COMPANIES AND SECURITIES LAW REVIEW COMMITTEE

DISCUSSION PAPER NO. 4
SHARE PREMIUMS

MARCH, 1986

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COMPANIES AND SECURITIES LAW REVIEW COMMITTEE

The Companies and Securities Law Review Committee was established late in 1983 by the Ministerial Council for Companies and Securities pursuant to the inter-governmental agreement between the Commonwealth and the States of 22nd December, 1978.

The Committee's function is to assist the Ministerial Council by carrying out research into and advising on law reform in relation to legislation concerning companies and the regulation of the securities industry.

The Committee consists of five part-time members, namely:

Mr. Reginald I. Barrett
Mr. David A. Crawford
Professor Harold A.J. Ford (Chairman)
Mr. Anthony B. Greenwood
Mr. Keith W. Halkerston.

The full-time research Director for the Committee is Mr. John B. Kluver.

The Committee's office is at Level 24, M.L.C. Centre, 19-29 Martin Place, Sydney, New South Wales, 2000.

General Aims of the Committee

To develop improvements of substance and form in such parts of companies and securities law as are referred to the Committee by the Ministerial Council and for that purpose to develop proposals for laws:

* which are practical in the field of company law and securities regulation;

* which facilitate, consistently with the public interest, the activities of persons who operate companies, invest in companies or deal with companies and of persons who have dealings in securities; and

* which do not increase regulation beyond the level needed for the proper protection of persons who have dealings with companies or in relation to securities.

In the identification of defects and the development of proposals to have regard to the need for appropriate consultation with interested persons, organisations and governments.

The Reference from the Ministerial Council

The Committee has received a reference from the Ministerial Council to enquire into and review the question of the use of the corporate form. The Committee is required, in making its enquiry and review, to have regard to the provisions in Part IV Division 3 of the Companies Act 1981, including:

* the discretion of a company to issue shares or options which might prejudice the rights of certain shareholders;

* the nature and extent of the power vested in companies to issue shares for consideration other than cash and the techniques for assessing the adequacy of non-pecuniary consideration; and

* any related matters.

A consideration of the present law and practice in relation to the issue of shares at a premium and the status and treatment of share premiums falls within the ambit of this reference.

Aim of this Discussion Paper

The Committee's aim in preparing this paper is to raise for consideration by interested persons issues relating to share premiums and, in that context, issues relating to the maintenance of capital.

It is recognised that the question of the desirability of shares of no par value is closely related to the issues canvassed in this paper. The Committee's reference

encompasses that question and it is intended that it will be considered separately in the future. For the time being, it is the aim of the Committee to deal only with share premiums.

The paper is in no sense a draft report. Any propositions and suggestions put forward do not represent concluded views of the Committee. Their function is simply to stimulate discussion and debate so that the Committee may better inform itself of views held within the community.

Invitation for Responses

The Committee invites written submissions on the matters dealt with in this paper.

The Committee will assume that it is free to publish any submission, in whole or in part, unless the respondent indicates that the submission is confidential. All respondents will, in any event, be listed in any report made by the Committee to the Ministerial Council.

Submissions should be sent to:

Mr. J. Kluver,
Research Director,
Companies and Securities Law Review Committee,
Level 24, MLC Centre,
19-29 Martin Place,
SYDNEY. 2000.

by 30th May, 1986.

PART I
DEVELOPMENT OF
EXISTING STATUTORY PROVISIONS

[1] The first Australian statutory provision about the issue of shares at a premium seems to have been s49 of the Companies Act 1896 (Vic). That section also appeared in the Victorian Acts of 1910, 1915 and 1928 and in the Tasmanian Act of 1920. It did two things. First, it prohibited until 12 months after a company had been "established" (as to which, see Re Tasmanian Credits Ltd (1931) 27 TAS LR 1), any "issue of shares in such company at a premium". Secondly, it required that "where shares are issued at a premium such premium when actually received by the company in money shall be carried to the credit of a reserve fund".

[2] Section 48 of the Companies Act 1938 (Vic) contained similar provisions. There was, however, the added requirement that the premium carried to the credit of the reserve be "not used for the purpose of paying a dividend unless it is a condition of the issue of the shares that the premium may be used for that purpose". This addition no doubt resulted from the decision in Moore v Carreras Ltd [1935] VLR 68 that it was, under the older section, permissible for the share premium reserve to be capitalised and distributed by way of bonus issue: in other words, that such a dividend in capitalised form could be paid out of share premium reserve. The 1938 Victorian version appeared in both the Victorian Act of 1958 and the Tasmanian Act of 1959.

[3] It was not until 1947 that the English legislation contained provisions in any way comparable with those which had already existed in Victoria and Tasmania for many years. The Cohen Committee said in 1946 - under the obvious influence of the decision in Drown v Gaumont-British Pictures Ltd [1937] Ch 402 - that "share premiums are in essence

capital though the assets acquired therewith do not represent the capital account strictly so called and there is no legal objection, apart from any provisions in the articles, to prevent the distribution thereof by way of dividend". The Cohen Committee concluded: "In our view this is undesirable."

[4] On the basis of views thus somewhat crytpically expressed, the Cohen Committee made the following recommendation:

"We recommend that a section be added to the Act providing that as from the coming into force of the new Act, the provisions of the Companies Act, 1929, relating to the reduction of share capital shall apply to any premiums received on the issue of shares of the company (whether received before or after the coming into force of the new Act) as if the share premium account were paid up share capital save so far as lawfully applied for other purposes before the coming into force of the new Act: Provided that notwithstanding this section such premiums may be applied by the company in or towards paying up unissued shares of the company to be issued to the members of the company".

[5] This resulted in the enactment in 1947 of a provision which, shortly afterwards, became s56 of the Companies Act 1948 (Eng): See Appendix 1. A similar provision now appears as s130 of the Companies Act 1985 (Eng): see Appendix 2. When the uniform Australian Acts of 1961-62 were drafted provisions similar to those introduced in England in 1947 were included as s60: see Appendix 3. Section 119 of the Companies Act 1981 is scarcely distinguishable from s60 of the 1961-1962 legislation. Its terms are set out in Appendix 4.

[6] There should be no quarrel with the general philosophy that premiums received upon the issue of shares should be assimilated to paid-up capital. Even if no par value shares were in future permitted, it would be necessary to require that the whole of the proceeds of issue (whether in cash or in kind) be reflected on capital account: see Gedge Committee Report, paragraph 72(7).

[7] There are, however, two main aspects of s119 which require attention. The first concerns the operation of the section in all cases where shares are issued for a consideration other than cash and, in particular, in cases of merger and amalgamation. The second concerns the extent to which premiums upon the issue of shares are in reality assimilated to share capital and the question whether reform in that area is desirable.

