of the Court or within such extended time as the Court allows.

(2) The Court, if having regard to all the circumstances of the case it thinks proper to do so, may make an order confirming the issue on such terms and conditions as it thinks fit.

(3) Every prospectus relating to the issue of the shares shall contain particulars of the discount allowed or of so much of that discount as has not been written off at the date of the issue of the prospectus.

(4) Notwithstanding any provision of its articles, a company shall not issue at a discount shares of any class unless it first offers the shares to every holder of shares of that class in the company proportionately to the number of those shares held by him.

(5) Every such offer shall be made by notice specifying the number of shares to which the member is entitled and limiting a time not being less than 21 days within which the offer may be accepted.

(6) If any such offer is not accepted within the time limited by the notice the shares may be issued on terms not more favourable than those offered to the shareholders.

(7) If default is made in complying with this section, the company and every officer of the company who is in default shall be guilty of an offence against this Act.

Penalty: $100. Default penalty.

(8) This section shall not affect the right of a no liability company to issue shares at a discount.

60. (1) Where a company issues shares for which a premium is received by the company whether in cash or in the form of other valuable consideration a sum equal to the aggregate mount or value of the premiums on those shares shall be transferred to an account called the "share premium account", and the provisions of this Act relating to the reduction of the share capital of a company shall subject to this section apply as if the share premium account were paid up share capital of the company.

(2) The share premium account may be applied:

(a) in paying up unissued shares to be issued to members of the company as fully paid bonus shares;

(b) in paying up in whole or in part the balance unpaid on shares previously issued to members of the company;

(c) in the payment of dividends if such dividends are satisfied by the issue of shares to members of the company;

(d) in the case of a company which carries on life insurance business in the Commonwealth by appropriation or transfer to any statutory fund established or maintained pursuant to any law of the Commonwealth relating to life insurance;

APPENDIX "A" - continued.

(e) in writing off:

(i) the preliminary expenses of the company; or

(ii) the expenses of, or the commission or brokerage paid or discount allowed on, any issue of shares or debentures of the company; or

(f) in providing for the premium payable on redemption of debentures or redeemable preference shares.

(4) Where a fourteen days after of the increase.

(5) If any cot and every officer of
Penalty: $11

61. (1) Subject to this section a company having a share capital may, if so authorized by its articles, issue preference shares which are to be redeemed, or at the option of the company are liable to be redeemed, and the redemption shall be effected only on such terms and in such manner as is provided by the articles.

(2) The reduction shall not be taken as reducing the amount of authorized share capital of the company.

(3) The shares shall not be redeemed:

(a) except out of profits which would otherwise be available for dividend, or out of the proceeds of a fresh issue of shares made for the purposes of the redemption; and

(b) unless they are fully paid up.

(4) The premium, if any, payable on redemption shall be provided for out of profits or the share premium account before the shares are redeemed.

(5) Where any such shares are redeemed otherwise than out of the proceeds of a fresh issue, there shall out of profits which would otherwise have been available for dividend be transferred to a reserve called the "capital redemption reserve" a sum equal to the nominal amount of the shares redeemed, and the provisions of this Act relating to the reduction of the share capital of a company shall, except as provided in this section, apply as if the capital redemption reserve were paid up share capital of the company.

(6) Where in pursuance of this section a company has redeemed or is about to redeem any preference shares, it may issue shares up to the nominal amount of the shares redeemed or to be redeemed as if those shares had never been issued, and accordingly the share capital of the company shall not for the purposes of any fee under this Act be deemed to be increased by such issue but where new shares are issued before the redemption of the old shares, the new shares shall not, so far as relates to any fee under this Act, be deemed to have been issued in pursuance of this sub-section unless the old shares have been redeemed within one month after the issue of the new shares.

(7) The capital redemption reserve may be applied in paying up unissued shares of the company to be issued to members of the company as fully paid bonus shares.

(8) If a company redeems any redeemable preference shares it shall within 14 days after so doing give notice thereof to the Registrar specifying the shares redeemed.

62. (1) A company if so authorized by its articles may in general meeting alter the conditions of its memorandum in any one or more of the following ways:

(a) Increase its share capital by the creation of new shares of such amount as it thinks expedient;

(b) Consolidate and divide all or any of its share capital into shares of larger amount than its existing shares;

(c) Convert or make provision for the conversion of all or any of its paid up shares into stock and re-convert or make provision for the re-conversion of that stock into paid up shares of any denomination;

(d) Subdivide its shares or any of them into shares of smaller amount than is fixed by the memorandum, so however that in the subdivision the proportion between the amount paid and the amount (if any) unpaid on each reduced share shall be the same as it was in the case of the share from which the reduced share is derived;

(e) Cancel shares which at the date of the passing of the resolution in that behalf have not been taken or agreed to be taken by any person or which have been forfeited and diminish the amount of its share capital by the amount of the shares so cancelled.

(2) A cancellation of shares under this section shall not be deemed to be a reduction of share capital within the meaning of this Act.

(3) An unlimited company having a share capital may by any resolution passed for the purposes of sub-section (1) of section 25:

(a) increase the nominal amount of its share capital by increasing the nominal amount of each of its shares, but subject to the condition that no part of the increased capital shall be capable of being called up except in the event and for the purposes of the company being wound up; and

(b) in addition or alternatively, provide that a specified portion of its uncalled share capital shall not be capable of being called up except in the event and for the purposes of the company being wound up.

APPENDIX "A" - continued.

(4) Where a company has increased its share capital beyond the registered capital, it shall within fourteen days after the passing of the resolution authorizing the increase lodge with the Registrar notice of the increase.

(5) If any company fails to comply with the provisions of sub-section (4) of this section the company and every officer of the company who is in default shall be guilty of an offence against this Act.

Penalty: $100. Default penalty.

63. Where a company has purported to issue or allot shares and the creation issue or allotment of those shares was invalid by reason of any provision of this or any other Act or of the memorandum or articles of the company or otherwise or the terms of issue or allotment were inconsistent with or unauthorized by any such provision the Court may upon application made by the company or by a holder or mortgagee of any of those shares or by a creditor of the company and upon being satisfied that in all the circumstances it is just and equitable so to do make an order validating the issue or allotment of those shares and confirming the terms of issue or allotment thereof or both and upon an office copy of the order being lodged with the Registrar those shares shall be deemed to have been validly issued or allotted upon the terms of the issue or allotment thereof.

64. (1) Subject to confirmation by the Court a company may if so authorized by its articles by special resolution reduce its share capital in any way and in particular, without limiting the generality of the foregoing, may do all or any of the following:

(a) extinguish or reduce the liability of any of its shares in respect of share capital not paid up;

(b) cancel any paid-up capital which is lost or unrepresented by available assets; or

(c) pay off any paid-up share capital which is in excess of the needs of the company:

and may so far as necessary alter its memorandum by reducing the amount of its share capital and of its shares accordingly.

(2) Where the proposed reduction of share capital involves either diminution of liability in respect of unpaid share capital or the

payment to any shareholder of any paid-up share capital, and in any other case if the Court so directs:

(a) every creditor of the company who at the date fixed by the Court is entitled to any debt or claim which, if that date were the commencement of the winding up of the company, would be admissible in proof against the company shall be entitled to object to the reduction;

(b) the Court, unless satisfied on affidavit that there are no such creditors, shall settle a list of creditors so entitled to object and for that purpose shall ascertain as far as possible without requiring an application from any creditor the names of those creditors and the nature and amount of their debts or claims, and may publish notices fixing a final day on or before which creditors not entered on the list may claim to be so entered; and

(c) where a creditor entered on the list whose debt or claim is not discharged or has not determined does not consent to the reduction, the Court may dispense with the consent of that creditor on the company securing payment of his debt or claim by appropriating as the Court directs:

(i) if the company admits the full amount of the debt or claim or though not admitting it is willing to provide for it, the full amount of the debt or claim; or

(ii) if the company does not admit and is not willing to provide for the full amount of the debt or claim or if the amount is contingent or not ascertained, an amount fixed by the Court after the like inquiry and adjudication as if the company were being wound up by the Court.

(3) Notwithstanding the provisions of sub-section (2) of this section the Court may, having regard to any special circumstances of any case, direct that all or any of the provisions of that sub-section shall not apply as regards any class of creditors.

(4) The Court, if satisfied with respect to every creditor who under sub-section (2) of this section is entitled to object, that either his consent has been obtained or his debt or claim has been discharged or has determined or has been secured may make an order confirming the reduction on such terms and conditions as it thinks fit.

(5) An order made under sub-section (4) of this section shall show the amount of the share capital of the company as altered by the order, the number of shares into which it is to be divided and the amount of each share and the amount, if any, at the date of the order deemed to be paid up on each share.

(6) Upon the registration by the Registrar of an office copy of the order lodged with him the resolution for reducing share capital as confirmed by the order so lodged shall take effect.

(7) The certificate of the Registrar shall be conclusive evidence that all the requirements of this Act with respect to reduction of share capital have been complied with and that the share capital of the company is such as is stated in the order.

APPENDIX "A" - continued.

(8) On the lodging of the copy of the order the particulars shown in the order pursuant to sub-section (5) of this section shall be deemed to be substituted for the corresponding particulars in the memorandum and such substitution shall be deemed to be an alteration of the memorandum for the purposes of this Act.

(9) A member, past or present, shall not be liable in respect of any share to any call or contribution exceeding in amount the difference (if any) between the amount of the share as fixed by the order and the amount paid, or the reduced amount (if any) which is to be deemed to have been paid, on the share (as the case may be) but where any creditor entitled to object to the reduction is, by reason of his ignorance of the proceedings for reduction or of their nature and effect with respect to his claim, not entered on the list of creditors, and after the reduction the company is unable, within the meaning of the provisions of this Act with respect to winding up by the Court, to pay the amount of his debt or claim:

(a) every person who was a member of the company at the date of the lodging of the copy of the order for reduction shall be liable to contribute for the payment of that debt or claim an amount not exceeding the amount which he would have been liable to contribute if the company had commenced to be wound up on the day before the said date; and

(b) if the company is wound up, the Court, on the application of any such creditor and proof of his ignorance of the proceedings for reduction or of their nature and effect with respect to his claim, may if it thinks fit settle accordingly a list of persons so liable to contribute, and make and enforce calls and orders on the contributories settled on the list as if they were ordinary contributories in a winding up:

but nothing in this sub-section shall affect the rights of the contributories among themselves.

(10) Every officer of the company who:

(a) wilfully conceals the name of any creditor entitled to object to the reduction;

(b) wilfully misrepresents the nature or amount of the debt or claim of any creditor; or

(c) aids abets or is privy to any such concealment or misrepresentation:

shall be guilty of an offence against this Act punishable on indictment.

Penalty: Imprisonment for three years.

(10A) Any person who is a party to, or who assists in carrying into effect, any transaction which if valid would have amounted to a reduction of capital not authorized by this Act shall be guilty of an offence against this Act unless he proves that he did not know and had no reason to believe that the transaction if carried into effect would have amounted to a reduction of the capital of the company.

(11) This section shall not apply to an unlimited company, but nothing in this Act shall preclude an unlimited company from reducing in any way its share capital, including any amount in its share premium account.

(12) The granting before the commencement of the Companies (Amendment) Act 1966 by a company to a shareholder of the company of a right to occupy or use any land, building or part of a building owned or held under lease by the company, whether for consideration or not and whether by virtue of his being a shareholder of the company or not, shall not be regarded as having been or as being a reduction of the company's share capital.

(13) The granting after the commencement of the Companies (Amendment) Act 1966 by a company to a shareholder of the company of a right referred to in the last preceding sub-section shall not be regarded as being a reduction of the company's share capital if it is made in pursuance of a provision of the company's memorandum or articles under which a shareholder of the company, by virtue of his being such a shareholder, may be granted such a right, whether the provision provides for consideration to be given for it or not.

64A. (1) Where shares which were formerly not divided into classes are so divided or where shares of one class are converted into shares of another class, the company shall lodge a return in the prescribed form showing particulars of the division into classes or conversion with the Registrar within one month after the division into classes or conversion.

(2) In the event of any default in complying with sub-section (1) the company and every officer of the company who is in default shall be guilty of an offence against this Act.

Penalty: $100. Default penalty.

65. (1) If in the case of a company the share capital of which is divided into different classes of shares provision is made by the memorandum or articles for authorizing the variation or abrogation of the rights attached to any class of shares in the company, subject to the consent of any specified proportion of the holders of the issued shares of that class or the sanction of a resolution passed at a separate meeting of the holders of those shares, and in pursuance of the said provision the rights attached to any such class of shares are at any time varied or abrogated the holders of not less in the aggregate than ten per centum of the issued shares of that class, being persons who did not consent to or vote in favour of the resolution for the variation or abrogation, may apply to the Court to have the variation or abrogation cancelled, and, if any such application is made, the variation or abrogation shall not have effect until confirmed by the Court.

APPENDIX "A " - continued

(1A) Where rights are attached to a class of shares of a company and no provision relating to the variation or abrogation of those rights is made in the memorandum or articles, the articles of the company shall be deemed to contain the following provisions:

"The fights attached to any class of shares of the company (not being rights attached to such shares by the memorandum) may, whether or not the company is being wound up, be varied or abrogated with the consent in writing of the holders of three-fourths of the issued shares of that class or with the sanction of a resolution passed by a majority of not less than three-fourths of such holders of shares of the class as being entitled so to do vote at a separate general meeting of the holders of shares of the class of which not less than 21 days' notice specifying the intention to propose the resolution at the meeting has been given. To each such separate general meeting the provisions of these articles relating to general meetings shall, with whatever modifications are necessary, apply, but so that the necessary quorum shall be two persons at least holding one-third of the issued shares of the class."

