THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

1972 - Parliamentary Paper No. 230

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

Seventh Interim Report
July 1972

Registration of Charges

Presented by Command 21 September 1972
Ordered to be printed 28 September 1972

COMMONWEALTH GOVERNMENT PRINTING OFFICE
CANBERRA: 1973

SEVENTH INTERIM REPORT
OF THE
COMPANY LAW ADVISORY COMMITTEE

REGISTRATION OF CHARGES.

INTRODUCTION.

1. Sections 100-110 of the Acts provide for the registration of charges given by a company. Section 110* provides that a reference in this Division to a company shall be read as including a reference to a foreign company to which Division 3 of Part XI. applies, but that frothing in this Division applies to a charge on property outside the State of a foreign company. Section 344 provides that Division 3 of Part XI. applies to a foreign company only if it has a place of business or is carrying on business within the State (sub-section (1)), and that a foreign company shall not be regarded as carrying on business within the State by reason only that within the State St does certain things, which include conducting an isolated transaction completed within thirty-one days, or investing any of its funds or holding any property. By section 346 a foreign company must register in a State within one month after it establishes a place of business or commences to carry on business within the State.

2. Section 100 requires that a charge to which the section applies shall be lodged for registration within thirty days after the creation of the charge. Failure to do so renders the charge void as against the liquidator or any creditor, so far as any security on the company's property or undertaking is concerned. The charges to which the section applies are listed in sub-section (3) and will be dealt with later. Sub-section (4) provides that where a charge created in the State affects property outside the State, the charge may be registered notwithstanding that further proceedings may be necessary to make the charge valid or effectual according to the law of the place in which the property is situated. This sub-section appears to have been introduced to deal with the possibility that until the charge is registered, or some other formality complied with, in the place where the property is situated, it may be considered to be incomplete, and therefore not registrable.

3. Section 102 provides for cases in which a company acquires property which is subject to a charge of a kind which if made by the company would have required registration, and also for the case in which a foreign company, having created a charge, subsequently becomes registered in the State, or acquires property subject to such a charge and subsequently becomes registered. It is to be noted that failure to register a charge under section 102 does not

invalidate the charge. This is as it should be, since the person entitled to the benefit of the charge will have no opportunity of ensuring that registration is effected. He may be unaware that the property has been acquired by the company, or that the company has become registered as a foreign company in the State. There is, however, an anomaly as between the obligation to register imposed on a foreign company under section 100, and that imposed under section 102. Under the former section, the obligation arises if the company is a company to which Division 3 of Part XI. applies, whether it is registered as a foreign company or not, whereas under section 102, the obligation only arises at the time of registration as a foreign company.

4. The object of these provisions is presumably the same as that of the Bills of Sale legislation (in Victoria, the Instruments Act 1958), that is to say, to protect creditors who extend credit to a company believing that it has unencumbered assets, when in fact those assets have been charged in favour of another creditor. It will be seen that the protection is imperfect, in that there is a period of thirty days in which the creditor may be deceived. A mortgagee may register his charge, having searched to ascertain whether any prior charges have been registered, only to find that a valid charge exists, granted at an earlier date, and registered at a later date, but still within thirty days after its creation. The difficulty is made more acute by the fact that section 37 of the Stamps Act (in Victoria) precludes the Registrar from receiving the instrument creating the charge for registration until the stamp duty has been assessed and paid. Section 107, which requires the company to keep a register of charges at its registered office, might be relied on as a source of information as to charges awaiting registration, but for the fact that that section specifies no time within which entries are to be made in that register, nor does failure to keep that register up to date involve invalidity, being the subject of a penalty only.

5. Section 100 does not, as does Part VI. of the Instruments Act, declare that the charge shall have no validity until registered, nor does it contain provisions enabling creditors to lodge caveats against registration. There is, however, a provision in sub-section (10) of section 100 which guards against the device of creating a new charge to replace the unregistered one within thirty days.

** As in previous Reports references to sections are to the Victorian Companies Act, 1961, unless otherwise stated.*

6. The chief difficulties that arise in practice with regard to these provisions are concerned with the necessity for registration in more than one jurisdiction. There are a number of questions, as to which no certain answer can be given, which may lead to multiple registrations, some of which may well be unnecessary. These arise from the failure of the legislation to make it clear whether the obligation to register is based on the place of incorporation of the company, on the location of the property, or on the place of execution of the instrument, or on more than one of these criteria. Difficulties also arise because of lack of uniformity in the descriptions of charges requiring registration in each State, and because of uncertainty as to the necessity for registration under other Acts in the case of property situated within the State, over which a charge has been given by a foreign company which is not registered, and is not required to be registered, as a foreign company within that State.

REGISTRATION IN THE PLACE OF INCORPORATION.

7. Having regard to the terms of sub-section (4) of section 100, section 108 and section 110, there is much to be said for the view that registration of a charge is required in the State of incorporation, wherever the property is situated. It would seem, however, that this view is not taken by all practitioners, and that there may well be cases in which a charge given by a company incorporated in Victoria, but limited to property in another State, is registered only in the latter State.

REMOVAL OF PROPERTY FROM ONE STATE TO ANOTHER.

8. On one view of the law, a creditor who lends money on the security of a charge cannot be certain that his security will remain available to him, since the property subject to the charge may be moved to a jurisdiction in which the company is or ought to be registered as a foreign company, and a person acquiring a subsequent charge over the property may get priority.

9. We have stated the problem in this way, even though it may well be the true position that registration of the charge, in the State in which the property is situated at the time of creation of the charge, is all that is needed, and the rights of the chargee are not affected by subsequent removal of the property (see Davis, Title to Goods which are Moved Inter-State Vol. 2 ACLR p. 51). We have done so because in the case of valuable movables, it is the practice of prudent lawyers to assume the worst, and in the absence of a clear provision to the contrary, it is sound practice to insist on registration in each jurisdiction to which the property subject to the charge is or could be removed, and in which the company is registered as a foreign company.

CHARGES GIVEN BY FOREIGN CORPORATIONS.

10. A further complication arises from the fact that although the scheme of the legislation is obviously to exempt companies from' the necessity of registering charges under the State Bills of Sale legislation applicable to persons other than companies, the exemption in some States is incomplete, and in others the form of words used leaves the extent of the exemption in doubt. Thus in New South Wales and in South Australia a charge "requiring registration" under the section need not be registered under the Bills of Sale legislation. As we have seen, the provisions of the section only apply to a company or a foreign company to which the provisions of Division 3 of Part XI. apply. Accordingly, if a company incorporated in Victoria has property in New South Wales but is not a company to which the provisions of Division 3 of Part XI. of the New South Wales Act apply (that is to say, it has no place of business and is not carrying on business in New South Wales), a charge given over that property will probably require registration under the New South Wales Bills of Sale legislation. It is assumed for the purposes of this discussion that the Bills of Sale legislation would apply to a bill of sale given by a foreign company over property in New South Wales. From the point of view of private international law this would clearly be so if the document were executed in New South Wales and were intended to be governed by New South Wales law. There is, however, a doubt as to whether the New South Wales Bills of Sale legislation applies to bills of sale given by companies (see Campbell v. Harrison (1903) 3 S.R. (N.S.W.) 432 and Braithwaite v. W. and ,4. McArthur Ltd. (1898) 19 L.R. (N.S.W.) Eq. 158). We do not find it necessary to come to a final conclusion on these points, as we think that the uncertainties that now surround the parties to such transactions ought to be removed by the means recommended in this report.

11. In the other States and in the Australian Capital Territory, a different form of words is used for the exception. In Victoria, sub-section (9) of section 100 reads "No charge or assignment to which this section applies need be filed or registered under the Instruments Act 1958 ". Similar words are used in the legislation in the other States and in the Australian Capital Territory Ordinance. These words refer back to the expression "charges to which this section applies" in sub-section (3). The relevant variations are shown in Appendix "D ".

12. Sub-section (3) of section 100 has a number of paragraphs, some of which refer to charges on particular kinds of property "of a company ", while others (e.g. paragraph (f)) are not expressly so limited. When paragraph (c) refers to "a charge or an assignment ... which if executed by an individual would be invalid" it is not clear whether it refers to a charge or

assignment executed by a "corporation" as defined in section 5 or a charge or assignment executed by a "company" which for the purposes of this Division means, as stated above, a company incorporated in the State or a foreign company to which Division 3 of Part XI. applies. One or other of these limitations must be read into either sub-section (3) or sub-section (9)' otherwise the sub-sections would have the effect of exempting some instruments executed by individuals from registration under the Instruments Act. It will be seen that according to one interpretation, a bill of sale given by a foreign company not registered in Victoria but affecting property in Victoria need not be registered at all. According to the other interpretation, the bill of sale would need to be registered under the Instruments Act, but would not be registered under the Companies Act. A person making a search would have to search the Companies Register to find out whether the company was registered as a foreign company, and would then have to search the register under the Instruments Act, if the company were not so registered. Even then, he could not be sure, having regard to the doubt as to the meaning of the section, whether a charge existed.

PLACE OF EXECUTION OF CHARGE.

13. A further area of uncertainty arises from the question: how far does the place of execution of the relevant document control the requirement of registration? We have already noted that section 100 (4) refers to registration in the State of a "charge created in the State" but affecting property outside the State. This might suggest that the test as to whether a particular State Act applies is to be found in the place where the charge is created, irrespective of the location of the property. On the other hand, section 108 allows extra time for registration in respect of an "instrument deed statement or other document" which is "required to be lodged with the Registrar" but has been "executed or made in a place out of the State ". In the case of the hire purchase legislation of New South Wales and Victoria the High Court has held that its application is limited to documents executed within the State, irrespective of the location of the property (Kay's Leasing Corporation Pty. Ltd. v. Fletcher (1964) 116 C.L.R. 124) and this decision was applied by a District Court Judge in Queensland in construing the Bills of Sale legislation of that State (A. J. Sineman Car Sales v. Richardson's Pre-Run Cars (1969) 63 Q.J.P.R. 150). We have some doubt as to whether there is any analogy between the Bills of Sale legislation and the Hire Purchase legislation, or whether, in the light of the sections above quoted, the same considerations apply to charges created by companies, but again the uncertainty which exists makes it desirable that 'a solution

be found which avoids the necessity to determine doubtful questions of law.

LACK OF UNIFORMITY AS TO CHARGES REQUIRED TO BE REGISTERED.