PART II
VALUATION OF NON CASH PREMIUMS

[8] The Cohen Committee's recommendation concerning assimilation of share premiums to share capital "was probably only directed to share premiums in the ordinary sense of premiums received in cash": Jenkins Committee Report, para 161. The statutory provisions, however, extend to premiums "in cash or in the form of other valuable consideration": s119(1). The Jenkins Committee noted as early as 1962 that there was "a division of opinion whether the section (a) applies only where either on the face of the transaction a premium is expressly provided or a premium is reflected in the entries in the books relating to the transaction or (b) also extends to every transaction where there is such an excess value" that is, where the value received by the company is in excess of the amount credited as paid up on the

shares issued. The Jenkins Committee recommended (para 162) that the law be clarified by providing that "a share premium arises whenever a company receives value in consideration for and in excess of the amount credited as paid up on shares issued in exchange, however the transaction is carried out, and however it is treated in the books of the company".

[9] It is instructive to examine the existing law concerning valuation of non-cash consideration for the issue of shares.

The Discount Cases

[10] The process of comparing the par value of shares issued with the value of the non-cash consideration for which those shares were issued has arisen most often upon enquiry whether shares have been issued at a discount.

[11] Where the possibility of an issue at a discount is under consideration, it seems to be necessary to examine the value of the consideration passing from the company which issues the shares. In Osborne v Steel Barrell Co. Ltd. [1942] 1 All ER 634, Lord Greene MR said that "when fully-paid shares are properly issued for a consideration other than cash, the consideration moving from the company must be at least the equal in value to the par value of the shares". The consideration passing from the company is on one view (but see Stanton v Drayton Commercial Holdings Ltd. [1983] AC 501) the credit it gives to the allottee in regarding his primary liability to pay for shares in cash as "satisfied by a consideration other than cash passing from the allottee": Osborne's case per Lord Greene MR.

[12] How is the consideration moving from the issuing company to be valued? In the Osborne case Lord Greene MR said that the consideration "must be based on an honest

estimate by the directors of the value of the assets acquired". Attention is thus immediately focused on the value of what the company receives (as distinct from what moves from it) and questions arise as to the proper methods to be employed by the directors in making an "honest estimate" of that value.

[13] Any such estimate will presumably be reflected in the recording of the "cost" of the assets acquired. That "cost", as Lord Greene MR observed in both the Osborne case and Craddock v Zevo Finance Co. Ltd. [1944] 1 All ER 566, is the figure at which the assets acquired by the company must be brought to account. The directors' "honest estimate" of the "value" of the assets acquired is thus also the determinant of the "cost".

[14] If the purchase contract itself states a price for the assets acquired, it seems that the price will generally be accepted as the directors' "honest estimate" of the "value" of those assets. In Re Wragg Ltd. [1897] 1 Ch 796, Lindley LJ said: "The value paid to the company is measured by the price at which the company agrees to buy what it thinks it is worth its while to acquire". In Ooregum Gold Mining Co. of India Ltd. v Roper [1892] AC 136, Lord Watson said that "shares may be lawfully issued as fully paid up, for considerations which the company has agreed to accept [emphasis added] as representing in moneys worth the nominal value of the shares". In Craddock's case in the House of Lords (1944) 27 TC 267, it was said that "acquiring the investments under a bona fide and unchallengeable contract, they paid the price which that contract required, a price which, whether too high or too low according to the views of third parties, was the price upon which these parties agreed". In Stanton v Drayton Commercial Holdings Ltd. [1983] AC 501, Lord Fraser of Tullybelton said: "the value

of consideration given in the form of fully paid shares allotted by a company .... , in the case of an honest and straight forward transaction, is the price upon which the parties agree".

[15] The possibility of abuse inherent in simple acceptance of the agreed price as the measure of adequacy of the consideration has long been recognised. Buckley LJ, as author of the 9th Edition (1909) of Buckley on the Companies Acts, said (at page 213) that he had "always keenly regretted that Wragg Ltd. was not carried to the House of Lords. The decision involves that the corporation may by agreeing the price of a property at a figure issue paid-up shares to that amount whatever be in fact the value of the property - meaning by that expression the value as measured by the price at which the company could have acquired it but for an agreement on their part to fix the value ... - a proposition which involves in fact that the corporation may agree to issue shares at a discount". Had that statement been made today it might have continued: "or at a premium not reflected in the share premium account".

[16] It is true that the courts had sought in a half hearted way to guard against this possibility. Statements that the agreed price must be accepted were qualified by references to consideration that is "colourable" or "illusory": see, for example, Re Wragg Ltd and Re White Star Line Ltd. [1938] Ch 458. The fact remains, however, that directors were traditionally allowed very considerable latitude in making the required "honest estimate" of the value of the consideration received.

The Premium Cases

[17] The first case arising under s56 of the Companies Act 1948 (Eng) was Henry Head & Co. Ltd. v Ropner Holdings Ltd.

[1952] 1 Ch 124. That case concerned an issue of shares by one company in exchange for the transfer to it of all the shares in another company. The nominal value of the shares issued was some 1.75 million pounds. A valuation obtained at the time the transaction was entered into showed that the shares acquired had a value of some 6.75 million pounds. The cost of the assets acquired was recorded at the 6.75 million pounds figure. It was held that the difference of 5.00 million pounds had to be carried to share premium account.

[18] The Henry Head decision, it is submitted, is not necessarily inconsistent with the earlier decisions. The company had adopted the 6.75 million pounds disclosed by the valuation as the cost of the assets acquired. It was that figure, therefore, that represented the directors' "honest estimate" of the value of the consideration received by the company and thus, according to Lord Greene's formulation, the consideration moving from the company.

[19] Difficulties in adhering fully to the approach of Lord Greene MR were, however, created by the decision in Shearer v Bercain Ltd. [1980] 3 All ER 295. Like Henry Head, that case concerned an issue of shares in exchange for the transfer to the company of shares in other companies: the company "acquired assets worth 96,000 pounds in total for an issue of 4,100 shares of a nominal value of 1 pound each, that is to say, assets worth 91,900 pounds more than the nominal value of those shares".

[20] Walton J held that the sum of 91,900 pounds had properly been transferred to share premium account and that s56 of the English Act required such a transfer. The decision was based largely on the proposition that directors must, in discharge of their fiduciary duties, issue as few shares as practicable to obtain particular assets and do not

have any great measure of flexibility. The judge's conclusion as to the application and operation of s56 proceeded on the basis that the "value" of the premium was to be determined according to what might be termed the "true" value of the assets acquired and, apparently, without regard to any different estimate that the directors may have made.