(1B) The creation or alteration of a provision contained in the articles of a company relating to the variation or abrogation of rights attached to any class or classes of shares in the company shall be deemed to vary those rights.

(1C) Where rights are attached to a class of shares of a company by the memorandum and the memorandum makes no provision for, or reference to provisions elsewhere contained for, the variation or abrogation of those rights, but the articles which accompanied the memorandum on the incorporation of the company made provision for the variation or abrogation of rights attached to classes of shares, the fights attached by the memorandum may, unless the application of the provisions in the articles to the rights attached by the memorandum is expressly or impliedly excluded by the memorandum or articles, be altered in accordance with the provisions contained in the articles at the time of incorporation, if they have not thereafter been altered or, if they have not been altered prior to the coming into operation of [this Bill] in accordance with the provisions of the articles at the time when the rights are to be altered.

(2) An application under sub-section (1) shall not be invalid by reason of the applicants or any of them having consented to or voted in favour of the resolution for the variation or abrogation if the

Court is satisfied that any material fact was not disclosed by the company to those applicants before they so consented or voted.

(3) The application shall be made within one month after the date on which the consent was given or the resolution was passed or such further time as the Court allows, and may be made on behalf of the shareholders entitled to make the application by such one or more of their number as they appoint in writing.

(4) On the application the Court, after hearing the applicant and other persons who apply to the Court to be heard and appear to the Court to be interested, may, if satisfied having regard to all the circumstances of the case that the variation or abrogation would unfairly prejudice the shareholders of the class represented by the applicant, disallow the variation or abrogation as the case may be and shall, if not so satisfied, confirm it, and the decision of the Court shall be final.

(5) The company shall within fourteen days after the making of an order by the Court on any such application lodge an office copy of the order with the Registrar and if default is made in complying with this provision the company and every officer of the company who is in default shall be guilty of an offence against this Act.
Penalty: $200. Default penalty.

(6) The issue by a company of preference shares ranking pari passu with existing preference shares issued by the company shall be deemed to be a variation of the rights attached to those existing preference shares unless the issue of the first-mentioned shares was authorized by the terms of issue of the existing preference shares or by the articles of the company in force at the time the existing preference shares were issued.

66. (1) No company shall allot any preference shares or convert any issued shares into preference shares unless there is set out in its memorandum or articles the rights of the holders of those shares with respect to repayment of capital, participation in surplus assets and profits, cumulative or non-cumulative dividends, voting, and priority of payment of capital and dividend in relation to other shares or other classes of preference shares.

(2) If default is made in complying with this section the company and every officer of the company who is in default shall be guilty of an offence against this Act.
Penalty: $200.

67. (1) Except as is otherwise expressly provided by this Act no company shall give, whether directly or indirectly, and whether by means of a loan, guarantee, or the provision of security or otherwise, any financial assistance for the purpose of or in connection with a purchase or subscription made or to be made by

any person of or for any shares in the company, or, where the company is a subsidiary, in its holding company or (except in the case of borrowing shares of a building society) in any way purchase deal in or lend money on its own shares.

APPENDIX "A" - continued.

(2) Nothing in sub-section (I) of this section shall prohibit:

(a) where the lending of money is part of the ordinary business of a company, the lending of money by the company in the ordinary course of its business;

(b) the provision by a company, in accordance with any scheme for the time being in force, of money for the purchase of or subscription for fully-paid shares in the company or its holding company, being a purchase or subscription by trustees of or for shares to be held by or for the benefit of employees of the company, or employees of a subsidiary of the company, including any director holding a salaried employment or office in the company or subsidiary; or

(c) the giving by a company of financial assistance to persons, other than directors, bona fide in the employment of the company or of a subsidiary of the company with a view to enabling those persons to subscribe for or purchase fully-paid shares in the company or its holding company to be held by themselves by way of beneficial ownership.

(3) Where a company enters into a transaction which contravenes sub-section (1) of this section, the transaction is not avoided unless the company elects to treat the transaction as void in accordance with sub-section (4).

(4) The company may elect to treat the transaction as void unless:

(a) at the time of the making of the transaction any party to it (other than the company) was unaware of the facts giving rise to the contravention;

(b) any other person has acquired, in consequence of the transaction, rights which would be adversely affected if the transaction were treated as void and such person was, at the time of his acquisition of those rights, unaware of the facts giving rise to the contravention; or

(c) any person who would be affected by an election has required the company in writing to decide whether it will so elect and the company has not within a reasonable time elected to avoid the transaction.

(5) Where the company elects to treat a transaction as void in accordance with sub-section (4) any party to the transaction (other

than the company) shall be liable to repay or return to the company any money or other property paid or transferred by the company pursuant to the transaction.

(6) Unless the company elects to treat as void a transaction which is in contravention of sub-section (1) of this section, any party to the transaction (other than the company) who is aware of the facts giving rise to such contravention shall be liable to pay damages to the company in respect of any loss sustained by it and to indemnify it against liabilities incurred under or pursuant to the transaction.

(7) Any officer of the company who, being aware of facts which give rise to a contravention of sub-section (1), acts or purports to act on behalf of the company, or authorizes or assists in the making or carrying out of a transaction which is, or would if entered into by the company be, prohibited by sub-section (1) of this section shall be guilty of an offence against this Act.

Penalty: Imprisonment for three months or $1,000.

67A. Shares of a company which are held in trust for that company shall, while they continue to be held in trust for the company, carry no voting rights.

68. (1) An option granted after the commencement of this Act by a public company which enables any person to take up unissued shares of the company after a period of five years has elapsed from the date on which the option was granted shall be void.

(2) Sub-section (1) of this section shall not apply in any case where the holders of debentures have an option to take up shares of the company by way of redemption of the debentures.

69. Where any shares of a company are issued for the purpose of raising money to defray the expenses of the construction of any works or buildings or the provision of any plant which cannot be made profitable for a long period, the company may pay interest on so much of the share capital as is for the time being paid up and charge the interest so paid to capital as part of the cost of the construction or provision but:

(a) no such payment shall be made unless it is authorized, by the articles or by special resolution, and is approved by the Court;

(b) before approving of any such payment, the Court may at the expense of the company appoint a person to inquire and report as to the circumstances of the case, and may require the company to give security for the payment of the costs of the inquiry;

(c) the payment shall be made only for such period as is determined by the Court, but in no case extending beyond a period of twelve

months after the works or buildings have been actually completed or the plant provided;

APPENDIX "A " - continued.

(d) the rate of interest shall in no case exceed five per centum per annum or such other rate as is for the time being prescribed; and

(e) the payment of the interest shall not operate as a reduction of the amount paid up on the shares in respect of which it is paid.

Division 4 - Debentures.

70. (1) Every company which issues debentures shall keep a register of holders of the debentures at the registered office of the company or at some other place in the State.

(2) Every company shall within seven days after the register is first kept at a place other than the registered office lodge with the Registrar notice of the place at which the register is kept and shall within seven days after any change in the place where the register is kept lodge with the Registrar notice of the change.

(3) The register shall except when duly closed be open to the inspection of the registered holder of any debentures and of any holder of shares in the company and shall contain particulars of the names and addresses of the debenture holders and the amount of debentures held by them.

(4) For the purposes of this section a register shall be deemed to be duly closed if closed in accordance with provisions contained in the articles or in the debentures or debenture stock certificates, or in the trust deed or other document relating to or securing the debentures, during such periods (not exceeding in the aggregate thirty days in any calendar year) as is therein specified.

(5) Every registered holder of debentures and every holder of shares in a company shall at his request be supplied by the company with a copy of the register of the holders of debentures of the company or any part thereof on payment of $0.20 for every hundred words or part thereof required to be copied, but the copy need not include any particulars as to any debenture holder other than his name and address and the debentures held by him.

(6) A copy of any trust deed relating to or securing any issue of debentures shall be forwarded by the company to a holder of those debentures at his request on payment of the sum of $1 or such less sum as is fixed by the company, or where the copy has to be specially

made to meet the request on payment of $0.20 (twenty cents) for every hundred words or part thereof required to be copied.

(7) If inspection is refused, or a copy is refused or not forwarded within a reasonable time (but not more than thirty days) after a request has been made pursuant to this section, the company and every officer of the company who is in default shall be guilty of an offence against this Act.

Penalty: $100. Default penalty.

70A. A company which issues debentures or which has issued debentures whether before or after the commencement of this Act may cause to be kept in any place outside the State a branch register of holders of debentures which shall be deemed to be part of the company's register of holders of the debentures and the provisions of section 157 shall with such adaptations as are necessary apply to and in relation to the branch register of holders of debentures.

71. A contract with a corporation to take and pay for any debentures of the corporation may be enforced by an order for specific performance.

72. A condition contained in any debenture or in any deed for securing any debentures whether the debenture or deed is issued or made before or after the commencement of this Act shall not be invalid by reason only that the debentures are thereby made irredeemable or redeemable only on the happening of a contingency however remote or on the expiration of a period however long, any rule or law or equity to the contrary notwithstanding.

73. (1) Where a company has redeemed any debentures whether before or after the commencement of this Act:

(a) unless any provision to the contrary, whether express or implied, is contained in the articles or in any contract entered into by the company; or

(b) unless the company has, by passing a resolution to that effect or by some other act, manifested its intention that the debentures shall be cancelled:

the company shall have and shall be deemed always to have had power to re-issue the debentures, either by re-issuing the same debentures or by issuing other debentures in their place but the re-issue of a debenture or the issue of one debenture in place of another under this sub-section, whether the re-issue or issue was made before or after the commencement of this Act, shall not be regarded as the issue of a new debenture for the purpose of any provision limiting the amount or number of debentures that may be issued by the company.

(2) After the re-issue the person entitled to the debentures shall have and shall be deemed always to have had the same priorities as if the debentures had never been redeemed.

APPENDIX "A " - continued.

(3) Where a company has either before or after the commencement of this Act deposited any of its debentures to secure advances on current account or otherwise, the debentures shall not be deemed to have been redeemed by reason only of the account of the company having ceased to be in debit while the debentures remain so deposited.

74. (1) Subject to this section every corporation which offers debentures to the public for subscription or purchase in the State after the commencement of the Companies (Public Borrowings) Act 1963, shall make provision in those debentures or in a trust deed relating to those debentures for the appointment as trustee for the holders 6f the debentures of a corporation (in this section called the "trustee corporation") being a person constituted as the Public Trustee or Public Curator in any State or Territory of the Commonwealth or a company within the meaning of Division 5 of this Part that is:

(a) a corporation authorized by the law of any State or Territory of the Commonwealth to take in its own name a grant of probate or of letters of administration of the estate of a deceased person;

(b) a corporation registered under the law of the Commonwealth relating to life insurance; (c) a banking corporation;

(d) a corporation (in this paragraph tailed "the subsidiary") the whole of the issued shares of which are held beneficially by a corporation or corporations of a kind referred to in sub-paragraph (a), (b) or (c) of this sub-section (in this paragraph called "the holding company ") if:

(i) the holding company is liable for all liabilities incurred or to be incurred by the subsidiary as trustee for the holders of the debentures; or

(ii) the holding company has subscribed for and beneficially holds shares in the subsidiary in respect of which shares there is a liability of not less than $500,000 which has not been called up and which the subsidiary has resolved by special resolution shall not be capable of being called up except in the event and for the purposes of the subsidiary being wound up; or

(e) a corporation approved by the Minister for the purposes of this sub-section.

(1A) The approval of a corporation by the Minister pursuant to paragraph (e) of sub-section (I) of this section shall be given by notice published in the Government Gazette and may:

(a) be given generally or in relation to a particular borrowing corporation or to a particular class of borrowing corporation or in relation to a particular trust deed;

(b) be given subject to such terms and conditions as the Minister thinks fit and as are specified in the notice; and

(c) be varied or revoked by notice published in the Government Gazette.

(2) Where a borrowing corporation is required to appoint a trustee for the holders of any debentures in accordance with sub-section (1) of this section it shall not allot any of those debentures until the appointment has been made and the trustee corporation has consented to act as trustee.

(3) Without leave of the Court, a trustee corporation shall not be appointed, hold office or act as trustee for the holders of debentures of a borrowing corporation if that trustee corporation is:

(a) a director of the borrowing corporation;

(b) a shareholder that beneficially holds shares in the borrowing corporation;

(c) beneficially entitled to moneys owed by the borrowing corporation to it;

(d) a corporation that has entered into a guarantee in respect of the principal debt secured by those debentures or in respect of interest thereon; or

(e) a corporation that is by virtue of sub-section (5) of section 6 deemed to be related to:

(i) any corporation of a kind referred to in paragraphs (a) to (d) inclusive of this sub-section; or

(ii) the borrowing corporation.

(4) Notwithstanding anything contained in sub-section (3) of this section, that sub-section shall not prevent a trustee corporation from being appointed, holding office or acting as trustee for the holders of debentures of a borrowing corporation by reason only that:

(a) the borrowing corporation owes to the trustee corporation or to a corporation that is deemed by virtue of sub-section (5) of section 6 to be related to the trustee corporation any moneys so long as such moneys are:

(i) moneys that (not taking into account any moneys referred to in sub-paragraphs.(ii) and (iii) of this paragraph) do not at the time of the appointment or at any time within a period of three months after the debentures are first offered to the public, exceed one-tenth of the amount of the debentures proposed to be offered to the public within that period and do not, at any time after the expiration of that period, exceed one-tenth of the amount owed by the borrowing corporation to the holders of the debentures.