14. Yet another complication of which account must be taken if uniformity is to be achieved lies in the fact that the legislation requiring registration in the case of individuals is not the same in each State. Thus in Victoria and Western Australia assignments of book debts are invalid unless registered, but this is not so in New South Wales, Queensland, South Australia, Tasmania and the Australian Capital Territory. On the whole, the differences are not very significant. An absolute assignment of book debts, if made by an individual, requires registration in Victoria. la Palette Shoes Pty. Ltd. v. Krohn, 58 C.L.R. 1, Dixon J. (as he then was) pointed out that as the provisions of the Companies Act then in operation did not provide for the registration of absolute assignments of book debts (being limited to mortgages and charges), an absolute assignment of book debts by a company still required registration under the Instruments Act. After this decision, words were inserted into the section which now appear (in modified form) in parentheses in sub-section (3) (c). The effect of these words (taken with sub-section (9)) is that absolute bills of sale and absolute assignments of book debts do not if given by a company, require registration under the Instruments Act; but since the effect of non-registration under the Companies Act is only to invalidate the security, and an absolute assignment does not give any security over property of the company, it need not be registered under the Companies Act either (see Coronet Investments Pry. Ltd. v. Hovelt (1962) V. R. 208). Turning from absolute assignments to charges and assignments by way of security, there is not much difference between the various jurisdictions, though some differences exist. Thus, sub-section (3) (h) refers to "a charge on the book debts of a company ". If this means (as it probably does) a charge on the book debts as a whole, and does not cover charges on particular book debts, then the position in New South Wales differs from that in Victoria. In New South Wales this is the only provision that would require registration of a charge of book debts, but in Victoria a conditional assignment of particular book debts by way of security would require registration if given by an individual, and would therefore require registration if given by a company, as being "a charge .... created by an instrument ... which if executed by an individual would be invalid or of limited effect if not filed or registered under the Instruments Act 1958."

15. The difficulties so far discussed arise out of the interstate activities of Australian Companies, or the Australian activities of overseas companies. They are not, however, the only difficulties presented by Division 7 of Part IV. Later in this report we deal with problems presented by the legislation, some of which apply to local companies which have no interstate activities. It is

Convenient, however, to deal first with the question of interstate registration of charges, partly because the solution of other problems would be easier if the system of registration is simplified.

THE PLACE AT WHICH REGISTRATION SHOULD BE EFFECTED.

16. It would obviously be convenient for those having to effect registration, or to search for the existence of charges, if charges were only required to be registered in one jurisdiction, wherever the assets affected by the charge were situated. We have accordingly considered whether it is feasible to effect this desirable simplification of the law.

17. Before indicating the solution we propose, it is necessary to say something about the question of stamp duty. The question of stamp duty on debenture trust deeds and other instruments creating charges is a source of constant concern to those who have to attend to their registration. It has been represented to us on behalf of the Trustee Companies Association that it would be desirable for the State to seek uniformity in the principles involved in subjecting debentures and floating charges to liability for stamp duty, and that the cost of registration of charges in some States may at the present time be prohibitive, as stamp duty is assessed on the entire issue of debentures covered by the trust deed, which may bear no relation to the value of the assets within the State concerned. It is of course no part of our function to make recommendations about the fiscal policies of the States or the Commonwealth, but we cannot ignore the fact that if we are to recommend any system of registration of charges in one jurisdiction only, the result may be to compel a company to register in that jurisdiction charges which do not affect any property in that State or Territory, but which may nevertheless be subject to stamp duty upon their being brought within the jurisdiction. Conversely, some instruments which now have to be brought within the jurisdiction in order to comply with section 100 will no longer be required to be registered in more than one State, so that stamp duty on those instruments may be lost to States in which registration is not required.

18. It appears therefore that the implementation of our proposals for a single State or Territory of registration will involve a reconsideration either of the basis on which stamp duty is assessed or of the system of collection. If a uniform basis for the assessment of stamp duties could be achieved, it would be a matter of indifference in which State or Territory a company was incorporated or registered as a foreign company. If the existing stamp duty laws remain in force, liability to stamp duty would become a significant factor in deciding where to incorporate a new company, or to register an overseas company. On the other hand, we see no reason why a different method of collection of duty should not be adopted, retaining the present quantum of liability. At the present time, liability to stamp duty does not arise until the

instrument is brought within the jurisdiction, and it is the obligation to register which compels the production of the instrument within the jurisdiction. If a system of returns were substituted, the difficulties created by the present system of collection would disappear. Copies of instruments could be lodged immediately on their execution, and the provisions of the Act could be simplified.

19. At the present time the consequence of failure to register a charge within the specified time after its creation is invalidity, although invalidity of a limited kind. Failure to register in a State or Territory may affect the chargee's rights over property in more than one State or Territory, or it may be limited to property in a particular State or Territory, depending on the view that is taken about the application of the provisions to foreign companies and to property outside the jurisdiction. On the assumption that partial invalidity continues to be a consequence of failure to register (an assumption that is further discussed below) it seems clear that any simplified system of registration should be such as to indicate one jurisdiction, and one only, for any given company, as that in which registration must be effected to preserve the validity of the charge.

20. From the point of view of convenience, there is much to be said for the State of incorporation as the sole place of registration. In the normal course of events, a search for charges will be made in that State, wherever else it might be made. If such a scheme were adopted, a person wishing to search would know that he must search in that State and need not search anywhere else. He would have no concern with the location of the property the subject of the charge, and all problems as to changing location of movable chattels such as aircraft and motor vehicles would disappear. If failure to register in a second State in which property were situated were to involve invalidity, there would always be problems arising out of the failure of the company to inform the creditor that it had moved the property to another State. Moreover, under the existing provisions, if the property is moved to another State without the company commencing business or establishing a place of business in that State, the charge is not invalidated by the Companies Act, though it may require registration under the Instruments Act. But if the company has set up a place of business, or commenced to carry on business, the charge may be invalid unless registered.

21. We recommend that the legislation should provide that so far as the validity of the charge is concerned, it should only be necessary to register in the State or Territory of incorporation.

22. The further question then arises whether there should be a requirement, enforceable under penalty, for registration in any other State in which there is property subject to the charge. Such

registration might serve two purposes, namely, to enable creditors or prospective creditors to search as to property situated within the State, and to compel the production of the relevant instrument in the State, thus enabling the revenue authorities to collect stamp duty.

23. As to the first of these purposes, having regard to the possibility of property being moved from State to State, and to the fact that, if the first recommendation [is accepted, registration would not be necessary for validity, a creditor would wish to search in the State of incorporation in any case. and little benefit would be gained by requiring registration in any other State. As to the second, questions of revenue are not really the concern of our Committee, as we have indicated earlier in this Report. It would be a matter for the revenue authorities to decide whether such a requirement is necessary to protect the revenue, or whether the same end could be achieved by requiring some sort of annual or other periodical return to be filed. Accordingly, in the draft attached to this report, we have not made any provision for registration in any State other than that in which the company is incorporated.

24. A problem to be solved under the proposal recommended by us is : what is to be done in the case of a "foreign company" that is not incorporated in any State or Territory? The case of a company incorporated in the United Kingdom may be taken as an example. One may assume that the most likely location for its Australian "head office" will be in the State or Territory in which it first commences to carry on business or establishes a place of business, and this will ordinarily be the place in Australia in which it is first registered as a foreign company. There will, of course, be cases in which an overseas company is first registered in a State or Territory other than that in which its main activities are carried on, but this is not likely to be more frequent in the case of overseas companies than in the case of Australian companies. We therefore think that it should be provided that in the case of a company not incorporated in Australia, charges should be registered in the State or Territory in which it is first registered as a foreign company.

25. Two other problems arise in relation to foreign companies. The first is that at the outset of any such scheme as we are suggesting, it will be necessary to provide for such companies to elect the State or Territory in which they wish to effect the registration of charges. They may in fact have registered in more than one jurisdiction on the same day, so that it is not possible to tell where their first registration took place, and there may be other reasons why they would wish to choose a place other than that of their first registration. Provision should therefore be made for a foreign company not incorporated in another State or Territory to file a statement of election specifying the jurisdiction in which it proposes to lodge the information as to charges required by the legislation. A similar provision should be included for

foreign companies which may in the future wish to register simultaneously in more than one State or Territory.

26. The second question relates to foreign companies which decide to discontinue their business in the State or Territory in which they are bound to register charges, while continuing to carry on business in more than one other State or Territory. In such a case we think they should again be free to elect in which of the other jurisdictions they will register charges, but subject to an obligation to tile particulars of existing charges as if they had become registered in that State or Territory for the first time at the time of making such election. If the foreign company was only registered in one other State or Territory it would be required to file in that State or Territory particulars of charges over property in any State or Territory.

27. It will be necessary to devise some machinery to inform a searcher as to the appropriate registry which should be searched for charges, and accordingly we recommend that there should be added to the information now required to be provided by a foreign company (not incorporated in a State or Territory), a statement as to which registry contains the necessary information, and that provision should be made for keeping the statement up to date.

CHARGES OVER ASSETS OUTSIDE THE JURISDICTION.

28. It is, of course, of the essence of the solution here put forward that the requirement of registration in the State or Territory of incorporation should apply to assets situated outside that jurisdiction, but within the jurisdiction of other States or Territories having similar legislation. Three questions still have to be considered, viz.

(a) Should the obligation to register apply to charges over assets situated in a State or Territory in which the uniform legislation does not apply, or over assets situated overseas?

(b) Should the obligation apply to charges over assets of a company not incorporated in Australia?

(c) How should the Acts deal with charges over assets of a company incorporated in a State or Territory that does not adopt the uniform scheme?

29. With regard to (a), we think the obligation to register charges, in the case of a company incorporated within the State, should extend to charges over assets outside the jurisdiction, whether m Australia or overseas. Although a foreign country, or a State or Territory outside the uniform scheme, might regard such registration as ineffective or insufficient, it is nevertheless important for persons dealing with the company to be able to

ascertain to what extent its assets outside the junction are encumbered.

30. With regard to (b), in the case of a company not incorporated within Australia or its territories, we think it would be sufficient if the obligation to register were confined to charges over assets situated within Australia and its territories. A foreign corporation might well wish to register as such without having any intention of borrowing money or otherwise incurring liabilities in this country, and the registration of charges over foreign assets would impose an unnecessary burden on such companies. Moreover, even if the foreign corporation were obliged to register in an Australian State or Territory all charges over assets wherever situated, a lender or other person wishing to know the extent to which a foreign corporation's assets were effectively charged, and the extent of the security available to be given, could only safely deal with the foreign corporation by investigating these matters in the place of incorporation; for instance, it may by the law of the place of incorporation be precluded in one way or another from borrowing money or charging its assets.

31. With regard to (c), we would hope that if a uniform scheme were adopted, it would be brought into effect in all jurisdictions at or about the same time. Nevertheless, it is necessary to consider what should be done during the period when the scheme is operative in some Australian jurisdictions but not in others. In our view, the logical solution is to treat any non-conforming State or Territory as a foreign jurisdiction for the purpose of the legislation, at least to the extent that a company incorporated in such a jurisdiction would be required to elect in which of the States subject to the uniform legislation charges over assets within those States would be registered. In such cases two searches would be necessary, one in the State or Territory of incorporation, and another in the jurisdiction so elected.