[21] The latest relevant case is Stanton v Drayton Commercial Investment Co. Ltd. [1983] AC 501, a decision of the House of Lords. The question in that case was a tax question. It concerned the amount or value of the consideration given by a company which had issued its own shares in exchange for a parcel of investments. The issue price was stated in the agreement to be 160 pence per share. Shares in the company stood on the market at the date the contract became unconditional at 125 pence. It was held that the value of the consideration given by the company was the contract price of 160 pence per share multiplied by the number of shares issued.

[22] The Drayton case thus appears to have given new life to the principles enunciated by Lord Greene MR. There was no suggestion that the directors had failed to act in accordance with the view of their fiduciary duties put forward by Walton J in the Shearer case. At the same time, however, the House of Lords apparently saw no need to enquire into any "true" value of the assets acquired. Paramountcy was afforded to the value settled upon in the contract.

Statutory Regulation of Value

[23] In some countries, statutory rules regulate the valuation of non-cash consideration for the issue of shares.

[24] In England, for example, the Companies Act 1980 introduced and the Act of 1985 continues provisions (see

Appendix 5) to the effect that a public company shall not issue shares as fully or partly paid up (as to their nominal value or any premium payable on them) otherwise than in cash unless the consideration for the allotment has been valued in accordance with the provisions of the Act. The valuation provisions (s108) require a report by an independent qualified person.

[25] In New Zealand, s64(1) of the Companies Act 1955 (as amended by the Companies Amendment Act 1982) reads as follows:

"For the purposes of this Act, a company issues shares at a premium if:

(a) the company issues shares for cash and the amount paid or payable in respect of each share so issued exceeds the nominal value of each share issued; or

(b) the company issues shares for a consideration other than cash (or partly for cash and partly for a consideration other than cash) and the value of the consideration in respect of each share so issued, whether or not expressed in or ascertainable from any contract relating to the issue of those shares, exceeds the nominal value of each share issued".

[26] Where a non-cash consideration is involved, the New Zealand Act directs that the value of the premium on each share be determined by reference to "the value of the [non-cash] consideration provided or liable to be provided as allocated in respect of each share in accordance with an estimate of value to be made by the directors of the

company"· The New Zealand provisions thus afford paramountcy to the directors' estimate of the value of non-cash consideration· In England, independent valuation is required but, it seems, the value thus disclosed does not necessarily determine the amount or value of the premium received although, if the directors' estimate remains the relevant factor, the independent valuation will no doubt influence the directors in arriving at any estimate·

[27] A step along a similar path has previously been contemplated in Australia· Clause 162(3) of the National Companies Bill 1976 read as follows:

"Shares shall not be allotted as fully paid up or partly paid up otherwise than in cash unless the directors are satisfied that the value of the consideration for the allotment is not less than the amount to which the shares are taken to be paid up".

[28] The emphasis here was upon the directors' opinion and, in that respect, the proposed Australian provision was similar to the New Zealand section·

Issues for Discussion

[29] The matters canvassed in Part II raise the possibility of legislative provisions to the following effect:

1. It shall be the duty of the directors, where shares are issued for a consideration which is not wholly cash, to make in good faith an assessment of the fair value of the non-cash element of the consideration, which assessment shall be based upon a determination of the amount of cash that the company would have found it necessary to pay in order to obtain the property or other non-cash advantage in fact obtained by issuing the shares.

2. In making any such assessment, the directors shall have regard to:

(a) any value expressed in or ascertainable from the contract relating to the issue of the shares;

(b) any independent valuation in fact obtained by the company; and

(c) if the non-cash element of the consideration consists of or includes property regularly traded in a market, the price at which such property is so traded·

3. A company shall be taken, for the purposes of s119 of the Companies Act 1981, to issue shares for which a premium is received if the aggregate of any cash received for the issue of those shares and the fair value, as assessed by the directors, of any non-cash consideration so received exceeds the par value of the shares, the premium being the amount of the excess.

[30] Any such provisions might need to be subject to modifications in the case of merger or amalgamation discussed in Part III.

PART III
MERGER ACCOUNTING

[31] Internationally accepted accounting practice recognises that, where two or more companies are combined in such a way that all shareholders in the individual constituents become

shareholders in the merged enterprise, it may be appropriate for the combination to be treated, for accounting purposes, by what is known as the "pooling of interests method". That method is described in para 29 of the introduction to International Accounting Standard 22 (November, 1983) as follows:

"The object of the pooling of interests method is to account for the pooled enterprise as though the separate businesses were continuing as before, though now jointly owned. The pooling of interests method does not recognise any goodwill arising on acquisition, and is only used where the purchase consideration is principally an exchange of voting common shares rather than a disbursement of cash or other assets. Under the pooling of interests method the combined assets, liabilities and reserves are recorded at their existing carrying amounts .... The difference between the amount recorded as share capital issued (plus any additional consideration in the form of cash or other assets) and the amount recorded for the share capital acquired is adjusted against shareholders' interests. The consolidated financial statements include the results of operations and the assets and liabilities of the pooled enterprises as if they had been part of the group for the whole of the current and preceding periods".

[32] The concept behind the pooling of interests method of accounting is that, because the shareholders of two companies in effect combine their resources to carry on in combination the businesses previously conducted separately, it is appropriate for the shares issued by the eventual holding company to be treated as issued at par. The combination is achieved without disbursing resources of either constituent

company and assets and liabilities of the constituents are carried forward to the combined corporation at their recorded amounts. Distributable reserves of the absorbed company remain as such in the accounts of the eventual holding company. There is no question of pre-acquisition profits of the absorbed company being frozen in the sense that, while they may be paid as dividends to the holding company, they are then (because of their capital character in its hands, being, in effect part of the totality of assets purchased) unavailable for distribution by the holding company to its own shareholders.

The Effect of Shearerr Bercain Ltd.

[33] The decision in Shearer v Bercain Ltd. seemed clearly to call in question the availability of the pooling of interests method of merger accounting in England. In 1971, the Accounting Standards Committee of the accounting bodies of the United Kingdom and Ireland published an exposure draft "Accounting for Acquisitions and Mergers" (ED3). A number of comments received on the draft suggested that merger accounting might be contrary to s56 of the Companies Act 1948. In October, 1982, a further exposure draft (ED31) was issued. It commented on this issue as follows:

"The legal position remained unresolved until the case of Shearer v Bercain Ltd. (1980). The judgement in that case appeared to confirm that

(a) the investment in a subsidiary should be recorded in the holding company's balance sheet at the fair value rather than the nominal value of the shares issued and that the excess of fair value over nominal value should be credited to the share premium account; and

(b) pre-acquisition profits of acquired subsidiaries were not available for distribution by the holding company, and that any dividend paid by a subsidiary to its holding company out of pre-acquisition profits should be applied by the holding company to reduce the cost of the investment in that subsidiary.