APPENDIX "A " - continued.

(ii) moneys that are secured by, and only by, a first mortgage over land of the borrowing corporation, or by any debentures issued by the borrowing corporation to the public or by any debentures not issued to the public which are issued pursuant to the same trust deed as that creating other debentures issued at any time by the borrowing corporation to the public or by any debentures to which the trustee corporation, or a corporation that is by virtue of sub-section (5) of section 6 deemed to be related to the trustee corporation, is not beneficially entitled; or

(iii) moneys to which the trustee corporation, or a corporation that is by virtue of sub-section (5) of section 6 deemed to be related to the trustee corporation, is entitled as trustee for holders of any debentures of the borrowing corporation in accordance with the terms of the debentures or of the relevant trust deed;

(b) the trustee corporation, or a corporation that is deemed by virtue of sub-section (5) of section 6 to be related to the trustee corporation, is a shareholder of the borrowing corporation in respect of shares that it beneficially holds, so long as the shares in the borrowing corporation beneficially held by the trustee corporation and by all other corporations that are deemed by virtue of sub-section (5) of section 6 to be related to it, do not carry the right to exercise more than one-tenth of the voting power at any general meeting of the borrowing corporation.

(5) Nothing in sub-section (3) of this section shall:

(a) affect the operation of any debentures or trust deed issued or executed before the commencement of the Companies (Public Borrowings) Act 1963; or

(b) apply to or in relation to the trustee for the holders of any such debentures:

unless pursuant to any such debentures or trust deed a further offer of debentures is made to the public after the commencement of that Act.

(6) If default is made in complying with any provision of this section, the corporation and every officer of the corporation who is in default shall be guilty of an offence against this Act.
Penalty: $400. Default penalty.

74A. (1) Notwithstanding anything contained in any Act or in the relevant debentures or trust deed a trustee for the holders of debentures shall not cease to be the trustee until a corporation qualified pursuant to section 74 for appointment as trustee for the holders of the debentures has been appointed to be the trustee for the holders of the debentures and has taken office as such.

(2) Where provision has been made in the debentures or in the relevant trust deed for the appointment of a successor to a trustee for the holders of the debentures upon retirement or otherwise, the successor may, subject to section 74, be appointed in accordance with such provision.

(3) Where no provision has been made in the debentures or in the relevant trust deed for the appointment of a successor to a retiring trustee the borrowing corporation may appoint a successor which is qualified for appointment pursuant to section 74.

(4) Notwithstanding anything in this Act or in any debentures or trust deed a borrowing corporation may, with the consent of an existing trustee for the holders of the debentures, appoint as successor to the existing trustee any corporation which is qualified pursuant to section 74 and which is deemed by virtue of sub-section (5) of section 6 to be related to the existing trustee.

(5) Where the trustee for the holders of the debentures has ceased to exist or to be qualified under section 74 or fails or refuses to act or is disqualified under that section the Court may on the application of the borrowing corporation or the trustee for the holders of the debentures or the holder of any of the debentures or the Minister appoint any corporation qualified pursuant to section 74 to be the trustee for the holders of the debentures in place of the trustee which has ceased to exist or to be qualified or which has failed or refused to act as trustee or is disqualified as aforesaid.

(6) Where a successor is appointed to be a trustee in place of any trustee the successor shall within one month after the appointment lodge with the Registrar notice in the prescribed form of the appointment.

Penalty: $100. Default penalty.

74B. Where after the date of the commencement of the Companies (Public Borrowings) Act 1963 a corporation offers debentures to the public for subscription in the State the trust deed (if any) and the debentures shall be deemed to contain the following covenants:

(a) A covenant by the borrowing corporation with the trustee that the borrowing corporation will use its best endearours to carry on and conduct its business in a proper and efficient manner;

APPENDIX "A " - continued.

(b) A covenant by the borrowing corporation with the trustee that, to the same extent as if the trustee or any registered company auditor appointed by the trustee were a director of the corporation, the borrowing corporation will:

(i) make available for its or his inspection the whole of the accounting or other records of the borrowing corporation; and

(ii) give to it or him such information as it or he requires with respect to all matters relating to the accounting or other records of the borrowing corporation; and

(c) Separate covenants by the borrowing corporation with the trustee and each debenture holder that the borrowing corporation will, on the application of persons holding not less than one-tenth in nominal value of the issued debentures to which the covenants relate delivered to its registered office, by giving notice:

(i) to each of the holders of those debentures (other than debentures payable to bearer) at his address as specified in the register of debentures; and

(ii) by an advertisement in a daily newspaper circulating generally throughout the State addressed to all holders of those debentures:

summon a meeting of the holders of those debentures to consider any matters arising in connection with the performance of the functions of the trustee or any question in relation to the interests of the 'holders of debentures and to give to the trustee advice in relation to the exercise of the trustee's powers, such meeting to be held at a time and place specified in the notice and advertisement under the chairmanship of a person nominated by the trustee or such other person as is appointed in that behalf by the holders of those debentures present at the meeting.

74C. (1) Notwithstanding anything in any debenture or trust deed the security for any debentures which are irredeemable or redeemable only on the happening of a contingency shall, if the Court so orders, be enforceable, forthwith or at such other time as the Court directs if, on the application of the trustees for the holders of the debentures or (where there is no trustee) on the application of the holders of any of the debentures, the Court is satisfied that:

(a) at the time of the issue of the debentures the assets of the corporation which constituted or were intended to constitute the

security therefor were sufficient or likely to become sufficient to discharge the principal debt and any interest thereon;

(b) the security, if realized under the circumstances existing at the time of the application, would be likely to bring not more than sixty per centum of the principal sum of moneys outstanding (regard being had to all prior charges and charges ranking pari passu if any); and

(c) the assets covered by the security, on a fair valuation on the basis of a going concern after allowing a reasonable amount for depreciation are worth less than the principal sum and the borrowing corporation is not making sufficient profit to pay the interest due on the principal sum or (where no definite rate of interest is payable) interest thereon at such rate as the Court considers would be a fair rate to expect from a similar investment.

(2) Sub-section (1) of this section shall not affect any power to vary rights or accept any compromise or arrangement created by the terms of the debentures or the relevant trust deed or under a compromise or arrangement between the borrowing corporation and creditors.

74D. (1) A trustee for the holders of debenture's:

(a) shall exercise reasonable diligence to ascertain whether or not the assets of the borrowing corporation and of each of its guarantor corporations which are or may be available whether by way of security or otherwise are sufficient or are likely to be or become sufficient to discharge the principal debt as and when it becomes due;

(b) shall, before consenting to act as trustee in relation to that prospectus, satisfy itself that each prospectus relating to the debentures does not contain any matter which is inconsistent with the terms of the debentures or with the relevant trust deed;

(c) shall ensure that the borrowing corporation complies with the provisions of Division 7 of this Part so far as they relate to the debentures and are applicable;

(d) shall exercise reasonable diligence to ascertain whether or not the borrowing corporation and each of its guarantor corporations have committed any breach of the covenants terms and provisions of the debentures or the trust deed;

(e) except where it is satisfied that the breach will not materially prejudice the security (if any) for the debentures or the interests of those holders shall take all steps and do all such things as it is empowered to do to cause the borrowing corporation and any

of its guarantor corporations to remedy any breach of those covenants terms and provisions;

(f) where the borrowing corporation or any of its guarantor corporations fails when so required by the trustee to remedy any breach of the covenants terms and provisions of the debentures or the trust deed, may place the matter before a meeting of holders of the debentures, submit such proposals for the protection of their investments as the trustee considers necessary or appropriate and obtain the advice of the holders in relation thereto;

APPENDIX "A " - continued.

(g) where the borrowing corporation submits to those holders a compromise or arrangement, shall give to them a statement explaining the effect of the compromise or arrangement and, if it thinks fit, recommend to them an appropriate course of action to be taken by them in relation thereto; and

(h) shall take all such steps as are reasonably open to it to protect the interests of the holders of the debentures.

(2) Where, after due inquiry, the trustee for the holders of the debentures at any time is of the opinion that the assets of the borrowing corporation and of any of its guarantor corporations which are or should be available whether by way of security or otherwise are insufficient, or likely to become insufficient, to discharge the principal debt as and when it becomes due, the trustee may apply to the Minister for an order under this sub-section and the Minister may, on such application, after giving the borrowing corporation an opportunity of making representations in relation to that application, by order in writing served on the corporation at its registered office in the State, impose such restrictions on the activities of the corporation, including restrictions on advertising for deposits or loans and on borrowing by the corporation, as the Minister thinks necessary for the protection of the interests of the holders of the debentures or the Minister may, and if the borrowing corporation so requires shall, direct the trustee to apply to the Court for an order under sub-section (4) of this section and the trustee shall apply accordingly.

(3) Where:

(a) after due inquiry, the trustee at any time is of the opinion that the assets of the borrowing corporation and of any of its guarantor corporations which are or should be available, whether by way of security or otherwise, are insufficient or likely to become insufficient, to discharge the principal debt as and when it becomes due; or

(b) the corporation has contravened or failed to comply with an order made by the Minister under sub-section (2) of this section:

the trustee may, and where the borrowing corporation has requested the trustee to do so, the trustee shall, apply to the Court for an order under sub-section (4) of this section.

(4) Where an application is made to the Court under sub-section (2) or sub-section (3) of this section, the Court may, after giving the borrowing corporation an opportunity of being heard, by order, do all or any of the following things:

(a) Direct the trustee to convene a meeting of the holders of the debentures for the purpose of placing before them such information relating to their interests and such proposals for the protection of their interests as the trustee considers necessary or appropriate, and of obtaining their advice in relation thereto, and give such directions in relation to the conduct of the meeting as the Court thinks fit;

(b) Stay all or any actions or proceedings before any court by or against the borrowing corporation;

(c) Restrain the payment of any moneys by the borrowing corporation to the holders of debentures of the corporation or to any class of such holders;

(d) Appoint a receiver of such of the property as constitutes the security (if any) for the debentures;

(e) Give such further directions from time to time as may be necessary to protect the interests of the holders of the debentures, the members of the borrowing corporation or any of its guarantor corporations or the public:

but in making any such order the Court shall have regard to the rights of all creditors of the borrowing corporation.

(5) The Court may vary or rescind any order made under sub-section (4) of this section as the Court thinks fit.

(6) A trustee in making any application to the Minister or to the Court shall have regard to the nature and kind of the security given when the debentures were offered to the public, and if no security was given shall have regard to the position of the holders of the debentures as unsecured creditors of the borrowing corporation.

(7) A trustee for the holders of debentures may rely on any report statement or certificate of the auditor of the borrowing corporation or of a guarantor corporation with respect to any matter falling within the scope of his functions as auditor, unless the trustee has reason to believe that the report statement or certificate is untrue or misleading.

(8) A trustee for the holders of debentures which fails to perform any obligation imposed on it by this section shall be liable to an action by a debenture holder for any loss suffered by him as a result of such failure.

74E. (1) The trustee for the holders of debentures may apply to the Court:

(a) for directions in relation to any matter arising in connection with the performance of the functions of the trustee; or

APPENDIX "A "--continued.

(b) to determine any question in relation to the interests of the holders of debentures:

and the Court may:

(c) give such directions to the trustee as the Court deems fit; and

(d) if satisfied that the determination of the question will be just and beneficial accede wholly or partially to any such application on such terms and conditions as the Court thinks fit or make such other order on the application as the Court thinks just.

(2) The Court may on an application under this section order a meeting of all or any of the holders of debentures to be called to consider any matters in which they are concerned and to advise the trustee thereon and may give such ancillary or consequential directions as the Court thinks fit.

(3) The meeting shall be held and conducted in such manner as the Court directs, under the chairmanship of a person nominated by the trustee or such other person as the meeting appoints.

74F. (1) Where there is a trustee for the holders of any debentures of a borrowing corporation the directors of the borrowing corporation shall:

(a) at the end of a period not exceeding three months after the date of the relevant prospectus ending on a day which the trustee is hereby required to notify to the borrowing corporation in writing; and

(b) at the end of each succeeding period thereafter, being a period of three months or such shorter time as the trustee may, in any special circumstances allow:

prepare a report that relates to that period and complies with the requirements of sub-section (2) of this section and within one month after the end of each such period lodge a copy of the report relating to that period with the Registrar and with the trustee.
Penalty: $400. Default penalty: $100.

(2) The report referred to in sub-section (1) of this section shall be made in accordance with a resolution of the directors and shall

be signed by not less than two of them and shall state with respect to the period covered by the report:

(a) whether or not the corporation has been in breach of any agreement limiting the amount which it may borrow;

(b) whether or not the borrowing corporation and each of its guarantor corporations have observed and performed all the covenants and provisions binding upon them respectively by or pursuant to the debentures or any trust deed;

(c) whether or not any event has happened which has caused or could cause the debentures or any provision of the relevant trust deed to become enforceable, and if so, particulars of the event;

(d) whether or not any circumstances affecting the borrowing corporation, its subsidiaries or its guarantor corporations or any of them have occurred which materially affect any security or charge included in or created by the debentures or any trust deed and if so particulars of those circumstances;

(e) whether or not there has been any substantial change in the nature of the business of the borrowing corporation or any of its subsidiaries or any of its guarantor corporations and if so particulars of that change; and

(f) where the borrowing corporation has deposited money with or lent money to or assumed any liability of a corporation which pursuant to sub-section (5) of section 6 is deemed to be related to the borrowing corporation, particulars of:

(i) the total amounts so deposited or lent and the extent of any liability so assumed during the period covered by the report; and

(ii) the total amounts owing to the borrowing corporation in respect of money so deposited or lent and the extent of any liability so assumed as at the end of the period covered by the report:

distinguishing between deposits loans and assumptions of liability which are secured and those which are unsecured.