32. For the purposes of the distinction referred to in the last paragraph, we have included in the draft references to a "prescribed State or Territory" We should, however, draw attention to the fact that the term "Territory" is not defined for the purposes of the Companies Acts. In the absence of a definition, it would probably be taken to include the Australian Capital Territory and the Northern Territory, but would not include Norfolk Island. The Territory of Papua-New Guinea raises a problem. Under section 17 of the Commonwealth Acts Interpretation Act 1901-1964 the term "Territory of the Commonwealth" or "Territory under the authority of the Commonwealth" includes "any Territory governed by the Commonwealth under a Trusteeship Agreement" Unless such a definition were included in the State Acts it would probably not be permissible to prescribe the Territory of Papua-New Guinea under those Acts. The point is probably unimportant in view of the development of self-government in that Territory, but we mention

it in case it is contemplated that Papua-New Guinea might become part of the uniform system of registration envisaged by this report.

WHAT CHARGES SHOULD BE REGISTERED.

33. The next question for consideration is, what types of charges should be registered?

The existing section sets out a list in the following terms:

(a) a charge (other than a charge solely on land) to secure any issue of debentures;

(b) a charge on uncalled share capital of a company;

(c) a charge or an assignment created or evidenced by an instrument (including instruments creating or evidencing absolute assignments or transfers of book debts) which if executed by an individual would be invalid or of limited effect if not filed or registered under the Instruments Act 1958;

(d) a floating charge on the undertaking or property of a company;

(e) a charge on calls made but not paid;

(f) a charge on a ship or aircraft or any share in a ship or aircraft;

(g) subject to any law of the Commonwealth, a charge on goodwill, on a patent or licence under a patent, on a trade mark, or on a copyright or a licence under a copyright; and

(h) a charge on the book debts of a company.

Two categories of security over property have been suggested for inclusion in the list, namely, charges on particular book debts, and charges over shares in other companies. A different approach was adopted in the Ghanaian Code, drafted in accordance with the recommendations of Professor Gower. Under that Code, all charges are registrable, unless they come within some express exclusion. The express exclusions are: pledges of or possessory liens on goods, or any charge by way of pledge, deposit, letter of hypothecation or trust receipt of bills of lading, dock warrants or other documents of title to goods, or of bills of exchange, promissory notes or other negotiable securities for money. It has been suggested that if this approach were to be adopted, there should be a further exclusion of charges on land (which have their own provisions for registration) and that, on the other hand, any charge (other than a charge solely on land) given to secure an issue of debentures should be required to be registered, even if it came within one of the exceptions indicate above.

34. We think it would be unwise to enact a general provision for the registration of all charges subject to the exceptions mentioned. Unless an exhaustive survey were undertaken of all the circumstances in which charges may be created by a company, there would be some risk that such a provision would invalidate some classes of temporary security now in common use. As an example, the lien of a stockbroker in respect of shares for which he holds the certificates would not fall within the exceptions. There may be other cases of which we are not aware, in which it is in the ordinary course of the business of a company to create charges of a temporary kind, in respect of which the burden of requiring registration would far outweigh the benefit to others of being able to ascertain whether such charges existed.

35. If the approach of the present Act, of listing the kinds of charges that have to be registered, is adhered to, it becomes necessary to examine the existing list, and to see whether any alterations are required. It is convenient to deal first with paragraph (h), "a charge on the book debts of a company". As explained above, there is some doubt whether this paragraph applies to a case in which a particular book debt, or some only of the book debts, are charged, or whether it is limited to cases in which the book debts are charged as a whole. The wording suggests that the paragraph is dealing only with cases in which the book debts are charged as a whole. As we have pointed out, however, in Victoria at least, a conditional assignment of particular book debts by way of security would be caught by paragraph (c) of the sub-section. It certainly seems anomalous that in other States a charge on the whole of the book debts would be invalidated while a charge only on a few large book debts would be valid even though unregistered. In our view, the paragraph should be amended to cover all charges over book debts, other than a charge created in the ordinary course of business by the deposit or pledge of any negotiable instrument given in respect of the debt. Such an exception would be in line with the exclusion of any debt for which a promissory note or acceptance has been given, in the definition of "book debts" in section 83 of the Victorian Instruments Act 1938.

36. There is no definition of book debts in the Act, although one appears in the Instruments Act 1958. We propose the addition of words excluding from the category debts owing in respect of mortgages, leases, and other types of obligation which are excluded by the definition in the Instruments Act.

37. If paragraph (h) were amended as proposed, the situation with regard to book debts would be the same for all companies wherever incorporated, and wherever the debts were located, which may not be the case at present.

38. Turning now to paragraph (c), the bills of sale provisions of the various States are not uniform, as we have pointed out above. In particular, there are provisions in Victoria relating to contracts of sale followed by contracts of letting and hiring which have no counterpart in New South Wales and the provisions of the Victorian Act relating to absolute bills of sale whereby the grantee has power to seize any property subject to the bill of sale have only a limited equivalent m New South Wales. It seems probable, however, that this is not material so far as companies are concerned, since these provisions do not give any security over the property of the company, and therefore would not be invalidated by section 100. The real difficulty about making registration depend on the provisions of State Acts relating to individuals is that these Acts have a limited territorial operation, and if they are to be incorporated by reference in a provision which is intended m have an operation on all the property of the company, wherever situated, some words of extension would have to be introduced ; and it would still remain true that each State Act might be found to have a different scope, so that the question of registration might depend on the accident of the place of incorporation or in the case of a foreign (overseas) company on the place in which it was first registered in Australia. So far as chattels are concerned, there would seem to be no reason why paragraph (c) should not be amended to specify the kinds of charge mat are to be registered instead of incorporating by reference the provisions of the Instruments Act. A definition of personal chattels could be added in substantially the form now contained in the New South Wales Bills of Sale Act which is similar to that in the Bills of Sale legislation of Victoria except for the omission of references to crops and horticultural produce. We have set out in Appendix "C" the definitions of "personal chattels" or "chattels" contained in the Bills of Sale legislation of the States and the Australian Capital Territory. It is also desirable, we think, to make it clear that charges over after-acquired property are included. This would still leave outstanding the problem of liens on crops, liens on wool and stock mortgages. Securities of this kind present a problem since the provisions of the Instrument Act do not merely provide for registration, but confer rights on the lienee against third parties that they would not have at common law. It would seem that under the existing provisions of the Companies Act a lienee who availed himself of the permission not to register his lien under the Instrument Act would not be able to take advantage of these special privileges, although the point does not seem to have arisen for decision. At all events, the rights attached to securities of this kind are local in character, and there is much to be said for leaving such securities to be dealt with by local legislation. We would therefore propose that securities of this kind should not require registration under the Companies Acts. Persons who desire to have the benefit of such a security would have to register under the appropriate legislation in the

State in which the property was situated, and a person desiring to search to ascertain whether crops or stock were encumbered would have to search the appropriate register under that legislation. There is some overlap between Part VI. and Parts VII. and VIII. of the Instruments Act, but this would be taken care of by excluding from registration under the Companies Act any instrument to the extent that it constitutes a security which could be registered under Part VII. or Part VIII., or any prescribed enactment in the place where the property is situated. A problem also arises in respect of shipping, for which a system of registration and priorities already exists. There are some difficulties in relation to the registration of shipping, but once a ship is registered the priorities of mortgages are determined by entry on the register. We do not see how a separate and different system of priorities could operate in respect of registered ships, and we recommend that the reference to ships appearing in section 100 (3) be modified by excluding ships entered on an official register.

39. With regard to the question whether the Act should require registration of charges on shares, we have referred above to the possibility that this would have the effect of invalidating deposits of certificates by way of pledge. The Jenkins Committee referred to the anomalous position which arises when a company charges the shares in its subsidiaries. If the company carried on business through branches, it could not charge the assets of the branches without registration, but if it carries on the business through subsidiary companies, it can charge the shares in the subsidiaries without registering the charge. The Jenkins Committee did not think that all charges on shares should be required to be registered, but that charges of shares in subsidiaries should be. Its reason for not applying the rule to all shares was that stated in relation to the proposal to make a general provision covering charges of all kinds, namely, that "its adoption (particularly in the case of commercial documents) would destroy in large measure one of the most important methods by which companies obtain financial assistance" (paragraph 301, quoting paragraph 65 of the Greene Report). While we agree with the Jenkins Committee that the anomaly in relation to shares in subsidiaries should be removed, we think the legislation should go further. There is, in our view, little difference between the case of a company whose substantial assets do not include shares, and one in which its assets consist to a large extent of shares in other companies, whether they are subsidiaries or not. In either case, a creditor may trust the company with credit, only to find that the assets are encumbered by a charge. It is true that, in the existing state of the law, the creditor would be foolish to assume that the shares are unencumbered, while he can protect himself so far as other assets are concerned by making a search. But as the law now stands, a

company wishing to borrow money on the security of shares in other companies would not be able to give any adequate assurance to the lender that no earlier charge had been given. If the Act required the registration of any charge on shares in other companies which was not accompanied by a deposit of the share certificates with the lender, a lender could ensure that his security was good by insisting on production and delivery of the share certificates, and one who attempted to obtain a secret security by an unregistered instrument creating a charge, but did not also get possession of the certificates, would find that his security did not avail him against other creditors.

40. We have considered whether there may be cases in which a company would wish to pledge shares for which it did not hold the certificates, either because the certificates had not yet been issued by the corporation concerned, or because the share certificates were in the of a custodian other than the borrowing company. It might be said that in cases of this kind, the chargee was in a position to get possession of the share certificates, he should when he obtained such possession be in as good a position as if he had held them from the time of the creation of the charge. It is difficult, however, to provide for an exemption from the registration provisions in cases in which, when the charge is created, the chargee has not obtained possession of the certificates, and may or may not subsequently obtain such possession. However the chargee can avoid the need for registration by providing that the charge does not attach until the chargee has obtained possession of the share certificates. On the whole we have come to the conclusion that the exemption should be confined to cases in which the charge is created by or accompanied by the delivery of the certificates for those shares. This solution follows the same, form as that adopted for the exemption in relation to charges over goods which are created by or accompanied by the delivery of documents of title.

41. There are, however, two classes of case in which stockbrokers may require protection for money advanced in respect of shares for which they do not hold the certificates. In the case of a sale of a parcel of shares forming part of a larger parcel for which a single certificate has been issued, it is the practice, we understand, to obtain marked transfers in exchange for the certificate, which is held by the corporation whose shares are the subject of the transaction. Such a transfer is treated as equivalent to the certificate itself, for the purposes of settlement between brokers, and a broker who has paid for the shares on the faith of a marked transfer should be treated as if he had obtained possession of the certificate which he would normally hold as security for payment by his client. The other case is that in which a buying broker has put the selling broker in funds to enable him to take up new shares to which the buying broker's client has become entitled under a rights issue. In such a case the buying broker

will ultimately certificates for both old and new shares, and should be entitled to hold the certificates for the new shares as security for the money advanced by him on his client's behalf. We think that express provision should be made for these cases.

42. We therefore recommend that the list of charges requiring registration should be extended to include:

(a) a charge over the shares of a subsidiary;

(b) a charge over shares in another corporation, not being:

(i) a charge in favour of a broker who has paid for shares purchased or applied for on behalf of the company; or

(ii) a charge created or accompanied by delivery of the certificates for those shares.