The judgement appeared to confirm the views of those who, in commenting on ED3, questioned whether merger accounting complied with the Companies Act 1948".

Legislative Intervention in Other Countries

[34] The difficulties thus created by Shearer v Bercain Ltd. in the context of merger accounting were resolved in England by special statutory provisions. Sections 36 to 41 of the Companies Act 1981 (now ws131 to 134 of the Companies Act 1985: see Appendix 6) provided relief from the strictures of s56 of the 1948 Act in certain situations of "merger" and "reconstruction". Similar provisions were also introduced in New Zealand, initially as s6 of the Finance Act (No 2) 1981 and later as ss64A to 64E of the Companies Act 1955 (introduced by the Companies Amendment Act 1982): see Appendix 7.

[35] Although there are some differences between them, the English provisions and those which apply in New Zealand embody the same basic principles. They cover two situations: first, where, as a result of either an amalgamation by scheme of arrangement or a takeover, one company acquires substantially the whole of the shares in or the whole of the undertaking of the other in consideration of an issue of shares by the acquiring company; and, secondly

where, in the context of a group, one group member issues shares to another in consideration of the transfer to the issuing company of assets. In the first situation, it is provided that the general provision with respect to share premiums does not apply to the premiums on shares issued as consideration. In the second situation, it is provided that the share premium provisions apply only to the amount by which the book value of the assets acquired (being the book value as recorded in the accounts of the group member which is the transferor) exceeds the par value of the shares issued as consideration for the transfer.

The Position in Australia

[36] It is beyond the scope of this paper to consider the question whether, as a matter of accounting principle, the pooling of interests method of accounting is or is not desirable in any general sense. It is noted that the Australian accounting bodies have recently issued a statement of accounting standards relating to "Accounting for the Acquisition of Assets (including Business Entities)" (AAS 21). That statement has yet to receive the attention of the Accounting Standards Review Board.

[37] Clause 26 of AAS 21 reads:

"The pooling-of-interests method shall not be used in accounting for acquisitions."

AAS 21 as a whole, however, does not apply in relation to "intra-group company reconstructions in which a new holding company completely replaces an existing holding company". It is thus clear that there may be some scope for use of the pooling of interests method consistently with AAS 21. The real question for present purposes is whether s119, coupled

with the decision in Shearer v Bercain Ltd., should be allowed to stand in the way of utilisation of the pooling of interests method in the circumstances, however limited, allowed by accounting principles from time to time.

Issues for Discussion

[38] The matters canvassed in Part III raise the possibility of legislative provisions to the following effect:

1. Clause 2 below shall apply where:

(a) a company ("the acquiring company") attains a position where it is or is entitled to become the holder of the whole of the voting share capital of or the owner of the whole of the undertaking of another corporation ("the acquired corporation");

(b) the transaction producing that result is effected in such a way that all persons who were the holders of voting shares in the acquired corporation receive voting shares in the acquiring company in substitution for their voting shares in the acquired corporation; and

(c) the result of the transaction is, without contravention of any approved accounting standard, reflected in the consolidated accounting records of the acquiring company in accordance with the pooling of interests method of accounting (suitably defined).

2. In a case to which this Clause 2 applies, any amount that would otherwise be required by s119(1) of the

Companies Act 1981 to be transferred to the share premium account of the acquiring company shall not be so transferred.

PART IV
ASSIMILATION OF PREMIUMS TO CAPITAL

[39] Section 119(1) states that the provisions of the Act relating to the reduction of share capital (other than s123(6)) apply, subject to s119 itself, as if the share premium account were paid-up share capital. Section 119(2) goes on to specify particular ways in which the share premium account may be applied. It has been held that any application of share premium account otherwise than in one of the ways permitted by s119(2) must be effected in accordance with s123: Re Vavasseur Pacific Ltd. (1977) 2 ACLR 414.

[40] It is therefore appropriate to ask whether the expressly permitted methods of application are themselves consistent with the notion that premiums on the issue of shares are to be treated as if they were share capital. That question has already been raised but not answered by at least one judge: "And if the share premium account is to be regarded as similar to the share capital account, it is natural to wonder why there is no equivalent in the [1961-62] Act to s60(2) [i.e., present s119(2)] in relation to the capital account": South Australian Barytes Ltd. v Wood (1976) 12 SASR 527 per Bray CJ.

Section 119(2) (a) and (c)

[41] These paragraphs provide, in different terms, for the making of bonus issues out of share premium account.

Paragraph (a) allows the share premium account to be applied "in paying up unissued shares to be issued to members of the company as fully paid bonus shares" while paragraph (c) allows the application of share premium account "in payment of dividends, if those dividends are satisfied by the issue of shares to members of the company." Between them, the two paragraphs appear to deal with the two alternative methods of effecting a bonus issue commonly provided for in articles of association and discussed in Peters American Delicacy Co.
Ltd. v Heath (1939) 61 CLR 457.

[42] Paragraphs (a) and (c) are uncontroversial. They entail application of share premium account - necessarily, it seems, on the basis prescribed by the articles in relation to dividends - in such a way that the amount debited to share premium account is credited to share capital. As a result, share capital and reserves remain unaltered. The amount standing to the credit of share premium account ceases to be "quasi capital" and actually becomes share capital.

Section 119(2)(b)
[43] Paragraph (b) permits share premium account to be applied "in paying up in whole or in part the balance unpaid on shares previously issued to members of the company."

[44] Several comments may be made in relation to this provision.

[45] First, the precise meaning of the words "to members of the company" is not clear. Every person by whom "shares previously issued" are held is necessarily a "member" of the company so that, on one reading, the words are superfluous. An alternative reading would require the persons to whom the shares were "previously issued" to have been, at the time of

issue of those shares, "members" of the company. Since the first construction denies any meaning to the words "to members of the company" it may be that the latter should be preferred.

[46] A question then arises as to the application of paragraph (b) in circumstances where there has been a renounceable rights issue. Shares issued to those shareholders who themselves take up "rights" according to their pro rata entitlements are, immediately after issue, clearly "shares previously issued to members of the company." So are shares taken up by such persons in addition to those included in their pro rata entitlement. Shares which result from the exercise of "rights" by persons who are not already members and have acquired those "rights" on the stock market are never, however "shares previously issued to members of the company." Thus if the second suggested construction of paragraph (b) is the correct one, some shares resulting from a renounceable rights issue will be within that paragraph and some will not. And, if advantage is to be taken of paragraph (b) some years after the issue (when some shares have changed hands many times), it will be necessary for the company to have earmarked in some way throughout that period the shares which do qualify and the shares which do not.