(2A) Where during the period to which any report referred to in sub-section (1) relates:

(a) a corporation has become a guarantor corporation;

(b) a guarantor corporation has ceased to be liable for the payment of the whole or part of the moneys for which it was liable under the guarantee; or

(c) a guarantor corporation has changed its name:

the report shall so state and shall give particulars of the matters so stated.

APPENDIX "A" - continued.

(3) Where there is a trustee for the holders of any debentures issued by a borrowing corporation, the borrowing corporation and each of its guarantor corporations which has guaranteed the repayment of the moneys raised by the issue of those debentures shall (within twenty-one days after the creation of the charge) in writing furnish the trustee for the holders of the debentures, whether or not any demand therefor has been made, with particulars of any charge created by the corporation or the guarantor corporation, as the case requires, and when the amount to be advanced on the security of the charge is indeterminate (within seven days after the advance) with particulars of the amount or amounts in fact advanced but where any such advances are merged in a current account with bankers or trade creditors it shall be sufficient for particulars of the net amount outstanding in respect of any such advances to be furnished every three months.

(4) (a) The directors of every borrowing corporation which has issued debentures (other than debentures of a kind that if issued after the commencement of the Companies (Public Borrowings) Act 1963 could be lawfully described pursuant to section 38 as mortgage debentures) and of every guarantor corporation which has guaranteed the repayment of the moneys raised by the issue of those debentures shall:

(i) at some date not later than seven months, or in the case of any particular corporation not later than the expiration of such other period as is for the time being fixed by the Registrar with the consent of the trustee for the debenture holders for that corporation, after the expiration of each financial year of a corporation, cause to be made out and lodged with the Registrar and with the trustee for the holders of the debentures (if any) a profit and loss account for that financial year and a balance-sheet as at the end of that financial year; and

(ii) at some date not later than ten months or, in the case of any particular corporation, not later than the expiration of such other period as is for the time being fixed by the Registrar with the consent of the trustee for the debenture holders for that corporation after the expiration of each financial year of the corporation cause to be made out and lodged with the Registrar and with the trustee for the holders of the debentures (if any) a profit and loss account for the period from the end of that financial year until the expiration of six months after the end of that financial year and a balance-sheet as at the end of the period to which the profit and loss account relates.

Penalty: $100. Default penalty.

(b) This sub-section shall not be construed as requiring the directors of a borrowing corporation or a guarantor corporation to make out and lodge with the Registrar or with a trustee any accounts in respect of a period which commenced before the coming into operation of the provisions of the Companies Act 19 relating to accounts and audit, but until the coming into operation of the obligations imposed by this sub-section the provisions of this section as it existed prior to the passing of that Act shall continue to apply to any such corporation.

(c) Nothing in paragraph (a) of this sub-section shall apply to the directors of a prescribed corporation.

(d) In this sub-section "prescribed corporation" means a corporation that is a pastoral company in respect of which an exemption granted under section 11 of the Banking Act 1959 of the Commonwealth, or that Act as amended from time to time, is in force and is declared by the Governor by notice in the Government Gazette to be a prescribed corporation for the purposes of this sub-section.

(e) The Governor in Council may by notice in the Government Gazette:

(i) specify terms and conditions subject to which paragraph (c) of this sub-section shall have effect in relation to a prescribed corporation; or

(ii) vary or revoke any declaration or specification made under this sub-section.

(4A) Sub-sections {1), (3) and (4) of this section shall not apply in respect of a borrowing corporation or a guarantor corporation which is being wound up or in respect of which a receiver or receiver and manager has been appointed and has not ceased to act under that appointment.

(5) The provisions of section 162 (other than sub-sections (5) and (6)), sub-sections (1), (2) and (3) of section 162A, section 162C, sub-sections (1), (2), (3), (4), (5) and (6) of section 167 and section 167C (other than any provision which requires the laying of accounts or group accounts before an annual general meeting) shall with such adaptations as are necessary be applicable to every profit and loss account and balance-sheet made out and lodged pursuant to sub-section (4) of this section as if that profit and loss account and balance-sheet were a profit and loss account and balance-sheet referred to in those sections but .notwithstanding the foregoing provisions of this sub-section where a guarantor corporation is not incorporated in any State or Territory of the Commonwealth and is not otherwise required to prepare accounts in

the form required by this Act it shall be sufficient compliance with the requirements of sub-section (4) of this section if there is lodged with the Registrar and the trustee a profit and loss account and balance-sheet which is in a form which complies with the law in force in the place in which the corporation is incorporated.

(6) Where the directors of a borrowing corporation do not lodge with the trustee for the holders of debentures a report as required by sub-section (1) of this section or where the directors of a borrowing corporation or a guarantor corporation do not lodge with the trustee the balance-sheets profit and loss accounts and reports as required by sub-section (4) of this section within the time prescribed the trustee shall forthwith lodge notice of that fact with the Registrar.

APPENDIX "A" - continued.

(7) (a) Notwithstanding anything contained in sub-section (5) of this section, a profit and loss account and balance-sheet of a borrowing corporation or its guarantor corporation relating to a period of six months immediately following a financial year of the corporation required to be made out and lodged in accordance with sub-section (4) of this section need not be audited or the audit may be of a limited nature or extent if the trustee for the holders of the debentures of the borrowing corporation has, by notice in writing, consented to the audit being dispensed with or being of a limited nature or extent, as the case may be.

(b) Where the trustee has, by notice in writing, so consented, the directors of the corporation in respect of whose profit and loss account and balance-sheet the notice was given shall lodge with the Registrar a copy of the notice at the time when the profit and loss account and balance-sheet to which the notice relates are lodged with the Registrar.

(c) Notwithstanding anything contained in this section, a profit and loss account and balance-sheet of a borrowing corporation or its guarantor corporation relating to a period of six months immediately following a financial year of the corporation required to be made out and lodged in accordance with sub-section (4) of this section may, unless the trustee for the holders of the debentures of the borrowing corporation otherwise requires in writing, be based upon the value of the stock of the borrowing corporation or the guarantor corporation as the case may be, as reasonably estimated by the directors thereof on the basis of the values of such stock in trade as adopted for the purpose of the profit and loss account and balance-sheet of that corporation laid before the corporation at its last preceding annual general meeting and certified in writing by them as such.

74G. (1) For the purpose of the preparation of a report that by this Act is required to be signed by or on behalf of the directors of a borrowing corporation or any of them, that corporation may by notice in writing require any of its guarantor corporations to furnish it with any information relating to that guarantor corporation which is by this Act required to be contained in that report, and that guarantor corporation shall furnish the borrowing corporation with that information before such date, being a date not earlier than fourteen days after the notice is given, as may be specified in that behalf in the notice.

(2) A corporation which fails to comply with a requirement contained in a notice given pursuant to sub-section (1) of this

section and every officer of that corporation who is in default shall be guilty of an offence against this Act.

Penalty: $400. Default penalty.

74H. (1) Where in any prospectus issued in connection with an invitation to subscribe for or to purchase debentures of a corporation there is a statement as to any particular purpose or project for which the moneys received by the corporation in response to the invitation are to be applied the corporation shall from time to time make reports to the trustee for the holders of those debentures as to the progress that has been made towards achieving such purpose or completing such project.

(2) Each such report shall be included in the report required to be furnished to the trustee for the holders of debentures under sub-section (1) of section 74F.

(3) When it appears to the trustee for the holders of the debentures that such purpose or project has not been achieved or completed within the time stated in the prospectus within which the purpose or project is to be achieved or completed or, where no such time was stated, within a reasonable time, the trustee may, and if in his opinion it is necessary for the protection of the interests of the holders of the debentures shall, give notice in writing to the corporation and within one month after such notice is given lodge with the Registrar a copy thereof.

(4) The trustee shall not give a notice pursuant to the provisions of sub-section (3) of this section if it is satisfied:

(a) that the purpose or project has been substantially achieved or completed;

(b) that the interests of the holders of debentures have not been materially prejudiced by the failure to achieve or complete the purpose or project within the time stated in the prospectus or within a reasonable time; or

(c) that the failure to achieve the purpose or to complete the project was due to circumstances beyond the control of the corporation that could not reasonably have been foreseen by the corporation at the time that the prospectus was issued.

(5) Upon receipt by the corporation of a notice referred to in sub-section (3) of this section, the corporation shall be liable to repay, and on demand in writing by him shall immediately repay, to any person entitled thereto, any moneys owing to him as the result of a loan or deposit made in response to the invitation unless:

(a) before the moneys were accepted by the corporation the corporation had given notice in writing to the persons from whom the moneys were received specifying a purpose or project, different from that stated in the prospectus, for which the moneys would in fact be used and the moneys were accepted by the corporation accordingly; or

APPENDIX "A" - continued.

(b) the corporation by notice in writing served on the holders of the debentures:

(i) had specified a purpose or project, different from that stated in the prospectus, for which the moneys would in fact be applied by the corporation; and

(ii) had offered to repay the moneys to the holders of the debentures:

and that person had not within fourteen days after the receipt of the notice, or such longer time as was specified in the notice, in writing demanded from the corporation repayment of the moneys.

(6) Where a corporation has given a notice in writing as provided in sub-section (5) of this section, specifying a purpose or project for which the moneys will in fact be applied by the corporation, the provisions of this section shall apply and have effect as if the purpose or project so specified in the notice was the particular purpose or project for which the moneys were to be applied.

74I. Notwithstanding any other provision of this Act, an invitation to the public by a prescribed corporation as defined in sub-section (7) of section 38 to deposit money with that corporation shall, for the purposes of this Division, be deemed not to be an invitation or offer to the public to subscribe for or purchase debentures of the corporation.

75. (1) Subject to this section, any provision contained in a trust deed relating to or securing an issue of debentures, or in any contract with the holders of debentures secured by a trust deed, shall be void in so far as it would have the effect of exempting a trustee from or indemnifying it against liability for breach of any of the obligations imposed on it by section 74D of this Act.

(2) Sub-section (1) of this section shall not invalidate:

(a) any release otherwise validly given in respect of anything done or omitted to be done by a trustee before the giving of the release; or

(b) any provision enabling such a release to be given:

(i) on the agreement thereto of a majority of not less than three-fourths in nominal value of the debenture holders present

and voting in person or where proxies are permitted by proxy at a meeting summoned for the purpose; and

(ii) either with respect to specific acts or omissions or on the dissolution of the trustee or on its ceasing to act.

(3) Sub-section (1) of this section shall not operate:

(a) to invalidate any provision in force at the commencement of this Act so long as any trustee then entitled to the benefit of that provision remains a trustee of the deed in question; or

(b) to deprive any trustee of any exemption or right to be indemnified in respect of anything done or omitted to be done by the trustee while any such provision was in force.'

3. The Fifth Schedule is to be repealed and replaced by the following:

'Fifth Schedule.

A. In this schedule:

(a) "the company" means the corporation or proposed corporation to shares in or debentures of which the prospectus relates;

(b) in relation to a company as defined by section 5 of this Act, references to provisions of this Act shall where appropriate be taken as references to any repealed provisions having the same or a similar effect;

(c) in relation to a corporation incorporated in another State or Territory of the Commonwealth, references to provisions of this Act shall be taken as references to corresponding enactments in force in that State or Territory, or (where appropriate) to any repealed enactment of that State or Territory having the same or a similar effect.

B. The following material shall be included in the prospectus:

1. (a) The authorized, issued and paid up capital of the company.

(b) The names and places of incorporation of the company and its subsidiaries (if any), the authorized issued and paid up capital of each subsidiary, and the date on which it became a subsidiary, unless that date was more than six years prior to the date of the prospectus,

(c) Where the directors are aware that the company is a subsidiary of another corporation, the name and place of incorporation of its immediate holding company, and the name of the corporation that

the directors believe to be the company's ultimate holding company, and, if known to them, the country in which that corporation is incorporated.

APPENDIX "A" - continued.

2. Where the prospectus relates to shares:

(a) if the share capital is divided into different classes, the tight of voting at meetings of the company and the tights in respect of capital and dividends attached to shares of each class;

(b) the mount payable on application and allotment on each share or where such amount may vary during the currency of the offer the basis of calculation of the amount so payable;

(c) in the case of a second or subsequent offer of shares, the number description and amount offered for subscription on each previous allotment made within the preceding two years, the number actually allotted, and the amount, if any, paid on the shares so allotted.

3. Particulars as to:

(a) the minimum amount which in the opinion of the directors the company requires to raise from all sources for each of the following purposes:

(i) the purchase price of any property purchased or to be purchased which is to be defrayed in whole or in part out of the proceeds of the issue;

(ii) the carrying out of any specific purpose or project the cost of which is to be defrayed in whole or in part from the proceeds of the issue;

(iii) any preliminary expenses payable by the company, and any brokerage or commission so payable to any person in consideration of his agreeing to subscribe for, or of his procuring or agreeing to procure subscriptions for, any shares in the company;

(iv) the repayment of any money borrowed by the company in respect of any of the foregoing matters;

(v) working capital; and

(vi) the discharge of any liability due or to become due.