43. A matter requiring consideration in relation to sub-section (3) relates to paragraph (a) of that sub-section. The term "debenture" as defined in section 5 is a wide one, and doubts have been expressed as to whether paragraph (a) might not be construed as requiring registration wherever a charge is given to secure a loan evidenced by a written instrument. If it were so, of course, the subsequent paragraphs of sub-section (3) would add little to the scope of the sub-section. We do not think this was what was intended, and indeed the definition of "debenture" was introduced into the legislation after the term first appeared in section 14 of the United Kingdom Act of 1900, the ancestor of sub-section (3) of section 100. It is to be noted also that paragraph (d) refers to a floating charge on the undertaking or property of a company. If, as we assume, paragraph (a) was introduced to cover the case of charges given to support a series of debentures, rather than a single debenture, most charges of this category, being floating charges, would be covered by paragraph (d) in any event. One effect of paragraph (a) is to require registration of charges created by deposit of documents of title to goods, shares, or negotiable instruments, wherever this is done to support an "issue of debentures" (whatever that term denotes). The other paragraphs of the section deal with charges over specific kinds of property, rather than with charges defined in terms of the kind of debt for which security is given, and m our opinion no harm will be done, and a source of uncertainty will be removed, if paragraph (a) omitted altogether.

44. Paragraph (d) of sub-section (3) refers to a floating charge "on the undertaking or property of a company" For the same reasons as those we have given above in relation to Paragraph (h), we think this should be amended to read "on the whole or part of the undertaking or property of a company" It is by no means clear that this meaning would not be given to the existing provision but if paragraph (h) is amended as suggested such a construction would become more difficult to sustain.

EFFECT OF FAILURE TO REGISTER

45, The next question for consideration is the effect which should be attributed to failure to register. The Act states that if the section is not complied with "the charge shall, so far as any security on the company's property is thereby conferred, be void against the liquidator and any
creditor of the company" Professor Gower, in his Ghanaian report, expressed the view that this form of relative invalidity had strange results, in that, if the mortgagee realised his security by selling, the purchaser got a good title and the liquidator or the other creditors would be unable to recover the proceeds of sale. On the other hand, he thought that a purchaser of the property from the company might not get a good title, as the charge is only void against creditors and not against purchasers. As to the first point, we would doubt whether if the mortgagee sold the property he could retain the proceeds against a liquidator if the winding up followed closely enough to bring the preference provisions into operation. If the sale were so far separated from liquidation that these provisions were not available, we would see no reason why the mortgagee should not get the benefit of his security. The second point, however, is more serious. It could be covered, as Professor Gower suggests, by simply making the charge void as a security. In this event, however, it would, we think, be necessary to protect an innocent purchaser who bought the property as a result of a sale by the mortgagee, in circumstances in which the purchaser had no means of knowing that the property was being sold in order to realise the security. In some cases it might be reasonable to expect him to make enquiries. In others it might not. The point could be covered by inserting a provision protecting the rights of a purchaser for value from the mortgagee without notice of the invalidity of the charge but making the mortgagee accountable for the proceeds of sale if the company were wound up within six months of their receipt. However, for reasons stated below, we have come to the conclusion that a better solution would be to substitute a system of priorities for the provisions making charges invalid if not registered within the thirty days period.

PRIORITIES.

46. The Law Society of New South Wales has suggested that some priority system of registration similar to that of the Torrens system is desirable. It did not make any specific recommendation as to the provisions which should be introduced to give effect to the proposal, but suggested that the question should be examined over a period of time, as the working out of such a system would involve the alteration of a vast body of law.

47. As stated above, we have come to the conclusion that the best solution for the problems created by the form of the present legislation is to substitute a system of priorities for the system of partial invalidity. The present system, although stated in terms of validity, is itself really a system of priorities, since the invalidity is stated to operate only as against the liquidator and any creditor of the company. The consequence of failure to register, therefore, is not to destroy the security absolutely but to destroy the preferential rights of the holder of the charge as against creditors and liquidators, but not (as pointed out by Professor Gower) as against persons who purchase the property from the company. The effect of non-registration therefore is to alter the priorities attaching to a charge. But it is apparent that the method of alteration of priorities set out in section 100 is unsatisfactory for several reasons.

48. In the first place, as we have already pointed out, the protection of a person registering a charge is imperfect in that such a person may register the charge at a time when the register is clear, only to find that an earlier charge which was not registered at the time of search or at the time of registration of the second charge is registered within thirty days of its creation, and so takes priority over the second charge. In the second place, charges which have not been perfected by registration ought to be postponed, not only to the claims of creditors, but also to the claims of persons who, having searched and found no relevant charges on the register, have purchased the property subject to the charge from the company. Thirdly, under the present system, if the charge is not registered in time it becomes void as a security to the extent stated iv. section 100, and the situation can only be cured by an application to the Court under section 106. If a suitable system of priorities were laid down, there would be no peed to impose a time limit on registration except insofar as failure to register might involve penalties for non-compliance with the Act. Late registration might result in the postponement of the charge as against interests created prior to registration, but need not affect its priority over interests created after the charge was registered. It would follow that sub-section (10) of section 100, and section 106, could be omitted from the Act. The power to extend the time for filing (section 108) would only affect the question of penalties, and could be made to apply generally, and not merely in the case of out-of-State documents.

49. A further unsatisfactory feature of the present system is that, by virtue of section 37 of the Stamps Act 1958, as amended by section 3 of Act No. 8006, the Registrar cannot accept the documents for lodgment in Victoria until the stamp duty has been paid. As long

as this can be done within the thirty days, the priority of the charge will not be affected under the present system, but the result may be that the order of registration does not reflect the order of priority. But if a system of priority according to date of registration were to be introduced, it would be necessary either to allow the documents to be lodged with the Registrar pending the assessment of duty, or to provide for the chargee to give notice of his claim over the assets to the Registrar.

50. Before a system of priorities can be established, a number of questions must be answered. It should be pointed out, first of all, that such a system differs from a complete registration system in that the property being dealt with is not ordinarily the subject of any registration process. It is accordingly not possible merely to provide that all interests priority in order of registration. An absolute sale of chattels will not be subject to registration either under the Companies Acts or under any other Act. It is therefore necessary to distinguish between charges which are subject to registration and other "unregistrable" interests. In the case of registrable charges, priority should depend on the date of registration, except in the case of a later charge, obtained with notice of the earlier one, and subject also to there being power to register or give notice to the Registrar before stamp duty has been paid, as pointed out in paragraph 49 above. As between registered and unregistered (but registrable) charges, the registered charge should have priority, generally speaking, but we feel that in the case where at the time of the creation of the registered charge the chargee had notice of a prior unregistered charge, the earlier charge should have priority, unless the earlier chargee consented to the later charge being preferred. It may, however, be thought not unreasonable to provide instead that an unregistered (but registrable) charge can never claim priority over a registered charge.

51. As between registered charges and unregistrable interests, the ordinary rule of priority in time would prevail, but as between art unregistered charge and an unregistrable interest the unregistered charge would be postponed to a subsequent unregistrable interest, provided that the person who acquired the unregistrable interest did so for value and without notice of the charge. An alternative view would be to postpone the unregistered charge to all unregistrable interest. This would be the effect of the proposal put forward by Professor Gower for the Ghana Code, but we do not think it is necessary to go so far. It should however, be provided that the burden of proof is on the chargee to prove that the other party had notice of the charge.

52. The position of execution creditors has next to be considered. The existing section says that the charge, so far as any security over the company's property or undertaking is thereby conferred, is void "against the liquidator and any creditor of the company

". This presumably means that a creditor who has levied execution against the property of the company can sell the property free of the charge, and we think this position should be retained.

53. So far as liquidators are concerned, we think that an unregistered charge should not confer any priority in a liquidation. This accords with the present position. But in the case of a registered charge, we think there should be a provision that the person entitled to a registered charge shall not be entitled to the benefit of the charge unless it is registered within thirty days of d5 creation, or at least six months prior to the liquidation. Otherwise a person might avoid dislosure of the existence of the charge until just before the company was about to go into liquidation, and then by a last-minute registration obtain the benefit of the charge.

54. Under the proposed system of priorities, a floating charge, when registered, will have priority as from the date of registration. However, in the case of a floating charge, and subject to any express limitation in the instrument itself, the company may, under the present law, deal with its property in the ordinary course of business until the date when the floating charge attaches, usually by the appointment of a receiver. Such dealings, although later in time, take priority over the floating charge because the chargee is taken to have consented to the company dealing with its assets in this way. We would propose that there should be a general provision for the order of priority to be modified by consent (express or implied) of the person who would otherwise I~: entitled to priority.

55. Provision must also be made for cases in which the owner of goods or shares creates a charge over them by depositing documents of title. The legislation relating to bills of sale excludes from the necessity of registration charges created by the deposit of documents of title, and we have suggested above that in the case of shares, charges should be required to be registered unless the share certificates are held by the chargee. It is not, however, enough merely to provide that such interests are not required to be registered. The holder of a registered charge over shares, or goods for which documents of title are in existence, should not be permitted to enforce his charge against a person who is in possession of the documents of title and has advanced money on them. If he could do so, some kinds of commercial dealing would become impossible, as the person asked to make an advance on documents of title would have to search the register on each occasion to ensure that there were no registered charges. We therefore think that a provision should he included to the effect that a person who holds documents of title as security for a charge or other interest is entitled to priority over a registered charge, even if it is prior in time to the interest or of the person holding the documents of title. For this purpose, documents of title would be defined so as to include the documents referred to in the bills

of sale legislation (in relation to the exemption from registration) and also as including share certificates.

56. A further question to be considered is the effect of the equitable doctrine of tacking. In the case of real estate an equitable mortgagee can gain preference over another equitable mortgagee whose interest is prior in time by purchasing the legal estate. This is so, even in cases in which the person who acquires the legal estate has express notice of the other person's equitable interest at the time he acquired the legal estate. An additional aspect of the doctrine was to enable a first mortgagee, who had the legal estate, to tack further advances on to the original loan, if at the lime when the further advances were made he did not have notice of the existence of the second mortgage. In Victoria and Tasmania, this position has been altered by Statute. Section 04 of the Victorian Property Law Act 1958 restricted the right of a first mortgagee to hold the land as security for further advances to cases:

(a) in which he had made an arrangement to that effect with subsequent mortgagees, or

(b) in which he had no notice of the later mortgage when the further advances were made, or

(c) in which the mortgage imposed an obligation on him to make the further advances.

The section further provides that if the prior mortgage was made expressly to secure a current account or other further advances, a mortgagee of land under the general law is not deemed to have notice of subsequent mortgages merely by reason of their registration under Part I. of the Property Law Act, if they were not so registered at the time when the original mortgage was created, or at the time when the last search by the mortgagee was made, whichever is later. If it were not for this provision, a first mortgagee making advances on current account, or whose mortgage expressly contemplated the making of further advances, would have to search the register before each advance was made.