[47] Paragraph (b) speaks of "the balance unpaid on shares". In so doing, it refers to sums which shareholders are bound to pay up either at some fixed future time or times or according to calls made by the company. Each such sum, which is necessarily an "amount ... unpaid on the shares" (at least to the extent that it represents unpaid capital) as mentioned in s360(1) (e), is required to be contributed by the holder of the shares on winding up. Paragraph (b) thus permits share premium account to be applied in satisfying the

unpaid liability owed to the company in respect of partly paid shares. This seems to be entirely at odds with the principles against reduction of capital. Those principles demand - as s123(1)(a) explicitly recognises - that a cardinal aspect of the maintenance of capital is retention of liability to pay up partly paid shares.

[48] Furthermore, there is no apparent requirement that any such application of share premium account be authorised by the articles. Nor is there any indication that it is impermissible for share premium account to be applied (and perhaps exhausted) in paying up the balance unpaid on shares issued to a few members without commensurate benefit to other holders of shares which are similarly partly paid or to those members whose shares have already been fully paid up. In other words "members" need not necessarily mean "all members".

[49] The English legislation has never contained any equivalent of s119(2)(b). Nor has there ever been any similar section in New Zealand. The reason for the existence of the provision in Australia is unclear.

Section 119(2)(4)

[50] This paragraph deals with the special case of life insurance companies. Given the fact that the Companies Act gives way to the Life Insurance Act in all matters relating to accounts (see s288), it seems unnecessary to comment on s119 (2) (d).

Section 119(2)(e)

[51] Paragraph (e) allows share premium account to be applied in writing off preliminary expenses or the expenses of or any payment made in respect of discount allowed on any issue of shares or debentures.

[52] These items appear as assets in the balance sheet but, because they are not saleable assets, the company will wish to write them off as quickly as possible. Pennington's Company Law (4th ed 1979) points out (at p156) that this may be done "by crediting the accounts in which they appear and debiting profit and loss account or share premium account with their amount ... The items written off disappear from the assets side, and profit and loss account or share premium account on the liability side is reduced accordingly".

[53] This explanation immediately shows that profit and loss account and share premium account are alternative sources for the writing off of items of the kind in question. Thus, far from assimilating share premiums to share capital, s119(2) (e) seems to assimilate share premiums to profits. And it is of course not permissible for share capital itself to be applied in writing off items of the kind with which s119(2) (e) is concerned.

[54] The Jenkins Committee said of the equivalent English section: "We think the section should be amended to prohibit the application of the account in writing off the expenses and commission paid and discounts allowed on any issue of debentures ..., since these are part of the ordinary expenses of borrowing".

Section 119(2)(f)

[55] This paragraph allows share premium account to be applied "in providing for the premium payable on redemption of debentures or redeemable preference shares". Its application in relation to redeemable preference shares is supplemented by s120(4) which identifies share premium account as one of the two sources from which the premium payable on redemption of such shares may be provided.

[56] It has been common place for ss119(2) (f) and 120(4) to be utilised in certain tax effective financing transactions. Typically, a company raises what it regards in commercial terms as loan funds by issuing a few redeemable preference shares of modest par value at a very large premium upon terms that those shares are to be redeemed at an equivalent premium. There is a simple "in and out" effect as regards share premium account.

[57] A common example may be examined. Company A wishes to "borrow" $100,000 for 12 months. It does so by issuing 100 redeemable preference shares of par value $1 each at an issue price of $1,000 per share, the premium on issue being $999 per share. The shares are to be redeemed in 12 months' time and carry the right to certain dividends (analogous to interest but with the benefit of rebateability for income tax purposes) in the meantime. Redemption is to be at an equivalent premium of $999 per share.

[58]
Upon the issue of these shares:

(a) share capital is increased by $100;

(b) $99,900 is credited to share premium account; and

(c) assets are increased by the $100,000 proceeds of issue.

[59] Upon redemption:

(a) share capital is reduced by $100;

(b) $100 is, in obedience to s120(5), transferred to capital redemption reserve;

(c) profit and loss appropriation account is, again in obedience to s120(5), reduced by $100;

(d) share premium account is, under the protection of ss119(2) (f) and 120(4), reduced by $99,900; and

(e) assets are reduced by $100,000 being the cash amount paid out.

[60] A more extreme case may be examined. Company B, like Company A, wishes to "borrow" $100,000. The term of the "borrowing" is to be 5 years. The "lender" is content to receive no "interest" during the 5 year term but wishes to receive $150,000 at the end of that period. Before the transaction takes place, an amount of $50,000 stands to the credit of share premium account as a result of an issue of shares at a premium some years earlier.

[61] As in the first example, 100 shares of $1 each are issued at a premium of $999 per share. But they are redeemable at a premium of $1,499 per share. The entries upon issue are the same as in the first example. Upon redemption, however:

(a) share capital is reduced by $100;

(b) $100 is, in obedience to s120(5), transferred to capital redemption reserve;

(c) profit and loss appropriation account is, in accordance with s120(5), reduced by $100;

(d) share premium account, however, is reduced not by $99,900 as in the first example, but by $149,900; and

(e) assets are reduced by $150,000.

[62] In these circumstances, the whole of the pre-existing share premium account disappears. It does so not in any way which involves participation by the general body of shareholders, supervision by the Court or consciousness of the interests of creditors. It all happens simply because the statute says it may happen.

[63] The Cohen Committee justified its recommendation by saying that "share premiums are in essence share capital" and that it was desirable "to prevent the distribution thereof by

way of dividend". One may ask whether, in view of the possibilities inherent in s119(2)(f) - and particularly those exemplified by the second example above - s119 wholly achieves this object. If share premium account may be applied in providing for the premiums on redemption of redeemable shares, why should share capital not be similarly applied? In other words, if Company B above had no pre-existing share premium account of $50,000 but pre-existing share capital of that amount, why should it - if s119 properly reflects the restrictions on applications of share capital - not have applied that $50,000 towards the premiums on redemption?