(b) where the prospectus relates to shares only, the minimum amount to be raised by the issue of those shares;

(c) where the prospectus relates to debentures only, the minimum amount to be raised from the issue of those debentures;

(d) where the prospectus relates to both shares and debentures the minimum amount to be raised from the issue of shares and the minimum amount to be raised from the issue of both shares and debentures;

(e) the amount to be provided from sources other than the issue of shares or debentures, and the sources from which it is to be provided.

4. The number and classes of unissued shares which any person has, or is entitled to be given, an option to subscribe for, together with the following particulars:

(a) the prices, or the method of fixing the prices, of issue of those shares;

(b) the date of expiration of the option;

(c) the consideration, if any, given or to be given for the option or for the right to the option;

(d) the names and addresses of the persons who are or will become entitled to the option or, if given to existing shareholders ~r debenture holders as such, the classes of shares or debentures to which the entitlement is attached;

(e) any rights of the holders to participate by virtue of the options in any share issue of any other corporation and any rights which under the terms of the option are to be attached to the shares when issued.

5. As to each director or proposed director:

(a) his name, address, age (in years) and occupation;

(b) the name of each corporation of which he is a director and of each corporation (other than an exempt proprietary company under this Act, or any corresponding provision in any other State or Territory of the Commonwealth) of which he has been a director within the preceding three years.

6. Where the company has commenced to carry on business, the names, addresses and ages (in years) of each of (at least) five employees of the company and a brief statement of their business experience.

7. (a) The name of any trustee for debenture holders.

(b) If the prospectus contains what purports to be a statement made by an expert or a copy of or extract from a report memorandum or valuation of an expert, the name and a description of the qualifications of the expert.

8. The number of shares, if any, fixed by the articles as the qualification of a director, and any provision in the articles as to the remuneration of the directors.

APPENDIX "A" - continued.

9. The number and amount of shares and debentures which within the two preceding years have been issued, or agreed to be issued, as fully or partly paid up otherwise than in cash, and in the latter case the extent to which they are so paid up, and in either case the consideration for which those shares or debentures have been issued or are proposed or intended to be issued.

10. The time of the opening of the subscription lists.

11. (1) With respect to any property to which this clause applies:

(a) the names and addresses of the vendors;

(b) the amount payable in cash, shares, or debentures to the vendor and, where there is more than one separate vendor or the company is a sub-purchaser, the amount so payable to each vendor;

(c) short particulars (so far as available) of any transaction relating to the property completed within the two preceding years in which any vendor of the property to the company or any person who is, or was at the time of the transaction, a promoter or a director or proposed director of the company had any interest direct or indirect.

(2) The property to which this clause applies is property purchased or acquired by the company or by any subsidiary of the company or proposed so to be purchased or acquired which is to be paid for wholly or partly out of the proceeds of the issue offered for subscription by the prospectus or the purchase or acquisition of which has not been completed at the date of the issue of the prospectus other than property the contract for the purchase or acquisition whereof was entered into in the ordinary course of the company's or the subsidiary's business, the contract not being made in contemplation of the issue nor the issue in consequence of the contract.

(3) The amount, if any, paid or payable as purchase money in cash, shares or debentures for any property to which this clause applies, specifying the amount, if any, paid or payable for goodwill.

12. The amount, if any, paid within the two preceding years, or payable, as brokerage or commission (but not including brokerage or commission to sub-underwriters) for subscribing or agreeing to subscribe, or procuring or agreeing to procure subscriptions, for any shares in or debentures of the company, or the rate of any such

brokerage or commission, and the names of any directors or promoters or experts or proposed directors who are entitled to receive any such. brokerage or commission and the amount or rate thereof.

13. The amount or estimated amount of preliminary expenses and the persons by whom any of those expenses have been paid or are payable, and the amount or estimated amount of the expenses of the issue and the persons by whom any of those expenses have been paid or are payable.

14. Any amount or benefit paid or given within the two preceding years or intended to be paid or given to any promoter, and the consideration for the payment or the giving of the benefit.

15. The dates of, parties to, and general nature of every material contract (whether or not the company is a party thereto) not being a contract entered into in the ordinary course of the business carried on or intended to be carried on by the company or a contract entered into more than two years before the date of issue of the prospectus.

16. The names and addresses of the auditors, if any, of the company.

17. Full particulars of the nature and extent of any material interest in the promotion of the company, or in any property to which clause 11 of this schedule applies:

(a) of any director, proposed director, promoter or expert;

(b) of any firm in which any director, proposed director, promoter or expert is a partner;

(c) of any corporation in which any director, proposed director, promoter or expert has a material shareholding.

18. In the case of a proposed company - a statement that the company has not yet been incorporated.

19. In the case of a company which has not commenced to carry on business, a statement to that effect together with a statement of the receipts and expenditure of the company since incorporation.

20. In respect of the company and each of its subsidiaries, the length of time for which it has been carrying on business, unless such time exceeds six years.

21. A description of the nature of any business carried on or intended to be carried on by the company or by any subsidiary or proposed subsidiary and, where any such business consists or will

consist of more than one class of business, a description of the nature of each class of business.

APPENDIX "A" - continued.

22. (1) In the case of a company which has commenced to carry on business, a report by a registered company auditor dealing with the following matters:

(a) the profits and losses of the company and of its subsidiaries (if any) in accordance with clause 24;

(b) a statement of earnings, interest paid and profits in accordance with clause 24 (2);

(c) the assets and liabilities of the company and its subsidiaries (if any) in accordance with clause 25;

(d) the rates of the dividends, if any, paid by the company in respect of each class of shares in respect of each of the five years referred to in clause 24, and if any dividend has been declared in respect of any of those years and remains unpaid at the date of the report, the amount of each such dividend.

(2) Where the auditor of the company is a registered company auditor, the report shall be made by him.

23. As to every guarantor corporation named in the prospectus (whether a subsidiary of the company or of another guarantor corporation or not):

(a) the name and place of incorporation of the guarantor corporation and of each of its subsidiaries (if any);

(b) a report by a registered company auditor as to:

(i) the profits or losses of the guarantor corporation and its subsidiaries in accordance with clause 24;

(ii) the assets and liabilities of the guarantor corporation and its subsidiaries in accordance with clause 25.

24. (1) Profits or losses shall be shown for each of the last five years prior to the date of the prospectus for which accounts have been made up in pursuance of section 162, and shall be arranged on the following basis:

(a) profits or losses of the company (or guarantor corporation); and

(b) one of the following:

(i) consolidated profits or losses of the company (or guarantor corporation) and its subsidiaries; or

(ii) separate profits or losses of the company (or guarantor corporation) and each subsidiary; or

(iii) consolidated profits or losses of the company (or guarantor corporation) and one or more subsidiaries and separate profits or losses of each other subsidiary.

(2) There shall be shown in respect of the company and in respect of the company and its subsidiaries of each of the five years:

(a) earnings before any deduction for interest on borrowings;

(b) the amount paid or payable for interest on borrowings;

(c) profits after deduction of interest and before any deduction or provision for taxation;

(d) net profits after provision for such taxation as is attributable to that year;

(e) the percentages which the amounts shown in pursuance of paragraphs (a) and (d) respectively represent in relation to shareholders' funds as at the end of each year.

The basis of calculation of shareholders' funds shall be indicated in the report.

25. (1) Assets and liabilities shall be shown as at the end of the last year for which accounts have been made up in pursuance of section 162, in accordance with the provisions of sub-clause (2) of tiffs clause, on the following basis:

(a) assets and liabilities of the company (or guarantor corporation); and

(b) one of the following:

(i) consolidated assets and liabilities of the company (or guarantor corporation) and its subsidiaries;

(ii) separately, assets and liabilities of the company (or guarantor corporation) and of each subsidiary;

(iii) consolidated assets and liabilities of the company (or guarantor corporation) and one or more subsidiaries, and, separately, assets and liabilities of each other subsidiary.

(2) Assets and liabilities shall be shown in such form and detail, and in such categories, as the auditor may consider most appropriate to present a summary of the state of affairs of the company (or guarantor corporation) as at that date, having regard to the nature and any stated purposes of the issue of shares or debentures to which the prospectus relates.

APPENDIX "A" - continued.

26. (1) The end of the last year for which accounts have been made up in pursuance of section 162 shall not be a date more than nine months prior to the date of issue of the prospectus, unless:

(a) where such date is not more than twelve months prior to the date of issue of the prospectus, the Minister having regard to the circumstances of the particular case, consents thereto in writing; or

(b) where such date is not more than fifteen months prior to the date of issue of the prospectus, accounts have been made up for a period of not less than six months commencing with the first mentioned date and reported upon by the directors and auditor as required by sub-clause (2) of this clause.

(2) The accounts referred to in paragraph (b) of sub-clause (1) shall be made up and. reported on by the directors and auditor in accordance with the provisions of sub-sections (1), (3), (4), (7), (8), (9), (10), (11), and (12) of section 162 and of section 167 of this Act and shall have attached thereto a report which complies with either sub-section (1) or sub-section (2) of section 162^ with such modifications as are required in respect of such shorter period.

(3) The auditor who makes the report referred to in clause 22 shall deal in that report with the profits or losses in respect of the period referred to in sub-clause (1) (in addition to the five years preceding that period), and with the assets and liabilities as at the end of that period in substitution for the assets and liabilities as at the end of the last year.

(4) The accounts referred to in sub-clause (2) and the reports attached thereto shall be subject to the provisions of clause 30.

27. Where information in respect of any subsidiary which has not been a subsidiary for the whole of any year is consolidated with information in respect of another corporation, an indication shall be given of the extent (if any) to which adjustments have been made to allow for that fact.

28. Where a subsidiary has been a subsidiary during only part of any year information in respect of that subsidiary for that period need not be taken into account in the report, but if not so taken into account a statement to that effect shall be included and

separate accounts of that subsidiary for that period shall be made available pursuant to clause 30.

29. Where, in the case of a subsidiary, the directors of the holding company, having taken all such steps as are reasonably available to them, are unable to obtain the information required to be furnished m respect of that subsidiary, such information may be omitted from the prospectus, but the prospectus shall include such explanations as are needed to prevent the information actually included from being misleading.

30. The prospectus shall state an address within the State at which copies of the directors' reports and accounts (together with the auditors' reports thereon, if any) of the company and each of its subsidiaries and each guarantor corporation and each of its subsidiaries for the five financial years preceding the date of the prospectus may be inspected by any person without fee. Such reports and accounts shall include the report and accounts of a subsidiary for each financial year within the period of five years whether or not it was a subsidiary during any part of that financial year.

31. If the prospectus relates to shares or debentures of a borrowing corporation the report referred to in paragraph 22 shall state separately estimates of the amounts payable by, and the debts payable to, the corporation:

(a) not later than two years;

(b) later than two years but not later than five years; and

(c) later than five years:

calculated from the last date to which the accounts of the company were made up.

32. In the case of a corporation which is incorporated outside the limits of the Commonwealth and its Territories and which is obliged to publish accounts according to the law of the place in which it is incorporated, such accounts shall be deemed to have been made up in pursuance of section 162 for the purposes of clauses 22 to 29 inclusive and to be the accounts referred to in clauses 30, 34 and 35, and the report referred to in clause 22 or 23 shall give such of the information required by that clause as is available to the auditor preparing the report and to the borrowing corporation and shall state whether and to what extent such accounts and such information have been reported upon by an auditor and the qualifications of such auditor.

33 (1) If the proceeds, or any part of the proceeds, of the issue of shares or debentures are to be applied directly or indirectly

in the purchase of any business, a report by a registered company auditor (who shall be named in the prospectus) dealing with:

(a) the profits or losses of the business for each of the five financial years immediately preceding the last date to which the accounts of the business were made up;

(b) the assets and liabilities of the business at the last date to which the accounts of the business were made up:

which date shall in no case be more than nine months (or, if the Minister having regard to the circumstances of any particular case consents thereto in writing, twelve months) before the issue of the prospectus.

APPENDIX "A" - continued.

(2) Where accounts of the business have been made up to within fifteen months before the date of the issue of the prospectus the consent of the Minister shall not be required if accounts which have been audited by a registered company auditor for a period of not less than six months dating from the date to which the last yearly accounts have been made up and containing the information referred to in sub-clause (1) hereof are annexed to the report.

34. (1) If:

(a) the proceeds, or any part of the proceeds, of the issue of shares or debentures are to be applied directly or indirectly for the purpose of paying for the acquisition by the company of shares in any other corporation; and

(b) by reason of that acquisition or anything which is to be or has been done in consequence thereof or in connection therewith that corporation will become or has become a subs/diary of the company:

a report by a registered company auditor (who shall be named in the prospectus) with respect to:

(c) the profits or losses of the other corporation for each of the five years immediately preceding the last date to which the accounts of the corporation were made up; and

(d) the assets and liabilities of the other corporation at the last date to which the accounts of the corporation were made up:

which date shall in no case be more than nine months (or, if the Minister having regard to the circumstances of the particular case consents thereto in writing, twelve months) before the issue of the prospectus.

(2) Where accounts of the corporation have been made up to within fifteen months before the date of issue of the prospectus the consent of the Minister shall not be required if accounts which have been audited by a registered company auditor for a period of not less than six months dating from the date to which the last yearly accounts have been made up and containing the information referred to in sub-clause (1) hereof are annexed to the report.