57. In the case of personal estate, the problem of tacking is unlikely to arise as often, but it is still necessary to deal with it. In the case of valuable personalty, such as an aeroplane, or in cases of floating charges, which may be given to secure an overdraft or a series of debentures, there is always the possibility of successive interests being created, and if a complete system of priorities is to be laid down, the right of the prior chargee to claim the property as security for further advances must be defined. It seems to us to be reasonable to provide that if the instrument creating the charge expressly provides for the making of further advances, the holder of a registered charge

should be entitled to the benefit of the security in respect of further advances, even if they Were made after he received notice, by registration or otherwise, of a subsequent interest, unless he has agreed not to exercise the right. A person who proposed to advance money on the

security of a second mortgage of personal property, and who was aware of the existence of registered charge providing for further advances, would then be required to protect himself obtaining the agreement of the first mortgagee that the second charge should rank before advances made by the holder of the earlier charge after the date of the second mortgage.

58. It is to be noted that a distinction has to be made, in any system of priorities, between cases in which the security is given by the company itself, and cases in which the company acquires property that is already subject to a charge. In the former case, the person entitled to the benefit of the security can protect himself by not advancing his money until all necessary documents have been signed and lodged for registration. In the latter case, the person entitled to the benefit of the charge may have no knowledge of the fact that the company has acquired the property, and may therefore have no opportunity to protect himself against the consequences of non-registration. For this reason, the existing legislation draws a distinction between these two classes of case. In the former, covered by section 100, the consequences of non-registration is that the charge is void against the liquidator and creditors. In the latter, no such penalty is imposed, and failure to register under section 102 is punishable by a fine, to which the company and any officer who is in default are liable.

59. In providing a system of priorities, an analogous distinction has to be drawn. In cases in which a charge is given by the company itself, after the new system has come into force, it is reasonable to provide that non-registration will affect the priority of the charge. But where the charge had come into existence before the property had been acquired by the company, it would be unreasonable to postpone the chargee. On the other hand, there is no reason why a chargee in such a case should not be encouraged to register by a provision that when registered his charge will become entitled to priority in the same way as any other registered charge. Similar considerations apply to charges which do not at present require registration, but which will, if our proposals are adopted, become subject to the requirement. It is also necessary to provide for cases in which an existing charge has been registered in one jurisdiction, but should, under our proposal for a single register, be put on the register in some other jurisdiction.

60. In the Schedule (Appendix "B") we have set out a suggested order of priorities which we believe gives effect to the principles above set out. If this system were adopted, it would not only overcome the unsatisfactory features of the present legislation, but also clear up a number of uncertainties that now exist. We are, however,

conscious of the difficulty of attempting to write a new code in this complex field, and we would suggest that this is eminently a case in which our proposals should be exposed to general scrutiny and criticism before being translated into legislation. We should add that the rules in the Schedule could no doubt be greatly simplified, but we have preferred to leave them in their present form for the time being, so as to spell out all the implications of the priority system we are proposing.

DEBENTURES FORMING PART OF SERIES.

61. Sub-section (5) of section 100 provides that "when a series of debentures containing or giving by reference to any other instrument any charge to the benefit of which the debenture holders of that series are entitled equally is created by a company", it shall be sufficient if certain particulars are lodged, including a statement of" the total amount secured by the whole series ". Difficulties have arisen in the application of this sub-section to cases in which an "open-ended", trust deed has been executed creating a charge for the benefit of holders of debentures which may thereafter be created and issued by the company. The trust deed or the debentures must state a limitation on the amount that the corporation may borrow (section 74B (1)) but this limitation is not usually expressed as a total amount. It appears that in many cases the difficulty is sought to be overcome by registering the trust deed under sub-section (1) and ignoring sub-section (5), but the decision in Cunard Steamship Co. Ltd. v. Hopwood (1908) 2 Ch. 564 suggests that unless sub-section (5) is availed of it may be necessary to treat each separate debenture as registrable under sub-section (1). In our view, where the charge is created by a trust deed, pursuant to which debentures are to be issued, it should be sufficient to register the deed under sub-section (1), and a new sub-section should be added providing that each debenture issued pursuant to such a deed is to be entitled to the benefit of the charge as if it had been separately registered. Sub-section (5) can then be amended to confine it to cases in which the company by resolution creates a series of debentures each containing its own charge clause, and not being supported by a separate trust deed. We have included amendments in the draft attached, embodying these recommendations.

62. It has also been suggested that provision should be made for the registration of variations of the terms of the charge. We think that the Act should require the filing of particulars of any variation in the terms of the charge, and that priority should be accorded to the increased security given by the variation as from the date on which the particulars are filed.

AMENDMENT OF SECTION 100 (2).

63. Section 100 (2) provides that when a charge becomes void under sub-section (1) "the moneys secured .... shall immediately become payable ". This provision gives rise to some difficulties, but if a priority system is substituted for the present partial invalidity, the sub-section can, we think, be omitted altogether.

REGISTRATION BY MORTGAGEE.

64. Section 101 allows registration to be effected by the company or by any person interested in the documents. It has been pointed out, however, that the forms prescribed in the regulations do not provide for signature of such a person on the documents lodged for registration. Indeed, it is difficult to see how the affidavit verifying the execution of the charge could be made by a person other than an officer of the company. But the difficulty only arises if registration is required in a second jurisdiction. The person entitled to the benefit of the charge will normally only advance moneys if all the documents required for registration are completed.

CERTIFICATE OF SATISFACTION.

65. Section 105 provides for the entry, on the register of a memorandum of satisfaction. It has been suggested that a provision should be included, as in the English Act, that the Registrar may be required to issue a certificate to the effect that a memorandum of satisfaction has been registered. If this suggestion was intended merely to provide evidence that the Act had been complied with, it would be unnecessary, as section 12 (3) provides for the authentication by the Registrar of copies of documents lodged in the registry. The English provision seems to arise from a different procedure under which the company lodges the evidence of satisfaction and the Registrar enters a memorandum on the register. In such a case, the Registrar's entry is not a copy of a document filed or lodged in the registry.

66. It may be, however, that the suggestion made was intended to convey an implication that the Registrar's certificate should have some conclusive effect in respect of the question whether the property was still affected by the charge. At the present time the entry of satisfaction does not have this effect, and if a change were to be made the Registrar would in effect become the arbiter between mortgagor and mortgagee as to whether the charge had been satisfied. We see no reason to suggest that it is desirable to commit this function to the Registrar. As we understand it, persons dealing with a company normally make their own enquiries from

persons who appear from the register to have prior securities, and we see no reason to alter this position, as to do so would require the Registrar to conduct a quasi-judicial enquiry as to each memorandum of satisfaction, even though as to many of them no contest or question would be likely to arise thereafter.

DISCLOSURE OF REGISTRATION IN OTHER STATES AND TERRITORIES.

67. One suggestion that was referred to us for consideration was a proposal that companies should be required to disclose in their annual returns the States and Territories in which they are registered as foreign companies. The purpose of the amendment was to enable the holder of the charge to ascertain in what other jurisdictions it might be necessary for him to register the charge. If our recommendations in this report are accepted it will no longer be necessary for the holder of the charge to register in more than one jurisdiction. We have suggested above that a provision should be introduced to enable a person who wishes to search against a foreign company to ascertain in which State or Territory the company was first registered.

REGISTRATION OF COPIES.

68. The present section gives the company the option of lodging either the original instrument or a copy. Unlike the practice in England, where the document is not retained by the Registrar, the practice of Registrars in Australia is to keep the document in the Registry. For this reason it seems convenient to provide for the lodging of a copy verified by affidavit in all cases, and to make express provision for retention of the copy, as without such a provision it is not easy to see why the Australian provisions should be construed differently from the English Act.

69. There does not appear to be any reason why the company should keep a register of charges as provided by section 107. A searcher could not rely on such a register in preference to searching the records at the office of the Registrar. Nevertheless, we think it desirable that copies of instruments should be available for inspection in the registered office in the State or Territory in which registration is effected.

ENDORSEMENT OF CERTIFICATES

70. Section 104 provides that the company shall cause to be endorsed on every debenture forming part of a series or certificate of debenture stock which is issued by the company, and the payment of which is secured by a charge so registered, a copy of the certificate of registration or a statement that registration has been effected and the date of registration but sub-section (2) provides that the section shall not apply to any debenture or certificate of debenture stock

which has been issued by the company before the charge was registered. The reason for the exception is no doubt that as registration can be effected within thirty days, there could be many cases in which the debenture stock was validly issued before registration. But the existence of such an exception goes far to destroy the utility of the rule itself. Indeed, we have grave doubts as to whether the section serves any useful purpose. We note that Professor Gower appeared to think that the provision was burdensome. In the case of small companies, his or her recommendations would have reduced the weight of the burden, but he thought that in the case of public companies the section was "probably vital ". We have some difficulty in seeing the justification for this view, but in any case, under the legislation in this country, section 74D (1) (c) of the Act imposes an obligation on the trustee for debenture holders, in the case of an issue to the public, to see that the provisions of Division 7 are complied with, which would include the obligation to register. In the circumstances we think that section 104 could well be omitted altogether.

AMENDMENT OF REGULATIONS.

71. Some amendments of the Regulations will be required if our recommendations are adopted. In particular, it will be necessary to make regulations prescribing the States and Territories which have adopted corresponding provisions for single registration of charges, and also prescribing the legislative provisions in other States or Territories which correspond with the Victorian legislation dealing with liens on crops, liens on wool and stock mortgages.

72. Form 26 in the Second Schedule of the Regulations should be amended by adding the words "(if any)" after the word "amount," since, as pointed out in paragraph 61 above, a money amount need not be specified in the instrument creating the charge.

TRANSITIONAL PROBLEMS.

73. As we have pointed out above (paragraph 59), in establishing a system of priorities such as we have suggested, it is necessary to provide that a charge which has been duly registered under the existing legislation will not lose its priority by reason of the failure of the chargee to register in a new jurisdiction after the new system comes into force. It would of course be possible to impose on all persons entitled to existing charges (not registered in the "home" State) an obligation to register within a specified time, but we think that such a provision, besides putting the chargee to considerable expense to protect his security, might lead

to very unfair results. A chargee who had taken legal advice at the time of the creation of the charge, and had done all that he was advised to do at that time, might well be unaware that the change in the law required him to take further steps to protect himself.

74. On the other hand, while the introduction of our proposals would greatly reduce the burden of registration, and would also simplify the task of the searcher in the case of companies incorporated after the new system came into force, it would still be necessary, in the case of a company incorporated before the commencement of the scheme, to search in other jurisdictions. A search in the" home" State or Territory would not reveal the existence of charges over property in other States or Territories, as to which the chargee had taken the view, contrary to that expressed in paragraph 7 above, that registration under the existing Acts is only required in the place where the property is situated. This difficulty would continue indefinitely. Nor is it entirely satisfactory to deal with the matter by placing an obligation on the company to effect complete registration of all charges in the "home" State or Territory. If the company should fail to file a complete record of all existing charges, a creditor might suffer because of that default. Ideally, if the Registrars could undertake to transmit to the "home" State details of all charges registered in respect of foreign companies in their respective States, the difficulty would disappear. We are advised, however, that the Registrars would find such a task very onerous, since in many cases charges remain on the register even after they have been satisfied. There are also problems arising from changes of name, and from the fact that until recently (in Victoria at least) the register of charges was kept separately from the file relating to the company concerned, and the task of searching the company files and the charges register and relating the two would be formidable.