[64] In England, it has not been possible since the Companies Act 1981 came into force for transactions of the kind described above to be undertaken. Section 160(1) (b) of the Companies Act 1985 lays down a general rule that any premium payable on redemption of redeemable shares must be paid out of distributable profits. Section 160(2), however, deals with the special case of redeemable shares which have been issued at a premium. It says that any premium payable on redemption of those shares may be paid out of the proceeds of a fresh issue of shares made for the purposes of the redemption, with the share premium account being reduced by the amount of the payment. The amount thus dealt with is, however, restricted to the smaller of the aggregate of the premiums received on issue of the shares and the balance of the share premium account (including any sum transferred to that account in respect of premiums on the new shares).

[65] Clearly, therefore, there is no scope for the device of merely reducing share premium account by the premiums on redemption without some compensatory increase in some other item on capital account.

[66] If share premiums are in reality to be assimilated to share capital, it may be thought appropriate that any reduction in share premium account arising from the operation of ss119(2) (f) and 120(4) upon the redemption of redeemable preference shares at a premium be recognised by a corresponding increase in either share capital as such or the capital redemption reserve provided for in s120(5).

[67] Section 119(2) (f) also permits application of share premium account to provide for premiums payable on the redemption of debentures. The same objections apply, but with greater force. Creditors generally are entitled to see share capital (and quasi-capital) maintained. Why should they suffer its reduction by way of satisfaction of an obligation owed to one of their own number? The Jenkins Committee recommended that this aspect of the English section be repealed.

The Status of Uncalled Premiums

[68] It is possible for shares to be issued on the basis that a premium is to be paid (in whole or in part) at some fixed future time or in accordance with calls made by the company. Thus, a share of $1 par value may, in Australia, be issued at a premium of $2 upon the terms that 60 cents (being 20 cents capital and 40 cents premium) is paid on allotment and the balance (80 cents capital and $1.60 premium) is payable as and when called. (In England, s22(1) of the Companies Act 1980 lays down a general rule that a public company shall not allot a share except as paid up at least as to 25% of its par value and the whole of any premium on it).

[69] Upon winding up, every present member is liable under s360(1) of the Companies Act 1981 to contribute an amount sufficient to pay the company's debts and liabilities

subject, however, to the qualification stated in s360(1)(e) that "no contribution is required from a member exceeding the amount (if any) unpaid on the shares in respect of which he is liable ...".

[70] In Niemann v Smedley [1973] VR 769, it was held that "the amount (if any) unpaid on the shares" meant "the amount unpaid of the nominal value of the shares". It was observed that the predecessor to s119 "says nothing to suggest that money due by a shareholder in payment of a premium is to be regarded as a part of the share capital which he has undertaken to pay on his shares". Such an amount was therefore not an "amount ... unpaid on the shares".

[71] In South Australian Barytes Ltd. v Wood (1976) 12 SASR 527, Sangster J accepted the reasoning of the Victorian Court and its conclusion that there was no statutory liability to pay uncalled or unpaid premiums in a winding up. He went on to say: "I am not completely satisfied that such a limitation of a statutory liability serves to wipe out a contractual liability to pay a share premium by stipulated instalments or (where such are the facts) on a date already fixed by the directors in a call made before the winding up, and the more so as that aspect does not appear to me to have been considered by the Victorian court". Bray CJ expressed a similar opinion. It is nevertheless clear that, in terms of statutory liability, there is a distinction between unpaid capital and unpaid premiums.

[72] On one view, no such distinction is justifiable and the company (or, in practical terms, its creditors and shareholders) should be able to get in unpaid premiums on a winding up in the same way as it can get in unpaid capital.

[73] There is, however, another consideration. The rights - as distinct from the liabilities - of shareholders on winding

up will most commonly be determined, under the articles, according to the amounts paid up on their shares. By the same reasoning as was applied in Niemann v Smedley, a member holding shares on which a premium has been paid will participate in distributable surplus on the same basis as a member holding shares issued at par. The payment of the premium will thus not normally enhance the right to participate in surplus on liquidation.

Issues for Discussion

[74] The matters discussed in Part IV raise the question whether some or all of the following legislative reforms are desirable:

1. Repeal of s119(2) (b);

2. Repeal of s119(2) (e);

3. Amendment of ss119 (2) (f) and 120 (4) to provide that, if a company has issued redeemable preference shares for which a premium has been received, any premium payable on redemption of those shares shall be provided for out of one or more of -

(a) profits;

(b) the proceeds of a new issue of shares made for the purpose of the redemption; and

(c) the share premium account

provided that:

(d) any amount provided for as mentioned in paragraph (b) shall not exceed the smaller of:

(i) the premiums received on the issue of the shares concerned; and

(ii) the amount of the share premium account

and the share premium account shall be reduced by a corresponding amount; and

(e) in a case to which paragraph (c) refers, an amount equal to that provided for out of the share premium account shall be transferred to the capital redemption reserve.

4. Amendment of s119(2)(f) to remove the ability of a company to apply the share premium account in providing for the premium payable on redemption of debentures.

5. Enactment of a provision that an amount payable in cash by way of premium upon the issue of a share shall be regarded for all purposes as an amount unpaid on that share.

APPENDIX 1

Companies Act 1948 (Eng), s56

56(1) Where a company issues shares at a premium, whether for cash or otherwise, a sum equal to the aggregate amount or value of the premiums on those shares shall be transferred to an account, to be called "the share premium account", and the provisions of this Act relating to the reduction of the share capital of a company shall, except as provided in this section, apply as if the share premium account were paid up share capital of the company.

(2) The share premium account may, notwithstanding anything in the foregoing subsection, be applied by the company in paying up unissued shares of the company to be issued to members of the company as fully paid bonus shares, in writing off - (a) the preliminary expenses of the company; or (b) the expenses of, or the commission paid or discount allowed on, any issue of shares or debentures of the company; or in providing for the premium payable on redemption of any redeemable preference shares or of any debentures of the company.

(3) Where a company has before the commencement of this Act issued any shares at a premium, this section shall apply as if the shares had been issued after the commencement of this Act: Provided that any part of the premiums which has been so applied that it does not at the commencement of this Act form an identifiable part of the company's reserves within the meaning of the Eighth Schedule to this Act shall be disregarded in determining the sum to be included in the share premium account.

APPENDIX 2

Companies Act 1985 (Eng), s130

130(1) If a company issues shares at a premium whether for cash or otherwise, a sum equal to the aggregate amount or value of the premiums on those shares shall be transferred to an account called "the share premium account".

(2) The share premium account may be applied by the company in paying up unissued shares to be allotted to members as fully paid bonus shares, or in writing off:

(a) the company' s preliminary expenses; or

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

or in providing for the premium payable on redemption of debentures of the company.

(3) Subject to this, the provisions of this Act relating to the reduction of a company's share capital apply as if the share premium account were part of its paid up share capital.