(3) The report shall:

(a) indicate how the profits or losses of the other corporation dealt with by the report would, in respect of the shares which have been or are to be acquired, have concerned members of the company and what allowance would have fallen to be made, in relation to assets and liabilities so dealt with, for holders of other shares, if the company had at all material times held the shares which have been or are to be acquired; and

(b) where the other corporation has subsidiaries, deal with the profit and losses and the assets and liabilities of the corporation and its subsidiaries in the manner provided by sub-clause (1) of clause 22 of this Schedule in relation to the company and its subsidiaries.

35. The prospectus shall, in the case of an existing company which has commenced to carry on business, contain a report adopted by the directors at a meeting of the board stating:

(a) that they have made due inquiry as to the interval between the date to which the last accounts have been made up and a specified date not earlier than fourteen days before the issue of the prospectus;

(b) whether or not during that interval:

(i) the directors had become aware of any circumstances which would render any amount stated in the report referred to in clause 22 misleading;

(ii) there has arisen any item transaction or event of a material and unusual nature likely in the opinion of the directors substantially to affect the results of the operations of any corporation in the group for the financial year immediately following the date to which the last accounts have been made up;

(c) whether or not at the end of the interval:

(i) the d/rectors were aware of any circumstances which would render the values attributed to current assets in the accounts misleading;

(ii) the directors were aware of any circumstances which would render the mount written off for bad debts, or the provision for doubtful debts in the company or any of its subsidiaries inadequate to any substantial extent;

(d) as at the specified date:

(i) the authorized issued and paid up capital of the company;

(ii) the bank overdrafts of the company;

(iii) the amount of other borrowings of the company, stating whether they are secured or unsecured, and if the prospectus relates to debentures stating whether they rank in priority to or pari passu with the debentures to be issued;

(e) where the accounts for the last year for which accounts have been made up have not been reported on by the auditor of the company pursuant to section 167 of the Act, that such accounts comply in all respects with the provisions of section 162 of the Act.

36. Clauses 8 and 13 (so far as they relate to preliminary expenses) and 17 (except so far as it relates to any property proposed to be acquired by the company) of this Schedule shall not apply in the case of a prospectus issued more than two years after the date at which the company is entitled to commence business.

APPENDIX "A " - continued.

37. Every person shall for the purposes of this Schedule be deemed to be a vendor who has entered into any contract, absolute or conditional, for the sale or purchase, or for any option of purchase, of any property to be acquired by the company in any case where:

(a) the purchase money is not fully paid at the date of the issue of the prospectus;

(b) the purchase money is to be paid or satisfied wholly or in part out of the proceeds of the issue offered for subscription by the prospectus; or

(c) the contract depends for its validity or fulfillment on the result of that issue.

38. Where any property to be acquired by the company is to be taken on lease this Schedule shall have effect as if the expression "vendor" included the lessor, and the expression "purchase money" included the consideration for the lease, and the expression "sub-purchaser" included a sub-lessee.

39. References in clause 4 of this Schedule to an option to subscribe for shares or debentures shall include an option to acquire them from a person to whom they have been allotted or agreed to be allotted with a view to his offering them for sale, but shall not include an option to subscribe for or acquire shares pursuant to a bona fide underwriting or sub-underwriting agreement.

40. For the purposes of clause 11 of this Schedule where the vendors or any of them are a firm, the members of the firm shall not be treated as separate vendors.

41. Where any corporation in respect of which information or accounts are required to be furnished has not been in existence for the full period for which such information or accounts are required, such information or accounts shall be furnished for the period commencing with the date on which the corporation commenced to carry on business.

42. (1) Subject to clause 41, where information is required for a period of five years, such information shall cover periods totalling at least fifty-eight months.

(2) Subject to sub-clause (1) of this clause where accounts have been made up in respect of any period for a period greater or less than a year, such period shall be treated as if it were a period of one year.

43. Where a corporation referred to in clause 34 has not been in existence for the full period for which information or accounts are required, but that corporation has been incorporated for the purpose of acquiring the assets of a business, the information or accounts required by clause 33 shall be furnished for the period preceding the incorporation of that corporation as if they were information or accounts relating to the corporation.

44. Where sub-section (4) of section 38 applies there shall be included:

(a) a statement to the effect that the repayment of all moneys that have been or may be deposited with or lent to the company in response to the invitation is secured by a first mortgage of freehold land given to the trustees for the holders of the debentures to be issued in relation to the deposit or loan and that the mortgage has been duly registered, or is a registrable mortgage which has been lodged for registration, in accordance with the law relating to the registration of mortgages of land in the place where the land is situated and that the aggregate amount of such moneys and of all other habilities, if any, secured or which may become secured by the mortgage of that land ranking in priority to or pari passu with the liability to repay such moneys does not exceed sixty per centum of the value of the land as shown in the valuation included in the prospectus;

(b) a copy of a statement signed by a qualified legal practitioner practising in the State or Territory in which the freehold land so mortgaged is situated stating that after due enquiry as to title he is of opinion that the mortgage is an effective security over that freehold land;

(c) a copy of a written valuation of the land so mortgaged made not more than six months before the date of the prospectus by a person competent and. qualified to make the valuation who is not an officer or employee of the company or of any of its guarantor corporations or of any related corporation.

45. (1) Where sub-section (5) of section 38 applies there shall be included:

(a) a statement to the effect:

(i) that the repayment of all moneys that have been or may be deposited with or lent to the company in response to the invitation has been secured by a charge in favour of the trustee for the holders

of the debentures over the whole or part of the tangible assets of the company or of its guarantor corporations or of any of them; and

(ii) that having regard to the particulars in the summary made in accordance with the provisions of sub-paragraph (b) of this sub-clause the tangible assets which constitute the security for the charge are sufficient and are reasonably likely to be sufficient to meet the liability for the repayment of all such moneys and all other liabilities ranking in priority thereto or pari passu therewith that have been or may be incurred; and

APPENDIX "A" - continued.

(b) a summary made by the registered company auditor who has made the report referred to in clause 22 with respect to the assets and liabilities of the company showing in tabular form the aggregate amounts (based on the amounts shown in the report made under clause 22) of the tangible assets of the company and of its guarantor corporations which have been charged to secure the repayment of the moneys referred to in sub-paragraph (i) of paragraph (a) of sub-clause (1) of this clause, after making such adjustments as are proper to give a true and fair view of the tangible assets available as security for the charge and, in particular, after making adjustments:

(i) to exclude from those aggregate amounts such part of the amount representing any shares in or advances to a corporation as is reflected in or depends upon the tangible assets of that corporation which are otherwise included in the summary;

(ii) to exclude from those aggregate amounts such part of the amount representing any shares in a related corporation of the company or a guarantor corporation as exceeds the proportion of the net tangible assets of such related corporation that is attributable to those shares;

(iii) where the prospectus states that the whole or part of the proceeds will be applied for a specific purpose, and the effect of such application will be to increase the tangible assets available as security for the charge, to add to those aggregate amounts, the amount or an estimate of the amount of the increase;

(iv) to exclude any sums which consist of or are in the nature of interest, accommodation charges, service charges, maintenance charges or insurance premiums, and which have not been earned at the date to which the accounts are made up;

(v) to deduct from those aggregate amounts the amount provided for doubtful debts, unless that provision has been made specifically in respect of debts not included in ascertaining those aggregate amounts.

(2) The summary referred to in paragraph (b) of sub-clause (1) shall include or be accompanied by a statement indicating:

(i) to what extent the assets taken into account in such summary are or can become subject to prior charges;

(ii) to what extent those assets are or can become charged in respect of liabilities ranking pari passu with the liability the repayment of which is secured by the charge;

and in either case, whether there is any limitation on the amounts of such prior or other charges and the nature of such limitation, together with a reference to any document in which it is contained.

(3) Such summary shall also be accompanied by a statement of the proportion (expressed as a percentage) which the maximum (as stated pursuant to clause 46 of this schedule) of the amounts referred to in sub-paragraph (i) of paragraph (a) of sub-clause (1) of this clause together with all amounts which rank in priority to or pari passu therewith bear to the aggregate amounts ascertained in accordance with paragraph (b) of sub-clause (1), and a statement of the extent to which the interest payable in respect of such amounts is covered by the earnings of the company available for the payment of such interest.

46. In every prospectus which relates to debentures there shall be included:

(a) a statement indicating the general nature of any limitations on the amount that the company may borrow imposed by the memorandum or articles of the company or by any contract or agreement or debenture trust deed, and identifying the document m which such limitation is contained and whether such limitation is capable of being removed, or will or may cease to exist, without the consent of debenture holders or the trustee for debenture holders;

(b) a statement as to the maximum amount of subscriptions that are being sought;

(c) particulars as to the rate of interest payable on the debentures, the times at which interest is payable, and the time at which and the terms upon which the debentures are to be redeemed or repaid or are liable to be redeemed or repaid.

47. An auditor who makes a report referred to in clause 22, 23, 33, 34 or 45 of this Schedule shall:

(a) make such adjustments as are required to allow for interests of shareholders (other than the holding company) of any subsidiary;

(b) call attention to any material variation in the length of the years dealt with in any accounts, and to any material change in the accounting principles applied in the preparation of any accounts;

(c) make such adjustments as are required to eliminate the effect of transactions between related corporations;

(d) call attention to any factors known to him which would affect the comparability of annual accounts with accounts for any shorter period;

APPENDIX "A" - continued.

(e) subject to sub-clause (2) of clause 48, make such adjustments as appear to him to be necessary to ensure that such report gives a true and fair view of the profits or losses or state of affairs of any corporation or business dealt with in the report;

(f) state the amounts of any adjustments made by him and the reasons for making those adjustments; and

(g) draw attention in his report to any matters of which he is aware as auditor or which have come to his knowledge in the course of preparing such report the omission of which would in his opinion render the report misleading.

48. (1) An auditor who makes a report referred to in clause 22, 23, 33, 34 or 45 of this Schedule may (unless he has any reason to doubt its accuracy) accept and rely upon a report by a registered company auditor as to any amounts stated in the accounts of a corporation or business.

(2) Where any accounts of a corporation or business have not been subject to audit the auditor referred to in sub-clause (1) hereof shall so state in his report and shall indicate what steps (if any) he has taken to verify the correctness of those accounts.

49. (1) The directors or proposed directors of the company may apply to the [Registrar] in writing for an order relieving them and the company from compliance with any of the requirements of this Schedule and the [Registrar] may make such an order either unconditionally or on condition that there is included in the prospectus such other information, or a statement in such terms, as the [Registrar] thinks fit to require.

(2) The [Registrar] shall not make any order under sub-clause (1) unless he is of the opinion that compliance with the requirement is impossible or inappropriate to the circumstances of the company, or would impose unreasonable burdens on the company or the directors or proposed directors or that non-compliance with the requirement will not deprive investors or intending investors of any material information.

(3) In determining any application under sub-clause (1), the [Registrar] shall take into account any views that he knows to be held by the persons who in the other States and the Territories of the Commonwealth exercise under the corresponding laws of those

States and Territories functions similar to those exercised by the [Registrar] under this section.

(4) An application made under this clause and any document relating thereto shall not, unless the [Registrar] otherwise determines in writing, be available for inspection by any person.'

4. The Sixth Schedule is to be repealed and replaced by the following:

' Sixth Schedule.

1. The contents of every directors' proposal shall be approved by a resolution of the directors and a copy of the proposal shall be signed by at least one director authorized by the resolution to sign the same.

2. A directors' proposal relating to shares shall contain the following:

(a) the names addresses and occupations of the directors;

(b) if the share capital is divided into different classes, the right of voting at meetings of the corporation and the rights in respect of capital and dividends attached to shares of each class;

(c) in respect of shares to be issued, the amount payable on application and allotment in respect of each share or where such amount may vary during the currency of the offer the basis of calculation of the amount so payable;

(d) particulars as to:

(i) the minimum amount which in the opinion of the directors the corporation requires to raise from all sources for each of the following purposes:

(A) the purchase price of any property purchased or to be purchased which is to be defrayed in whole or in part out of the proceeds of the issue;

(B) the carrying out of any specific purpose or project the cost of which is to be defrayed in whole or in part from the proceeds of the issue;

(C) the repayment of any money borrowed by the corporation in respect of any of the foregoing matters;

(D) working capital; and

(E) the discharge of any liability due or to become due.

APPENDIX "A" - continued.

(ii) where the directors' proposal relates to shares only, the minimum amount to be raised by the issue of the shares being offered for subscription;

(iii) where the directors' proposal relates to both shares and debentures, the minimum amount to be raised from the issue of shares and the minimum amount to be raised from the issue of both shares and debentures;

(iv) the amount to be provided from sources other than the issue of shares or debentures, and the sources from which it is to be provided;

(e) whether any of the proceeds of the issue are to be applied for any purpose from which:

(i) any director;

(ii) any firm in which any director is a partner; or

(iii) any corporation in which any director has a material shareholding:

will receive any benefit, and if so details of the nature of such benefit;

(f) whether since the date of the last report of the directors sent pursuant to section 164 to persons entitled to receive notice of general meetings of the corporation:

(i) the business of the corporation and of its subsidiaries (if any) has in the opinion of the directors been satisfactorily maintained;

(ii) the directors have become aware of any circumstances which would render any statement in that report or in the accounts attached thereto misleading, and if so particulars of those circumstances;

(iii) there has arisen any item transaction or event of a material and unusual nature likely, in the opinion of the directors, to affect substantially the results of the operations of the corporation or any subsidiary of the corporation for the current financial year.