75. Perhaps as a first step, the legislation could provide that every company incorporated in the State should include in its annual return a statement setting out whether it was or had at any time been registered as a foreign company in any other State or Territory, and if so, details of the date of registration and if it has ceased to be so registered, the date of cessation. A person wishing to make a search could, by referring to the first such statement filed after the passing of' the new legislation, decide in which of those jurisdictions he would need to search. In some cases the location of the property over which he proposed to take a charge would be the determining factor. In others, he might wish to search in all such jurisdictions in order to see to what extent the assets of the company had been encumbered. In other cases, the date of registration as a foreign company or of cessation of the registration might be such as either to make a search in the other jurisdiction unnecessary or to limit the period required to be covered. Here again, there is always the possibility that the company might file an inaccurate return as to foreign

registrations, but the risk of an untrue statement here would be much less than in the case of an obligation to file details of all charges, and if the searcher had any reason to mistrust the information on the file he could always search in all States and Territories.

76. Whatever difficulties might remain, the position would be better than it is at present so far as searches are concerned, and so far as registration is concerned it would be very much better. In course of time the number of cases in which interstate searches would be required would be a diminishing proportion, and at some stage it might become possible to consider imposing an obligation on the chargee to register any charges outstanding since before the new legislation, if not already registered in the "home" State.

CONCLUSION.

77. To some extent the changes we recommend in the existing legislation are interdependent, but some of them at least can stand by themselves. However, as we have embodied them all in a fresh draft of Division 7 (Appendix "A"), and as we have not considered to what extent individual proposals might require modification if they were to stand alone, we content ourselves with a recommendation that the draft embodied in Appendix "A" be substituted for the existing Division 7. As indicated in paragraph 60 of this Report, however, we envisage that the report and the draft will be exposed to public comment and criticism before final adoption, in accordance with the practice adopted by the Standing Committee in relation to our previous reports. We should add that we have not included in the draft any provisions designed to deal with the traditional problems referred to in paragraphs 73-76 of the Report, as it may well be that the Registrars may be able to devise more effective methods of dealing with the situation than we have felt able to suggest.

R. M. EGGLESTON,

J. M. RODD,

P. C. E. COX.

7th July, 1972.

APPENDIX "A".

REDRAFT OF DIVISION 7 - REGISTRATION OF CHARGES.

100. (1) Subject to this Division where a charge to which this section applies affecting property wherever situated is created by a company there shall be lodged with the Registrar for registration within thirty days after the creation of the charge a statement of the prescribed particulars and (where the charge is created or evidenced by an instrument) a copy of the instrument together with an affidavit verifying its execution and also verifying the copy as being a true copy.

(2) The priorities of registered and unregistered charges in relation to each other and in relation to other interests shall be in accordance with the rules set out in the Schedule.*

(3) The charges to which this section applies are:

(a) (Omitted).

(b) a charge on uncalled share capital of a company;

(c) any written charge or assignment or other instrument whereby security is given over personal chattels (including personal chattels which are unascertained or are to be acquired in the future) but not including:

(i) an instrument insofar as it constitutes a lien or mortgage which is or could be registered under the provisions of Part VII. or Part VIII. of the Instruments Act 1958 or any prescribed enactment in another State or Territory of the Commonwealth; or

(ii) a charge or lien in respect of goods created by or accompanied by the delivery of any bill of lading, warehousekeeper's certificate, wharfinger's certificate, warrant or order for the delivery of those goods or any other document relating to those goods used in the ordinary course of business as proof of the possession or control of goods or authorising or purporting to authorise either by endorsement or delivery the possessor of such document to transfer or receive goods thereby represented;

(d) a floating charge on the whole or part of the undertaking or property of a company;

(e) a charge on calls made but not paid;

(f)a charge on a ship or aircraft or any share in a ship or aircraft (not including a ship registered on any official register entry in which confers title);

(g) subject to any law of the Commonwealth, a charge on goodwill, on a patent or licence under a patent, on a trade mark, or on a copyright or a licence under a copyright;

(h) a charge over any present or future book debts of a company;

(i) a charge created by a company over shares in a subsidiary of that company; and

(j) a charge over shares in another corporation, not being:

(i) a charge in favour of a broker who has paid for shares purchased or applied for on behalf of the company; or

(ii) a charge created by or accompanied by delivery of the certificates for those shares.

(4) Registration may be effected under this section notwithstanding that further action or further proceedings (whether within or outside Victoria) may be necessary to make the charge valid or effectual.

(4A) Where an instrument creating a charge has been registered under sub-section (1) of this section and such charge secures an issue of debentures, all debentures issued pursuant to that instrument shall have the benefit of that charge to the same extent as if each such debenture had been registered as a charge pursuant to that sub-section.

(5) When a resolution is passed by a company authorising the issue of a series of debentures conferring on the holders thereof a charge to the benefit of which the debenture holders of that series are entitled equally, and there is no instrument creating or evidencing the charge other than that resolution or those debentures, it shall be sufficient if there are lodged with the Registrar for registration within thirty days after the execution of the first debenture of the series, a statement containing the following particulars:

(a) the total amount (if any) secured by the whole series;

(b) the date of the resolution authorising the issue of the series;

(c) a general description of the property charged; and

(d) the names of the trustee (if any) for the debenture holders:

together with a copy of the resolution authorising the issue of the series and a copy of the first of such debentures, and an affidavit verifying its execution and verifying the copies to be true copies; and save as aforesaid it shall not be necessary to register any debenture forming part of that series.

(6) For the purposes of sub-section (5) of this section where more than one resolution is passed authorising the issue of debentures in the series a copy of each subsequent resolution after the first shall be lodged within thirty days after the passing thereof.

* *"See Appendix "B".*

APPENDIX "A " - continued.

(7) Where any commission allowance or discount has been paid or made either directly or indirectly by a company to any person in consideration of his whether absolutely or conditionally subscribing or agreeing to subscribe or procuring or agreeing to procure subscriptions, whether absolute or conditional, for any debentures the particulars required to be lodged under this section shall include particulars as to the amount or rate per centum of the commission allowance or discount so paid or made.

(8) The deposit of any debentures as security for any debt of tile company shall not for the purpose of sub-section (7) of this section be treated as the issue of the debentures at a discount.

(9) No transaction or instrument whereby a corporation transfers or assigns or gives security over any personal chattels (as defined in the Instruments Act 1958) or any book debts (as therein defined) need be filed or registered under Part VI. or Part IX. of the Instruments Act 1958 unless the same is made or given by the corporation jointly with a person who is not a corporation.

(10) (Omitted)

(11) For the purposes of paragraph (c) of sub-section (3) of this section, the expression "personal chattels" shall be taken to mean goods furniture fixtures or other articles capable of complete transfer by delivery (either at the time of the making of any charge assignment or other instrument or at any time thereafter) hut does not include documents of title in respect of real estate, chattel interests in real estate, nor shares or interests in the stock funds or securities of any government or in the capital or property of any incorporated or joint stock company, nor chooses in action nor any stock or produce upon any farm or lands which by virtue of any covenant or agreement ought not to be removed from any farm where the same are at the time off the making of such charge assignment or other instrument.

(12) For the purposes of paragraph (h) of sub-section (3) of this section, "book debts" means any debt due or to become due at some future time to a company on account of or in connection with any professional trade or business carried on by it whether entered in any book or not, and includes future debts of the same nature although not incurred or owing at the time of the creation of the charge, but does not include any debt owing in respect of any mortgage lease debenture stock deposit receipt judgment bond fire or life insurance policy or contract for sale of real property nor any debt for which a promissory note or acceptance has been given.

101. (1) Documents and particulars required to be lodged for registration in accordance with section 100 may be lodged for registration by the company concerned or by any person interested in the documents, but if default is made in complying with that 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.

(2) Where registration is effected by some person other than the company, that person shall be entitled to recover from the company the amount of any fees properly paid by him on the registration.

102.(1) Where it company acquires any property which is subject to a charge of any such kind, as would, if it had been created by the company after the acquisition of the property, have been required to be registered under this Division, the company shall cause a statement of the prescribed particulars and a copy of the instrument (if any) by which the charge was created or is evidenced accompanied by an affidavit containing such particulars as are prescribed, and also verifying the copy (if any) as a true copy, to he lodged with the Registrar for registration within thirty days after the date on which the acquisition is completed.

(2) Where a foreign company {not being a company incorporated or registered as a foreign company in a prescribed State or Territory) becomes registered in the State and has prior to such registration:

(a) created a charge which if it had been created by a company incorporated in the State would have been required to be registered under this Division; or

(b) acquired property which is subject to a charge of any such kind as would if it had been created by a company incorporated in the State have been required to be registered under this Division - the foreign company shall cause a statement of the prescribed particulars and a copy of the instrument (if any) by which the charge was created or is evidenced accompanied by an affidavit containing such particulars as are prescribed, and also verifying the copy (if any) as a true copy, to be lodged with the Registrar For registration on the date of the registration of the company in the state.

(3) Where a foreign company which has registered charges pursuant to section 100 or this section ceases to have a place of business or to carry on business in Victoria, it shall file with the notice referred to in sub-section (1) of section 352 a notice stating whether it is registered as a foreign company in any other prescribed State or Territory, and, if more than one, in which of

such States or Territories it elects to file the particulars of charges registered in Victoria.

(4) if default is made in complying with this section, the company or the foreign company and every officer of' the company or foreign company who is in default shall be guilty of an offence against this Act.

Penalty: $100. Default penalty.

APPENDIX "A " - continued.

103. (1) The registrar shall retain all copies of instruments lodged under this Division and shall keep a register of all the charges lodged for registration under this Division and shall enter in the register with respect to those charges the following particulars:

(a) in the case of a charge to the benefit of which the holders of a series of debentures are entitled, such particulars as are required to be contained in a statement furnished under sub-section (5) of section 100;

(b) in the case of any other charge:

(i) if the charge is a charge created by the company, the date of its creation, and if the charge was a charge existing on property acquired by the company the date of the acquisition of the property;

(ii) the amount (if any) secured by the charge;

(iii) a description sufficient to identify the property charged; and

(iv) the name of the person entitled to the charge.

(2) The Registrar. shall issue a certificate of every registration stating, if applicable, the amount secured by the charge and the certificate shall be conclusive evidence that the requirements as to registration have been complied with.

104. (Omitted).

105. (1) Where, with respect to any registered charge:

(a) the debt for which the charge was given has been paid or satisfied in whole or in part; or

(b) the property or undertaking charged or any part thereof has been released from the charge or has ceased to form part of the property or undertaking of the company concerned:

the company may lodge with the Registrar in the prescribed form a memorandum of satisfaction in whole or in part, or of the fact that the property or undertaking or any part thereof has been released from the charge or has ceased to form part of the company's property or undertaking, as the case may be, and the Registrar shall enter particulars of that memorandum in the register.