(4) Sections 131 and 132 below give relief from the requirements of this section, and in those sections references to the issuing company are to the company issuing shares as above mentioned.

APPENDIX 3

Uniform Companies Acts 1961-1962, s60

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

(2) The share premium account may be applied:

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

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

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

(d) in writing off:

(i) the preliminary expenses of the company; or

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

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

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

(3) Where a company has before the commencement of this Act issued any shares at a premium the provisions of this section shall apply as if those shares had been issued after the commencement of this Act but where any part of the premiums has been so applied that it does not at the commencement of this Act form an identifiable part of the company's reserves it shall be disregarded in determining the sum to be transferred to the share premium account.

APPENDIX 4

Companies Act 1981 (Cth), s119

119(1) Where a company issues shares for which a premium is received by the company, whether in cash or in the form of other valuable consideration, a sum equal to the aggregate amount or value of the premiums on those shares shall be transferred to an account to be called the "share premium account", and the provisions of this Act relating to the reduction of the share capital of a company, other than sub-section 123(6) apply, subject to this section, as if the share premium account were paid-up share capital of the company.

(2) The share premium account may be applied:

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

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

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

(d) in the case of a company that carries on life insurance business in Australia - by appropriation or transfer to any statutory fund established and maintained pursuant to the Life Insurance Act 1945;

(e) in writing off:

(i) the preliminary expenses of the company; or

(ii) the expenses of, or the payment made in respect of or discount allowed on, any issue of shares in, or debentures of, the company; or

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

APPENDIX 5

Companies Act 1985 (Eng), s103

103(1) A public company shall not allot shares as fully or partly paid up (as to their nominal value or any premium on them) otherwise than in cash unless:

(a) the consideration for the allotment has been independently valued under section 108; and

(b) a report with respect to its value has been made to the company by a person appointed by the company (in accordance with that section) during the 6 months immediately preceding the allotment of the shares; and

(c) a copy of the report has been sent to the proposed allottee.

(2) Where an amount standing to the credit of any of a company's reserve accounts, or of its profit and loss account, is applied in paying up (to any extent) any shares allotted to members of the company or any premiums on shares so allotted, the amount applied does not count as consideration for the allotment, and accordingly subsection (1) does not apply in that case.

(3) Subsection (1) does not apply to the allotment of shares by a company in connection with an arrangement providing for the allotment of shares in that company on terms that the whole or part of the consideration for the shares allotted is to be provided by the transfer to that company (or the cancellation) of all

or some of the shares, or of all or some of the shares of a particular class, in another company (with or without the issue to that company of shares, or of shares of any particular class, in that other company).

(4) But subsection (3) does not exclude the application of subsection (1) unless under the arrangement it is open to all the holders of the shares in the other company in question (or, where the arrangement applies only to shares of a particular class, to all the holders of shares in that other company, being holders of shares of that class) to take part in the arrangement.

In determining whether that is the case, shares held by or by a nominee of the company proposing to allot the shares in connection with the arrangement, or by or by a nominee of a company which is that company's holding company or subsidiary or a company which is a subsidiary of its holding company, shall be disregarded.

(5) Subsection (1) also does not apply to the allotment of shares by a company in connection with its proposed merger with another company; that is, where one of the companies proposes to acquire all the assets and liabilities of the other in exchange for the issue of shares or other securities of that one to shareholders of the other, with or without any cash payment to shareholders.

(6) If a company allots shares in contravention of subsection (1) and either:

(a) the allottee has not received the valuer's report required by that subsection to be sent to him; or

(b) there has been some other contravention of this section or section 108 which the allottee knew or ought to have known amounted to a contravention,

the allottee is liable to pay the company an amount equal to the aggregate of the nominal value of the shares and the whole of any premium (or, if the case so requires, so much of that aggregate as is treated as paid up by the consideration), with interest at the appropriate rate.

(7) In this section:

(a) "arrangement" means any agreement, scheme or arrangement (including an arrangement sanctioned in accordance with section 425 (company compromise with creditors and members) or section 582 (liquidator in winding up accepting shares as consideration for sale of company property)), and

(b) any reference to a company, except where it is or is to be construed as a reference to a public company, includes any body corporate and any body to which letters patent have been issued under the Chartered Companies Act 1837.

APPENDIX 6

Companies Act 1985 (Eng), ss131 to 134

131(1) With the exception made by section 132(4) (group reconstruction) this section applies where the issuing company has secured at least a 90 per cent equity holding in another company in pursuance of an arrangement providing for the allotment of equity shares in the issuing company on terms that the consideration for the shares allotted is to be provided:

(a) by the issue or transfer to the issuing company of equity shares in the other company, or

(b) by the cancellation of any such shares not held by the issuing company.

(2) If the equity shares in the issuing company allotted in pursuance of the arrangement in consideration for the acquisition or cancellation of equity shares in the other company are issued at a premium, section 130 does not apply to the premiums on those shares.

(3) Where the arrangement also provides for the allotment of any shares in the issuing company on terms that the consideration for those shares is to be provided by the issue or transfer to the issuing company of non-equity shares in the other company or by the cancellation of any such shares in that company not held by the issuing company, relief under subsection (2) extends to any shares in the issuing company allotted on those terms in pursuance of the arrangement.

(4) Subject to the next subsection, the issuing company is to be regarded for purposes of this section as having secured at least a 90 per cent equity holding in another company in pursuance of such an arrangement as is mentioned in subsection (1) if in consequence of an acquisition or cancellation of equity shares in that company (in pursuance of that arrangement) it holds equity shares in that company (whether all or any of those shares were acquired in pursuance of that arrangement, or not) of an aggregate nominal value equal to 90 per cent or more of the nominal value of that company's equity share capital.

(5) Where the equity share capital of the other company is divided into different classes of shares, this section does not apply unless the requirements of subsection (1) are satisfied in relation to each of those classes of shares taken separately.

(6) Shares held by a company which is the issuing company's holding company or subsidiary, or a subsidiary of the issuing company's holding company, or by its or their nominees, are to be regarded for purposes of this section as held by the issuing company.

(7) In relation to a company and its shares and capital, the following definitions apply for purposes of this section:

(a) "equity shares" means shares comprised in the company's equity share capital; and

(b) "non-equity shares" means shares (of any class) not so comprised;

and "arrangement" means any agreement, scheme or arrangement (including an arrangement sanctioned under section 425 (company compromise with members and creditors) or section 582 (liquidator accepting shares etc. as consideration for sale of company property)).

(8) The relief allowed by this section does not apply if the issue of shares took place before 4th February 1981.