3. A directors' proposal relating to debentures shall contain the following:

(a) the names addresses and occupations of the directors; (b) particulars as to:

(i) the minimum amount which in the opinion of the directors the corporation requires to raise from all sources for each of the following purposes:

(A) the purchase price of any property purchased or to be purchased which is to be defrayed in whole or in part out of the proceeds of the issue;

(B) the carrying out of any specific purpose or project the cost of which is to be defrayed in whole or in part from the proceeds of the issue;

(C) the repayment of any money borrowed by the corporation in respect of any of the foregoing matters;

(D) working capital; and

(E) the discharge of any liability due or to become due:

(ii) where the directors' proposal relates to debentures only, the minimum amount to be raised from the issue of debentures;

(iii) where the directors' proposal relates to both shares and debentures the minimum amount to be raised from the issue of shares and the minimum amount to be raised from the issue of both shares and debentures;

(iv) the amount to be provided from sources other than the issue of shares or debentures, and the sources from which it is to be provided;

(c) whether any of the proceeds of the issue are to be applied for any purpose from which:

(i) any director;

(ii) any firm in which any director is a partner; or

(iii) any corporation in which any director has a material shareholding:

will receive any benefit, and if so details of the nature of such benefit;

(d) whether since the date of the last report of the directors sent pursuant to section 164 to persons entitled to receive notice of general meetings of the corporation:

(i) the business of the corporation and of its subsidiaries (if any) has in the opinion of the directors been satisfactorily maintained;

(ii) the directors have become aware of any circumstances which would render any statement in that report or in the accounts attached thereto misleading, and if so particulars of those circumstances;

(iii) there has arisen any item transaction or event of a material and unusual nature likely, in the opinion of the directors, to affect substantially the results of the operations of the corporation or any subsidiary of the corporation for the current financial year;

(e) a statement as to the maximum amount of subscriptions that are being sought;

APPENDIX "A" - continued.

(f) a statement as to whether there are any limitations on the amount that the corporation may borrow imposed by the memorandum or articles of the corporation or by any contract or agreement or debenture trust deed, and if so stating the general nature of such limitations;

(g) particulars as to the rate of interest payable on the debentures, the times at which interest is payable, and the time at which and the terms upon which the debentures are to be redeemed or repaid or are liable to be redeemed or repaid;

(h) whether the debentures are secured, and if so in what manner and over what assets of the corporation or any other person, and whether there are any charges having priority over the debentures and the amount thereof.'

5. The following consequential amendments will be required:

(a) In sub-section (1) of section 5, the definition of "minimum subscription" is to be replaced by the following definition:

'" Minimum subscription" means the amount stated as the minimum amount to be raised from an issue of shares or debentures or shares and debentures (as the case may be) pursuant to paragraph (b) (c) or (d) of clause 3 of tile Fifth Schedule or to sub-paragraph (ii) or (iii) of paragraph (d) of clause 2 of the Sixth Schedule or sub-paragraph (ii) or (iii) of paragraph (b) of clause 3 of the Sixth Schedule.'

(b) Sub-section (3) of section 5 is to be repealed.

(c) In sub-section (4) of section 5, the words "directors' proposal" are to be substituted for the words "statement in lieu of prospectus".

(d) Section 26 is to be amended:

(i) by repealing paragraph (b) of sub-section (2);

(ii) in paragraph (c) of sub-section (2), by substituting the expression "paragraph (a)" for the expression "paragraph (b)".

(e) Section 31 is to be amended by adding the following new sub-section:

"(4) A company may not under this section alter or add to its articles so as to vary or abrogate rights attached to a class of shares of the company, except in accordance with a provision made in the memorandum or articles for variation or abrogation of those rights, or in accordance with the provision deemed to be contained in the articles by virtue of sub-section (1A) of section 65 (as the case may be)."

(f) Section 365 is to be amended by adding to sub-section (4) the following new paragraph:

"(e) trustees for the holders of debentures of a borrowing corporation ".

APPENDIX "B"

NOTES ON THE DRAFTS IN APPENDIX "A".

The following notes have been prepared as a guide to the drafts in Appendix "A", so that the changes from the existing Act can be traced, and in order to provide cross-references to the main body of the Report.

Section 5, sub-section (6): This replaces the existing sub-section - see Report paragraphs 3-16. Paragraphs (a) and (15) of the sub-section cover the same ground as (a) (b) and (d) of the existing sub-section, except that (a) has been added to by including a reference to persons whose ordinary business it is to lend money. Paragraphs (c) and (d), together with section 50, give effect to the scheme summarized in paragraph 16 of the Report. Paragraph (e) is designed to exclude offers to allot shares or debentures made in conjunction with a takeover offer, in respect of which the Part A statement required by the takeover provisions will provide the requisite information.

Section 5, sub-section (6A): New. Required to provide a definition of the term "allotment" as applied to debentures. See Report paragraph 83.

Sub-section (6s): See Report paragraph 85.

Section 37, sub-section (1): Existing section 37 redrafted to conform to proposal for defining the public in terms of numbers to whom the offer is made. See also note to sub-section (2) below.

Sub-section (2): Although section 40 requires an advertisement to state that applications for shares will only be accepted on forms attached to the prospectus, the existing Act does not require that forms circulated with a prospectus shall be attached, nor does it require that applications shall only be accepted on that form. This sub-section, together with sub-section (1), provides for this.

Sub-section (3) provides the same exception as in section 5 (6) (a).

Sub-section (4) provides a defence to a person who was unaware that more than fifty offers had been made or were in contemplation.

Sub-section (5) provides that allotments made in contravention of the section are not invalidated. Cf. section 48 (9).

Section 38: This section has been redrawn to cover the objection that a proposed company cannot give an undertaking. Additional words have been included to prevent the use of expressions which might give a misleading impression of priority: see Report paragraph 25.

Sub-section (1): Existing sub-section to end of paragraph (b), substituting "a statement that the corporation or proposed corporation will" for "an undertaking by the corporation that it will ".

Sub-section (1A): This incorporates (c) of sub-section (1) but in a form which makes it operate independently of sub-section (1), and with the addition of words relating to the description of debentures (Report, paragraph 25).

Sub-section (2): Unchanged.

Sub-sections (3) (4) and (5): Unchanged except for the omission of some words rendered unnecessary by sub-section (1A).

Sub-sections (6) (7) (8) and (9): Unchanged.

Sub-section (10): Redrafted with the addition of words to allow the original description to be used in cases where an old certificate is replaced by a new one. See Report, paragraph 27.

Sub-section (11): Unchanged.

Section 39: Sub-section (1) is substantially unchanged. The alterations are as follows:

(i) in paragraph (a) the words "issuing, advertising, circulating or distributing of the prospectus in the State" have been replaced by the words "registration of the prospectus ". Sections 40 (2) and 42 (1) between them prohibit the issuing advertising circulation or distribution before registration;

(ii) in paragraph (c) a reference to "registration" has been added, in accordance with a proposal in the General Revision Bill;

(iii) in paragraph (d) the reference to Parts of the Fifth Schedule has been omitted, as that Schedule will no longer be divided into Parts;

(iv) paragraph (e) has been omitted, as provision has been made for this in the Fifth Schedule - see Report, paragraph 29;

(v) existing (f) renumbered as (e);

(vi) existing (g) becomes (f) amended as indicated in Report, paragraph 28;

(vii) (h) and (i) become (g) and (h).

Sub-section (2): First part of sub-section omitted and latter part redrafted - see Report, paragraphs 33, 34.

APPENDIX "B" - continued.

Sub-section (3): Substantially unchanged but some drafting amendments. Sub-section (4): Reference to "proposed corporation" added. Sub-sections (5) and (6): Unchanged.

Section 40: The changes in this section are referred to in paragraphs 17 and 22 of the Report. Sub-sections (1) (2) and (3) are new.

Sub-section (4) is the existing sub-section (3) with the addition of a reference to notices and circulars, to conform with the new sub-section (1).

Sub-section (5) has the effect of the existing sub-section (4), in different language.

Sub-section (6) restates existing sub-section (5), but omits the requirement that the advertisement is not patently an advertisement that is deemed to be a prospectus by virtue of sub-section (i). This reference to sub-section (1) is now inappropriate, and it is not thought to be necessary to replace it, as the directors are unlikely to give a certificate for a document that is an obvious breach of the section.

Sub-section (7) corresponds with existing sub-section (6).

Sub-section (8) is existing sub-section (7) subject to the correction of a drafting error.

Sub-section (9) is new and arises from the addition to what is now sub-section (2) which is referred to in Report, paragraph 22.

Section 40A: This section is new, and is explained in detail in Report, paragraphs 19 - 21.

Section 41: This section has been substantially amended for the reasons stated in paragraphs 35--38 of the Report. The proposed clause 46 of the Fifth Schedule will require a maximum amount of subscriptions which will be accepted in respect of debentures to be stated in the prospectus, and sub-section (1) provides a sanction for breach.

Sub-section (2) prevents the making of statements as to either asset backing or interest cover except in relation to the maximum so stated.

Sub-section (3) is a penalty section in common form.

Section 42: Sub-section (1) is unchanged.

Sub-section (2) follows the existing sub-section (2), but some changes have been made. Paragraph (b) has been changed by omitting all the words following "requirements of this Act". These words become unnecessary if the proposed new sub-section (2B) is adopted. Paragraph (d) of the present Act was introduced by Act No. 7391 in 1966, but has been transferred to a new sub-section (2n), for reasons stated in the Report, paragraphs 41, 42. The new paragraph (d) represents the provisions of an amendment adopted in some States and. which we have recommended should be adopted in all, subject to a minor variation--see Report, paragraph 46.

Sub-section (2a): See above.

Sub-section (2s): This sub-section is designed to give effect to our recommendation for automatic registration of interstate prospectuses - see Report, paragraph 47.

Sub-section (3) is unchanged except for the addition of references to circulation and distribution to bring the provision into line with sub-section (1). This amendment derives from the General Revision Bill.

Sub-section (4). Two changes have been made. The first is to add a reference to documents referred to in the prospectus in respect of which the corporation is required to indicate in the prospectus a place where they are available for inspection. Although section 39 (1) (i) obliges a foreign company to so indicate, there is no provision requiring the company to keep the documents at that place. Also, we have added to the Fifth Schedule provisions requiring some documents other than material contracts to be so made available. Additional words have been added to sub-section (4) to cover these documents. The second change in the sub-section arises from the fact that although a prospectus is primarily addressed to the public, the obligation to permit inspection in that sub-section is restricted to members and creditors. We have provided for inspection by any person without fee. The words "and if it has no registered office in the State" have been omitted, since under the existing section the company need not keep the documents at the address specified in the prospectus if it has a registered office in the State.

Section 43: Sub-section (1): The phrase "to other persons" has been substituted for "to the public" (where first appearing) and the words "by the corporation" after the same expression where it last appears. The reasons for the change are explained in the Report, paragraphs 57-59.

Sub-section (2) represents part of the present sub-section (2). The reference to cases in which the whole of the consideration has not been received by the corporation has been omitted, and the test of offers for sale to more than twenty persons within three months has been substituted in accordance with our general approach to the problem of offers to the public.

Sub-section (2A): This extends the provisions to invitations to make an offer, as was done in the case of the provisions relating to takeovers.

APPENDIX "B" - continued.

Sub-section (3): Unchanged.

Sub-section (4): Unchanged, except for the addition of the words "a copy of" as suggested by the General Revision Bill.

Sub-section (5): Unchanged.

Sub-sections (6) (7) and (8) have been introduced to give effect to the views expressed in paragraph 57 of the Report.

Sub-section (9) is designed to make applicable to offers made in contravention of the section those provisions of the Act which impose obligations in respect of offers to the public, since the section, while it makes the prospectus provisions applicable, would not, without the inclusion of sub-section (9), bring into operation other provisions relating to offers to the public (e.g. section 40).

Section 44: Sub-sections (1) to (8) inclusive remain unchanged.

Sub-section (9) has been altered by substituting the words "relating to" for "inviting persons to subscribe for" with the object of making the section applicable to both invitations and offers. The words "within three days of the issue of the prospectus" have been altered to bring them into line with the provisions of sub-section (1).

Sub-section (10): Unchanged.

Section 45: The words "inviting subscription for or purchase of" have been altered to "relating to ", for the same reason as in section 44 (9) above.

A paragraph has also been added requiring the name of the expert and his qualifications to be disclosed in the prospectus.

Section 46: Existing sections 46 and 47 redrafted - see Report, paragraph 61.

Section 48: Th. is section has been amended to make it applicable to debentures (in respect of which a minimum subscription has been provided for in the Fifth Schedule) and also to directors' proposals.

Sub-section (2A) is new. The reasons for these changes are set out in paragraph 82 of the Report. A minor amendment has been made to sub-section (7).

Section 49: The reference to "offered to the public" has been deleted, and a specific requirement to pay the money into a separate bank account has been added. The expression "intended company" has been altered to "proposed company" as used elsewhere in the Act.

Sections 50 and 51 have been drafted to provide for directors' proposals, and for the liability of directors in respect thereof, as explained in paragraphs 12, 14 and 84 of the Report. The existing sections 50 and 51 disappear with the abolition of the statement in lieu of prospectus.

Section 52: Sub-section (1) has been altered to avoid the reference to "inviting the public to subscribe" for reasons stated above (see notes on section 44 (9)). Provision has also been made for cases in which there is a minimum subscription for debentures. "Allotted" has been altered to "subscribed for" - see sub-section (5) below.