(2) The memorandum must be supported by evidence sufficient to satisfy the Registrar of the payment satisfaction release or ceasing referred to in sub-section (1) of this section.

106. (Omitted).

107. (1) Every company shall keep at its registered office within the State a copy of every instrument creating or evidencing a charge which has been registered pursuant to this Division.

(2) Copies of instruments kept in pursuance of this section shall be open to the inspection of any creditor or member of the company without fee, and to the inspection of any other person on payment of such fee not exceeding one dollar as is fixed by the company.

(3) If default is made in complying with any of the provisions 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: $200. Default penalty.

108. (1) Where under this Division an instrument deed statement or other document is required to be lodged with the Registrar within a specified time, the time so specified shall by force of this section, in relation to an instrument deed statement or other document executed or made in a place out of the State, be extended by seven days.

(2) The Registrar may, before the expiration of any time fixed for lodgement under this Division, extend such time for such period as he thinks proper.

108A. (1) Where in the case of any charge registered pursuant to this Division any variation is made in the terms of the charge, particulars of such variation shall be lodged within thirty days of the making of such variation.

(2) Such particulars shall identify the terms of the original charge that have been varied and shall indicate the nature of the variation made in each such term.

(3) Where the effect of the variation is to increase the extent of the security or the amount for which security is available the priority accorded to a registered charge shall be available in respect of such increase as from the date on which particulars have been filed in accordance with this section.

(4) 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.

109. (1) All charges registered under the repealed Act or any corresponding provision in any prescribed State or Territory shall be deemed to have been registered under and for the purposes of this Act.

(2) Where a charge created before the commencement of this Act was not a charge to which section 100 of the repealed Act applied within the meaning of sub-section (3) of that section, but is a charge to which section 100 applies, section 100 shall apply as if for the words "within thirty days after the creation of the charge" there were substituted the words "within thirty days after the commencement of this Act

APPENDIX "A "--continued.

110. (1) A reference in this Division to a company shall be read as including a reference to a foreign company registered as such pursuant to Division 3 of Part XI. (not being a company incorporated in any prescribed State or Territory, and not being a foreign company which at the time of its first registration in Victoria was registered as a foreign company in a prescribed State or Territory).

(2} Where at the date of commencement of this Act a foreign company is registered as such in Victoria and is neither incorporated nor registered as a foreign company in a prescribed State or Territory, it shall register charges pursuant to section 102 as if it had become registered as a foreign company within thirty days of the commencement of this Act.

(3) Where at the date of commencement of this Act a foreign company (not being a company incorporated in a prescribed State or Territory) is registered as a foreign company in Victoria and in one or more prescribed States or Territories it shall within thirty days of the commencement of this Act give notice in writing to the Registrar electing to treat Victoria or one of such States or Territories as that in which it first became registered as a foreign corporation and if it specifies the State of Victoria for that purpose it shall register charges pursuant to section 102 as if it had become registered as a foreign company on the date of such notice and was not registered as a foreign company in another State or territory.

(4) Where after the commencement of this Act a foreign company which is registered as such in Victoria but which is not required to register charges in Victoria by virtue of sub-section (1) or (2) of this section, gives notice (pursuant to the provisions of the laws of the State or Territory corresponding to sub-section (1) of section 352 of this Act) to the appropriate officer of the State or Territory in which it is required by virtue of the corresponding provisions of the legislation of that State or Territory to register charges stating that it has ceased to have a place of business or carry on business in that State or territory, it shall, unless by notice in writing to the Registrar it elects to treat some other prescribed Stale or Territory in which it is registered as a foreign company as the prescribed State or Territory in which it was first registered as a foreign company register charges on and from the day of giving notice to the said officer as if it had become registered as a foreign company in Victoria on the date on which it gave such notice.

(5) Where a foreign company (not being a company incorporated or registered as a foreign company in a prescribed State or Territory) becomes registered as a foreign company in Victoria and on the same day becomes registered as a foreign company in a prescribed State or Territory, it shall at the time of such registration give notice in writing to the Registrar electing to treat Victoria or a specified State or Territory as that in which it first became registered as a foreign corporation, and if it specifies Victoria for that purpose it shall register charges pursuant to section 102 as if it had become registered as a foreign company on that day and was not registered as a foreign company in another State or Territory.

(6) Where a foreign company (not being a company incorporated in a prescribed State or Territory) becomes registered as a foreign company in Victoria it shall on the day of such registration file a notice m writing stating whether it is registered as a foreign company in any prescribed State or Territory, and if so, which of the States or Territories in which it is registered as a foreign company is to be treated as that in which it was first registered as a foreign company for the purposes of this Division.

(7) Where a foreign company has given notice to the Registrar or other proper officer in a prescribed Slate or Territory electing to treat Victoria as the prescribed State or Territory in which it was first registered as a foreign company, it shall register charges as if it had become registered as a foreign company in Victoria on the date on which it gave such notice.

(8) Nothing in this Division shall require the registration of any charge made or given by a corporation not incorporated in a State or Territory of the Commonwealth if such charge relates solely to property not situated within the limits of the Commonwealth and any prescribed Territory.

110A. Where under the corresponding provisions of the law of a prescribed State or Territory a corporation is required to register charges in that State or Territory, the same effect shall be given in Victoria to registration or non-registration in that State or Territory of charges affecting the property of that corporation as if the corporation were a company to which this Division applies, and the registration (if any) had been effected in Victoria.

APPENDIX "B".

THE SCHEDULE.

ORDER OF PRIORITIES.

1. The following order of priorities is subject to any consent (express or implied), given by the person who would otherwise be entitled to priority, according priority to the holder of another interest.

2. Subject to 1. above, a registered charge has priority over:

(a) All charges subsequently registered, unless tile later registered charge was entitled to priority under 3 (c) below, prior to its registration.

(b) All other subsequent interests, whether registrable or not, other than an interest supported by documents of title.

(c) Prior unregistered charges, unless the prior chargee proves that the registered chargee had notice of tile prior charge at the time when the registered charge was created.

(d) Execution creditors.

(e) Liquidators, if the charge was registered within thirty days of its creation, or at least six months before the commencement of the winding tip.

3. Subject to 1. above, a registered charge is postponed to:

(a) Charges previously registered, unless the later registered charge was entitled to priority under 3 (c) below, prior to its registration.

(b) Prior unregistrable interests.

(c) Prior unregistered charges of which it is proved that the registered chargee had notice at the time when the registered charge was created.

(d) Liquidators, unless the charge was registered within thirty clays of its creation, or at least six months before the commencement of the winding up.

(e) Interests (whether prior or subsequent) supported by documents of title.

4. Subject to 1. above, an unregistered charge has priority over

(a) Subsequent unregistered charges.

(b) Subsequent registered charges, if it is proved that the subsequent chargee had notice of the prior charge at the time when the subsequent charge was created.

(c) A subsequent unregistrable interest (other than an interest supported by documents of title), if the chargee proves that the person who acquired that interest did not give value or had notice of the charge at the time when that interest was acquired.

5. Subject to 1. above, an unregistered charge is postponed to:

(a) All prior interests, whether registrable or not.

(b) Subsequent registered charges, unless it is proved that the later chargee had notice of the earlier charge at the time of the creation of the later charge.

(c) A subsequent unregistrable interest, unless the chargee proves that that interest (not being an interest supported by documents of title) was not acquired for value or that at the time when it was acquired, the person acquiring it had notice of the charge.
(d) Execution creditors.
(e) Liquidators.

6. Subject to I. above, where a registered charge is expressed to be made to secure an indeterminate amount, or a determinate amount and further advances, the chargee shall be entitled to rely on the charge as security for further advances to the same extent as it is available in respect of the original amount advanced, notwithstanding that at the time of such further advances the chargee was aware of the creation of a subsequent interest in the property charged.

7. A person who acquires an interest in property which is subject to an unregistered charge, whether he searches the register or not, shall not be deemed to have notice of the unregistered charge unless he knows of its existence or is aware of facts that give rise to an inference that the property is subject to an unregistered charge.

8. (1) In these rules, "charge" means a charge of a kind to which section 100 applies, as set out in sub-section (3) of that section.

(2) A charge required to be registered pursuant to section 102, sub-section (2) of section 109, or sub-sections (2) (3) (4) (5) or (7) of section 110 shall be treated as if it were an unregistrable

interest until actually registered but when so registered shall have the priority accorded to a registered charge as from the time of such registration, but without prejudice to any rights of the chargee acquired prior to registration.

9. Where tile property charged includes an interest in land registrable under the Property Law Act or the Transfer of Land Act or any corresponding enactment in the place where the land is situated, the priorities set out in this Schedule shall not apply in respect of that interest.

10. Except in the case of a floating charge, where a charge gives security over property of such a kind that the charge would require registration, and also over other property, the priorities set out in this Schedule shall apply in respect of the first-mentioned property, but not in respect of the other property.

APPENDIX "B " - continued.

11. In this Schedule:

(a) "Prior" and "subsequent" when used in relation to a registered charge, refer to the date of registration, and not to the date on which the charge was created.

(b) "Interest supported by documents of title" means:

(i) any interest in goods arising in the ordinary course of business and created by or accompanied by the delivery of any bill of lading, warehousekeeper's certificate, wharfinger's certificate, warrant or order for the delivery of goods or any other document relating to those goods used in the ordinary course of business as proof of the possession or control of goods or authorising or purporting to authorise either by endorsement or delivery the possessor of such document to transfer or receive goods thereby represented; and

(ii) any interest in shares ill a corporation arising ill tile ordinary course of business, being either:

(A) the interest of a broker who has paid for shares purchased or applied For on behalf of the company concerned; or

(B) an interest created by or accompanied by delivery of the certificates for those shares.

APPENDIX "C"

DEFINITIONS OF "PERSONAL CHATTELS" CONTAINED IN THE BILLS OF SALE AND INSTRUMENTS LEGISLATION OF THE AUSTRALIAN STATES AND THE AUSTRALIAN CAPITAL TERRITORY.

NEW SOUTH WALES:

Bills of Sale Act, 1898-1938, s. 3:

"Personal chattels" shall mean goods, furniture, fixtures, and other articles capable of complete transfer by delivery (either at the time of the making or giving of a bill of sale of the personal chattels comprised in or made subject to the bill of sale or at any time thereafter); and shall not include chattel interests in real estate, nor shares or interests in the stock, funds, or securities of any Government, or in the capital or property of any incorporated or joint stock company, nor chooses in action, nor any stock or produce upon any farm or lands which by virtue of any covenant or agreement, or of the custom of the country, ought not to be removed from any farm where the same are at the time of making or giving of such bill of sale.