132(1) This section applies where the issuing company:

(a) is a wholly-owned subsidiary of another company ("the holding company") , and

(b) allots shares to the holding company or to another wholly-owned subsidiary of the holding company in consideration for the transfer to the issuing company of assets other than cash, being assets of any company ("the transferor company") which is a member of the group of companies which comprises the holding company and all its wholly-owned subsidiaries.

(2) Where the shares in the issuing company allotted in consideration for the transfer are issued at a premium, the issuing company is not required by section 130 to transfer any amount in excess of the minimum premium value to the share premium account.

(3) In subsection (2), "the minimum premium value" means the amount (if any) by which the base value of the consideration for the shares allotted exceeds the aggregate nominal value of those shares.

(4) For the purposes of subsection (3) the base value of the consideration for the shares allotted is the amount by which the base value of the assets transferred exceeds the base value of any liabilities of the transferor company assumed by the issuing company as part of the consideration for the assets transferred.

(5) For the purposes of subsection (4):

(a) the base value of the assets transferred is to be taken as:

(i) the cost of those assets to the transferor company, or

(ii) the amount at which those assets are stated in the transferor company's accounting records immediately before the transfer, whichever is the less; and

(b) the base value of the liabilities assumed is to be taken as the amount at which they are stated in the transferor company's accounting records immediately before the transfer.

(6) The relief allowed by this section does not apply (subject to the next subsection) if the issue of shares took place before the date of the coming into force of the Companies (Share Premium Account) Regulations 1984 (which were made on 21st December 1984).

(7) To the extent that the relief allowed by this section would have been allowed by section 38 of the Companies Act 1981 as originally enacted (the text of which section is set out in Schedule 25 to this Act),

the relief applies where the issue of shares took place before the date of the coming into force of those Regulations, but not if the issue took place before 4th February 1981.

(8) Section 131 does not apply in a case falling within this section.

133(1) An amount corresponding to one representing the premiums or part of the premiums on shares issued by a company which by virtue of sections 131 or 132 of this Act, or section 12 of the Consequential Provisions Act, is not included in the company's share premium account may also be disregarded in determining the amount at which any shares or other consideration provided for the shares issued is to be included in the company's balance sheet.

(2) Reference in this Chapter (however expressed) to:

(a) the acquisition by a company of shares in another company; and

(b) the issue or allotment of shares to, or the transfer of shares to or by, a company,

include (respectively) the acquisition of those shares by, and the issue or allotment or (as the case may be) the transfer of any of those shares to or by, nominees of that company; and the reference in section 132 to the company transferring the shares is to be construed accordingly.

(3) References in this Chapter to the transfer of shares in a company include the transfer of a right to be included in the company's register of members in respect of those shares.

(4) In sections 131 to 133 "company", except in references to the issuing company, includes any body corporate.

134(1) The Secretary of State may by regulations in a statutory instrument make such provision as appears to him to be appropriate:

(a) for relieving companies from the requirements of section 130 in relation to premiums other than cash premiums, or

(b) for restricting or otherwise modifying any relief from those requirements provided by this Chapter.

(2) Regulations under this section may make different provision for different cases or classes of case and may contain such incidental and supplementary provisions as the Secretary of State thinks fit.

(3) No such regulations shall be made unless a draft of the instrument containing them has been laid before Parliament and approved by a resolution of each House.

APPENDIX 7

Companies Act 1955 (NZ), ss64A to 64E

64A. For the purposes of Sections 64B to 64D of this Act:

"equity shares" means the shares comprised in the equity share capital of a company within the meaning of s158(5) of this Act;

"issuing company" means a company which issues shares in consideration for the acquisition of shares in, or the undertaking of, another company;

"merged company" means a company in respect of which an issuing company issues shares;

"Scheme of acquisition" means:

(a) a takeover offer as defined by s2(1) of the Companies Amendment Act 1963 which is made in accordance with Part I of that Act or which, by virtue of s3(a) of that Act, is not required to be made in accordance with Part I of that Act;

(b) an arrangement sanctioned by the Court pursuant to s205 of this Act;

(c) a sale or arrangement of the whole or part of the business or property of a company to which s278 of this Act applies;

"undertaking" means the whole of a business and all property, rights, and interests relating to that business.

64B. Nothing in s64(3) of this Act shall apply to the issue of shares at a premium by an issuing company pursuant to a scheme of acquisition whereby the shares are issued as fully paid up in consideration for either:

(a) the transfer or issue to the issuing company of shares in a merged company, or the cancellation of shares in a merged company, which results in the issuing company acquiring (together with any shares already held by it or any subsidiaries of the issuing company) 90 percent or more of the nominal value of the issued equity shares in the merged company; or

(b) the transfer or sale to the issuing company of the whole of the undertaking of the merged company.

64C. This section applies to the issue by an issuing company which is a wholly owned subsidiary of its holding company of shares to:

(a) that holding company; or

(b) a wholly owned subsidiary of that holding company:

in consideration for the transfer to the issuing company of shares in any other subsidiary of that holding company.

(2) Where an issuing company issues shares to which this section applies at a premium, nothing in s64(3) of this Act shall require the issuing company to transfer to the share premium

account any sum greater than the amount by which the value of the shares in the subsidiary transferred to the issuing company as shown in the accounting records of the company transferring the shares immediately before the transfer, exceeds the nominal value of the shares issued by the issuing company.

(3) For the purposes of this section, a company shall be deemed to be a wholly owned subsidiary of another if it has no members except that other and that other's wholly owned subsidiaries and its or their nominees.

64D.(1) This section applies to the issue by an issuing company of shares at a premium at any time before the 22nd day of October 1981 in consideration for the transfer or issue to the issuing company of shares or the cancellation of shares in another company which was, or, on the allotment of the shares issued, became a subsidiary of the issuing company where no part of the premiums on such shares was transferred to the issuing company's share premium account in accordance with or for the purpose of complying with s64 of this Act as in force immediately before the 1st day of January 1983.

(2) Section 64 of this Act as in force immediately before the 1st day of January 1983 shall be deemed never to have applied to the issue of shares at a premium by an issuing company to which this section applies.

(3) Nothing in paragraph 16(5) of the Eighth Schedule to this Act shall be taken as ever having affected the payment or declaration of any dividend by any company.

64E.(1) Where a company issues shares at a premium but, by virtue of s64B of this Act, is not required to transfer a sum equal to the aggregate amount or value of the premiums on those shares to a share premium account, and that sum is included or shown in any reserve or retained profits of the company in its balance sheet, that balance sheet shall state, whether by note or otherwise, the amount, origin, and nature of that sum.

(2) This section shall come into force on the 1st day of January 1983.