Sub-section (2) has been amended to take account of the abolition of the statement in lieu of prospectus, and also to add a reference to debentures to conform with sub-section (1).

Sub-sections (3) and (4): Unchanged, except for the addition of the words "or ratified or adopted" in sub-section (4), to provide for the operation of an amendment proposed in the General Revision Bill, which will permit of the ratification or adoption of a contract entered into before the company is incorporated, by persons purporting to act on behalf of the company.

Sub-section (5): Amended to make it clear that although the company may receive the money paid on application for debentures before it is entitled to commence business, it cannot allot debentures until it is so entitled. To enable this sub-section to operate with sub-section (1), sub-section (1) has been altered to require shares and debentures to be "subscribed for ", rather than "allotted ".

Sub-section (6): Unchanged.

Section 53: Reference to the statement in lieu of prospectus has been omitted.

Section 54: Sub-sections (1) to (4) are unchanged.

Sub-section (5): See report paragraph 86.

Sub-section (6): Amended in accordance with a proposal in the General Revision Bill, to make it clear that allotment to the subscribers to the memorandum is automatic.

Sub-section (6A): New. Explained in Report, paragraph 86.

Sub-section (7): Unchanged.

APPENDIX "B" - continued.

Sections 55, 56 and 57: Unchanged.

Section 58: Amended in accordance with paragraph 87 of the Report. See also paragraph 84. Sections 59 and 60: Unchanged.

Section 61: Amended to bring the wording into line with amendments proposed in the General Revision Bill for clause 3 of Table "A" of the Fourth Schedule.

Section 62: Amended to give effect to a proposal in the General Revision Bill, not reserved in our first interim report.

Section 63: Unchanged.

Section 64: Changes in this section are explained in paragraphs 88-90 of the Report. Sub-sections (12) and (13) were added to the Victorian Act by the Companies Amendment Act 1966.

Section 64A: New. Proposed by the General Revision Bill and not reserved in first interim report.

Section 65: Unchanged except for the addition of sub-sections (1A) (1B) and (1C), the effect of which is explained in paragraphs 91-93 of the Report.

Section 66: Unchanged.

Section 67: This section has been altered in accordance with the views expressed in paragraph 94 of the Report. We have also amended sub-section (2) to remove some inconsistencies in the provisions relating to employees' shares. Thus, paragraph (b) permits the provision of money for the purchase of shares in the company or its holding company for the benefit of employees of the company, but not for the benefit of employees of a subsidiary, while paragraph (c) omits the reference to the holding company, and also refers only to "purchase" and not to subscription for shares. We have also adopted a suggestion made in the General Revision Bill that the words "the giving by a company of financial assistance" be substituted for "the making by a company of loans ", so as to make the terms of the exception conform with the prohibition in sub-section (1).

Section 67A: New. Deprives shares of a company, held in trust for that company, of voting rights while so held. Proposed by General Revision Bill and not reserved in first interim report.

Sections 68 and 69: Unchanged.

Section 70: Unchanged.

Section 70A: New. Provides for a branch register of debenture holders, in accordance with a suggestion in the General Revision Bill.

Section 71: Unchanged except for the substitution of the word "corporation" for the word "company". See Report paragraph 99.

Section 72: Unchanged.

Section 73: Unchanged.

Section 74: Unchanged. Sub-section (1A) was inserted by Act No. 7281, section 3.

Section 74A: Unchanged.

Section 74B: This represents sub-section (1) redrafted as explained in Report paragraph 100-103. Sub-section (2) has been omitted for reasons there stated.

Section 74C: Unchanged.

Section 74D: Unchanged except for the following:

In paragraph (b) of sub-section (1) the words "before consenting to act as trustee in relation to that prospectus" have been added – see Report, paragraph 105.

In paragraph (f) of sub-section (1) "directions" has been altered to "advice " - See Report Paragraph 106.

A new paragraph (h) has been added to sub-section (1) - see Report, paragraph 104.

In sub-section (4) "directions" has been altered to "advice " - see Report paragraph 106.

Sub-section (7) has been redrafted to give effect to Report paragraph 107.

APPENDIX "B" - continued.

Sub-section (8) is new - See Report paragraph 104.

Section 74E: Unchanged.

Section 74F: Sub-section (1): Unchanged except for omission of reference to the Act of 1963 by which the provision was first introduced.

Sub-section (2): Amended to give effect to paragraphs 111-114 of the Report.

Sub-section (2A): New. As proposed in the General Revision Bill, subject to the modifications suggested in Report, paragraphs 115, 116.

Sub-section (3): Unchanged.

Sub-section (4): Amended as proposed in the General Revision Bill, subject to the change suggested in paragraph 117 of the Report.

Sub-section (4A): New--see Report paragraphs 108-110.

Sub-section (5): Amended as explained in Report, paragraphs 118-122.

Sub-section (6): Unchanged.

Sub-section (7): As sub-section (4) now applies to annual as well as haft-yearly accounts, it is necessary to amend sub-section (7) to limit its operation to half-yearly accounts. Amendments are as proposed in the General Revision Bill.

Section 74G: Unchanged.

Section 74H: Unchanged except for omission of "to the public" in sub-section (1), and amendment of sub-section (5), as proposed in paragraph 123 of the Report.

Section 74I: Unchanged.

Section 75: Sub-section (1) has been amended as indicated in Report, paragraph 124. Sub-sections (2) and (3) unchanged.

FIFTH SCHEDULE.

A. (a) The definition of "company" is new. Although the requirements of the existing schedule apply to "corporations", the schedule itself is expressed in terms of "companies". As it is necessary to distinguish between the company issuing the prospectus and other corporations referred to in the Schedule, it is convenient to retain the term "company" to refer to the corporation in respect of which the prospectus is issued.

(b) During the transitional period, there will be cases in which references to provisions of the Act will have to be read as referring to the provisions which will be replaced by the new provisions relating, for example, to accounts and audit.

(c) Since the prospectus provisions apply to corporations incorporated outside the State, it is necessary to provide that references to sections of the Act shall be taken as references to enactments of other States or Territories, where appropriate. A special provision dealing with corporations incorporated outside the limits of the Commonwealth and its Territories has been made in clause 32.

B. The order of clauses has been rearranged, although in some cases the numbering corresponds with the existing numbering. In the existing schedule the numbered provisions are referred to as paragraphs, although the corresponding units of other schedules are referred to as clauses. We have used the term "clause" in the redraft, and have used the term in these notes to refer both to the "paragraphs" of the existing schedule and to the "clauses" of the redraft.

Clause 1:

(a) replaces the existing clause 1, which refers only to founders or management or deferred shares and the interest of their holders.

(b) See Report, paragraph 73.

(c) See Report, paragraph 73.

Clause 2:

(a) Existing clause 18.

(b) and (c) Existing clause 7.

Clause 3: Existing clause 4, expanded to cover debentures. Sub-paragraphs (ii) and (vi) are new. See Report paragraphs 68, 69.

Clause 4: Existing clause 8, amended to conform with the provisions of proposed new section 162A (6) (c), and with the addition of a

reference to any rights which are to be attached to the shares when issued.

APPENDIX "B" - continued

Clause 5: Existing clause 3, with additions: see Report, paragraph 70.

Clause 6: New. See Report, paragraph 70.

Clause 7: New. As to trustees, see Report, paragraph 105. As to experts, see section 45 in Appendix "A". The provision is repeated here for convenience.

Clause 8: Existing clause 2.

Clause 9: Existing clause 9. See new sub-section (6B) of section 5 in Appendix "A ".

Clause 10: Existing clause 6.

Clause 11: (1) and (2): Existing clause 10, with the addition of the words "so far as available ". There may be cases in which the information is not known to the directors and they have no means of obtaining it. (3): Existing clause 11.

Clause 12: Existing clause 12, with the addition of a reference to brokerage.

Clause 13: Existing clause 13.

Clause 14: Existing clause 14.

Clause 15: Existing clause 15, with the addition of the words "whether or not the company is a party thereto ". An amendment was proposed by the General Revision Bill referring specifically to (inter alia) subsidiaries. The existing clause, however, is in general terms and is not limited to contracts to which the company is a party. In our view it should not be so limited and in order to remove any doubts it was thought desirable to make this addition.

Clause 16: Existing clause 16.

Clause 17: The General Revision Bill proposed an extension of the existing clause to cover disclosure of the interests of corporations in which a director is interested, and of the extent of the interest of the director in the corporation. Such a requirement could involve a heavy burden in cases in which a director had small shareholdings in public companies. The draft limits disclosure to eases where the interest is material, and in which the director has a material shareholding in the corporation.

Part of the existing clause has been omitted as it appears to be surplusage.

Clause 18: New.

Clause 19: New.

Clause 20: New. See Report, paragraph 71.

Clause 21: New. See Report, paragraph 71.

Clause 22:

(1) Based on existing clause 20, with additional information as indicated in Report paragraph 71.

(2) See Report paragraph 77.

Clause 23: Based on existing clause 20.

Clause 24: Sub-clause (1) provides for grouping of information in the same way as for annual accounts under the Ninth Schedule, removing an inconsistency which formerly existed.

Sub-clause (2) amplifies clause 22 (1) (b).

Clause 25: See Report paragraph 72.

Clause 26: Provides for half-yearly accounts. See Report, paragraph 31.

Clause 27: New.

Clause 28: New.

Clause 29: New. Based on provision suggested by us in respect of annual accounts.

Clause 30: New. See Report, paragraphs 71, 72.

Clause 31: Based on proposed clause 8 of Ninth Schedule, and existing clause 20 (4).

Clause 32: New. See note under A (c) above.

APPENDIX "B"

Clause 33:

Clause 34: Based on existing clause 21, with provision for half-yearly accounts.

Clause 35: Based on existing clause 22, with provision for half-yearly accounts.

Clause 36: Existing clause 23, extended and adapted as indicated in Report paragraphs 31 and 73.

Clause 37: Existing clause 24.

Clause 38: Existing clause 25.

Clause 39: Existing clause 26.

Clause 40: Existing clause 27.

Clause 41: Existing clause 28.

Existing clause 29 redrafted.

Clause 42: This clause replaces existing clause 30. It is designed to ensure that approximately five years' accounts will be available, while allowing for the fact that a company may adopt accounting periods which are greater or less than twelve months. The expression "financial year" has been avoided except where it is intended to have the meaning assigned to it in section 5 of the Act (e.g., in clause 30). Under the definition in section 5 it is not possible to determine what the financial year is until accounts have been laid before the corporation in general meeting.

Clause 43: New. See Report, paragraph 71.

Clause 44: Existing clause 32, redrafted to take account of the views expressed in Report, paragraph 74.

Clause 45: Existing clause 33, subject to some modifications. Sub-clause (1) (a) substantially corresponds with 33 (1) (a).

Sub-clause (1) (b) corresponds with 33 (I) (b), except that:

(A) The word "amounts" has been substituted for "values ", as the process involved is not really one of valuation.

(B) In sub-paragraph (ii) the existing clause requires a deduction of so much of the value of shares in a related corporation as is attributable to intangible assets. We have redrafted this to provide for the exclusion of so much of the amount representing the shares as exceeds the proportion of tangible assets attributable to those shares.

(C) Sub-paragraph (iii) has been redrafted to give effect to the views expressed in Report, paragraph 75.

(D) Sub-paragraph (iv) is new; it is based on our proposed new clause 12 (2) of the Ninth Schedule.

(E) Sub-paragraph (v) is new. It seems to be a necessary provision.

Sub-clause (2) embodies parts of existing 33 (2) and 34. See Report, paragraph 76.

Sub-clause (3) is new. See Report, paragraphs 35-38 and 76.

Clause 46: Existing clause 34, paragraphs (a) and (b). Paragraph (b) has been amended by adding the word "maximum". See Report, paragraph 35. Paragraph (c) is based on a proposal in the General Revision Bill.

Clause 47: Based in part on existing clause 31 and section 39 (1) (e). See Report, paragraphs 29, 30. See also existing clause 22 (2). Other provisions are new. As to the use of accounts audited by another auditor, or accounts that have not been audited, see clause 48. Clause 47 (e) has been made subject to clause 48 (2).

Clause 48: New. See Report, paragraphs 77, 78.

Clause 49: New. See Report, paragraph 81.

SIXTH SCHEDULE.

The existing schedule deals with the form of the statement in lieu of prospectus, which is to be abolished (Report, paragraph 84). The new schedule is to deal with the contents of the directors' proposal, to which we refer in the Report, paragraphs 9-16. The matters required to be stated have been adapted from the Fifth Schedule. We have listed the requirements for share issues and debenture issues separately, so that the requirements in each class of case can be clearly seen, but some economy of verbiage could be achieved by recombining them where they cover the same ground.

APPENDIX "B" - continued.

CONSEQUENTIAL AMENDMENTS.

(a) Amendment of the definition of "minimum subscription" is required to take account of the fact that minimum subscriptions may now be stated in respect of debenture issues, and may also be included in directors' proposals.

(b) Section 46 as redrafted now makes express reference to "misleading" statements, and sub-section (3) of section 5 is no longer needed, if indeed it ever was - see R. v. Kylsant (1932) 1 K.B. 442.

(c) The amendment of sub-section (4) of section 5 follows from the abolition of the statement in lieu of prospectus and the introduction of directors' proposals.

(d) As to amendment of section 26 see Report, paragraph 84.

(e) As to amendment of section 31, see Report, paragraph 91.

(f) As to amendment of section 365, see Report, paragraph 107.