VICTORIA:

Instruments Act 1958, s. 32:

"Personal chattels" includes goods furniture fixtures and other articles capable of complete transfer by delivery (either at the time of the making or giving of a bill of sale of the personal chattels specified in the bill or at any time thereafter) and also a growing crop or growing crops of agricultural produce including perennial grass or of horticultural produce including fruit of any kind; but does not include chattel interests in real estate, nor shares or interests in the stock funds or securities of any Government or in the capital or property of any incorporated or jointstock company, nor chooses in action, nor any stock or produce upon any farm or lands which by virtue of any covenant or agreement ought not to be removed from any farm where the same are at the time of the making or giving of such bill of sale.

QUEENSLAND:

Bills of Sale and Other Instruments Act, 1955, s. 6:

"Chattels "--Furniture, goods, chattels, and other articles capable of complete transfer by delivery, and (when separately assigned or charged) fixtures: The term does not include:

(i) Chattel interests in real estate, title-deeds, negotiable instruments, or chooses in action; or

(ii) Fixtures (except trade machinery) when assigned together with a freehold or leasehold interest in any land or building to which they are affixed; or

(iii) Growing crops when assigned with any interest in the land on which they grow; or

(iv) Shares and interests in the stock, funds, or securities of any Government, any Crown corporation or instrumentality or corporation or instrumentality representing the Crown, or any Local Authority; or

(v) Shares and interests in the capital or property of any company or other corporate body; or

(vi) Debentures and interest coupons issued by any Government, any Crown corporation or instrumentality or corporation or instrumentality representing the Crown, or any Local Authority, or any company or other corporate body; or

(vii) Stock, or wool on the sheep's back.

SOUTH AUSTRALIA:

Bills of Sale Act, 1886-1935, s. 2:

"Personal chattels" shall mean horses or cattle, furniture, goods, chattels, and other articles capable of complete transfer by delivery, and (when separately assigned or charged) fixtures or growing crops; but shall not include chattel interests in real estate, nor fixtures (except trade machinery, as hereinafter defined), when assigned together with a freehold or leasehold interest in any land or building to which they are affixed, nor growing crops when assigned together with any interest in the land on which they grow, nor debentures, shares, or interests in the stock, funds, or securities of any Government, or in the capital or property of any loan, mortgage, or incorporated or joint-stock company, nor chooses in action; nor sheep, pigs, goats, camels, mules, or donkeys, nor wool on the sheep's back, nor more than ten horses or more than ten head of cattle belonging to one owner.

WESTERN AUSTRALIA:

Bills of Sale Act, 1899-1957, s. 5:

"Chattels" includes any personal property capable of complete transfer by delivery, including fixtures and growing crops when

separately assigned, charged, or bailed, and also book debts, but shall not include chooses in action other than book debts.

No fixtures shall be deemed separately assigned, charged or bailed, and no growing crops shall be deemed separately assigned, or charged by reason only that they are assigned, charged, or bailed, or assigned or charged respectively by separate words, or that power is given to sever them from the premises to which they are affixed or on which they grow, without otherwise taking possession of or dealing with such premises, if by the same instrument any freehold or leasehold interest in the premises to which such fixtures are affixed, or on which such crops grow, is also conveyed, transferred, bailed, or mortgaged to the same person or persons.

APPENDIX "C " - continued.

The machinery used in or attached to any factory or workshop as hereinafter defined, shall be chattels within the meaning of this Act; but

(1) The fixed motive-powers, such as the water-wheels and steam and other engines, and the steam-boilers, donkey-engines, and other fixed appurtenances of the said motive powers; and

(2) The fixed-power machinery, such as the shafts, wheels, drums, and their fixed appurtenances which transmit the action of the motive-power to the other machinery, fixed and loose; and

(3) The pipes for steam, gas, and water, in the factory or workshop, shall not be chattels within the meaning of this Act.

TASMANIA:

Bills of Sale Act 1900, s. 4:

"Personal chattels" means goods, stock-in-trade, furniture, and other articles capable of complete transfer by delivery, including stock of every description and their produce and progeny, and also wool growing on sheep wherever assigned or charged separately from the sheep, and also, when separately assigned or charged, fixtures, but shall not include chattel interests in real estate, nor fixtures when assigned together with a freehold or leasehold interest in any land or building to which they are affixed, nor growing crops when assigned together with any interest in the land on which they grow, nor shares or interests in the stock funds or securities of any Government, or of any local or corporate body, nor shares or interests in the capital or property of any company or other corporate body, nor debentures or interest coupons issued by any Government or by any local or corporate body, nor chooses in action nor any stock or produce upon any farm or lands which by virtue of any covenant or agreement between the landlord and the tenant of such farm or lands ought not be to removed from any farm or lands where the same are at the time of making or giving of such bill of sale.

AUSTRALIAN CAPITAL TERRITORY:

Instruments Ordinance 1933-1949, s. 8:

"Personal chattels" means goods, furniture, fixtures and other articles capable of complete transfer by delivery; but does not

include chattel interests in real estate, or shares or interests in the stock, funds or securities of any Government, or in the capital or property of any incorporated or joint stock company, or theses in action, or any stock or produce upon any farm or lands which by virtue of any covenant or agreement, or of the custom of the country, ought not be removed from any farm or lands where the stock or produce are at the time of making or giving of the bill of sale.

APPENDIX "D"

THE VARYING FORMS OF SECTION 100 SUB-SECTIONS (3) AND (9) IN THE COMPANIES OF THE AUSTRALIAN STATES AND THE AUSTRALIAN CAPITAL TERRITORY.

NEW SOUTH WALES:

100. (3) (c) a charge or an assignment created or evidenced by an instrument which, if executed by an individual, would be invalid or of limited effect if not filed or registered as:

(i) a bill of sale under the provisions of the Bills of Sale Act 1898, as amended by subsequent Acts; or

(ii) a lien on crops, lien on wool or stock mortgage under the provisions of the Liens Crops and Wool and Stock Mortgages Act of 1898.

100. (9) Notwithstanding anything in any other Act a charge requiring registration under section need not be filed or registered and shall not be subject to avoidance under the provisions of the Bills of Sale Act 1898, as amended by subsequent Acts, or the Liens on Crops and Wool and Stock Mortgages Act of 1898, and upon registration under this Part a charge, which, but for this sub-section would need to be filed or registered under the provisions of either of the last mentioned Acts, shall for all purposes have effect and be so valid as if the same had been duly filed or registered thereunder.

VICTORIA:

100. (3)(c)a charge or all assignment created or evidenced by an instrument (including instruments creating or evidencing absolute bills of sale or absolute assignments or transfers of book debts) which, if executed by an individual, would be invalid or of limited effect if not filed or registered under the Instruments Act 1958:

100. (9) No charge or assignment to which this section applies need be filed or registered under the Instruments Act 1958.

QUEENSLAND:

100. (3) (c) a charge or an assignment created or evidenced by an instrument (including instruments creating or evidencing absolute bills of sale) which if executed by an individual would be of limited effect if not registered under "The Bills of Sale and Other

Instruments Act of 1955" or "The Liens on Crops of Sugar Cane Acts, 1931 to 1951";

100. (9) No charge or assignment to which this Section applies need be filed or registered under "The Bills of Sale and Other Instruments Act of 1955" or "The Liens on Crops of Sugar Cane Acts, 1931 to 1951."

SOUTH AUSTRALIA:

100. (3) (a) a charge or an assignment created or evidenced by an instrument which, if executed by an individual, would be invalid or of limited effect if not filed or registered under:

(i) The Bills of Sale Act, 1886, as amended;

(ii) the Liens on Fruit Act, 1923, as amended; or

(iii) the Stock Mortgages and Wool Liens Act, 1924, as amended;

100. (9) Notwithstanding anything in any other Act, a charge requiring registration under this section need not be filed or registered and shall not be subject to avoidance under the Bills of Sale Act, 1886, as amended, the Liens on Fruit Act, 1923, as amended, or the Stock Mortgages and Wool Liens Act, 1924, as amended, and upon registration under this Division such a charge which, but for this sub-section, would need to be filed or registered under any of those Acts, shall for all purposes have effect and be as valid and effectual as if it had been duly filed or registered thereunder.

WESTERN AUSTRALIA:

100. (3) (c) a charge or an assignment created or evidenced by an instrument (including instruments creating or evidencing absolute bills of sale or absolute assignments or transfers of book debts) that would be invalid or of limited effect if not filed or registered under the Bills of Sale Act, 1899.

100. (9) (a) Notwithstanding the provisions of any other Act, a charge or assignment to which this section applies is not required to be filed or registered under the provisions of the Bills of Sale Act 1899, and is not subject to avoidance under those provisions, but those provisions shall, subject to this section, continue to apply to any charge or assignment registered under that Act before the commencement of this Act until the charge or assignment is registered under this Act in accordance with the provisions of paragraph (b) of this sub-section.

(b) An existing charge or assignment that:

(i) is registered under the Bills of Sale Act, 1899; and

(ii) is a charge or assignment to which this Division would have applied, if this Act had been in Force at the date of such registration,

shall be registered under this Act at any time during a period of sixty days before the date on which the registration of the charge or assignment would, but for this sub-section, be next required, after the coming into operation of this Act, to be renewed under the Bills of Sale Act. 1899,

APPENDIX "D " - continued.

(c) Upon the registration of a charge or assignment pursuant to paragraph (b) of this section:

(i) the provisions of this Act shall apply to the charge or assignment and the charge or assignment is not required to be registered under the Bills of Sale Act, 1899;

(ii) the original or copy of the charge or assignment filed in the registry under the Bills of Sale Act, 1899, shall be lodged by the Registrar under that Act with the Registrar.

(d) Registration of a charge or assignment under this sub-section shall be effected by lodging with the Registrar for registration, within the period referred to in paragraph (b) of this sub-section, a statement of the prescribed particulars together with the prescribed fee.

(e) If this sub-section is not complied with in relation to a charge or assignment created by a company, the charge or assignment shall, so far as any security on the company's property or undertaking is thereby conferred, be void against the liquidator and any creditor of the company.

TASMANIA:

100. (3) (c) any:

(i) charge or assignment created or evidenced by an instrument which, if executed by an individual, would be required by the Bills of Sale Act 1900 to be registered thereunder; or

(ii) instrument creating or evidencing an absolute bill of sale or an assignment or a transfer of book debts;

100. (9) A charge or an assignment to which this section applies need not be registered under the Bill of Sale Act 1900 and is not subject to avoidance thereunder.

AUSTRALIAN CAPITAL TERRITORY:

100. (3) The charges to which this section applies are:

(e).a charge or an assignment created or evidenced by an instrument (including instruments creating or evidencing absolute bills of sale or absolute assignments or transfers of book debts) which,

if executed by an individual, would be invalid or of limited effect if not registered under the Instruments Ordinance 1933-1949;

100. (9)A charge to which this section applies need not be registered, and is not subject to avoidance, under the provisions of the Instruments Ordinance 1933-1949, and, upon registration under this Part, a charge which, but for this sub-section, would need to be registered under the provisions of that Ordinance, shall, for all purposes, have effect and be as valid as if it had been duly registered under that Ordinance.