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

## Third Interim Report
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## SECTION A. INTRODUCTION

1. On 2 October 1968, the Committee presented a First Interim Report dealing with the Accounts and Audit provisions of the Act and indicated its intention, subject to the approval of the Ministers, of proceeding to deal with the other topics listed in paragraph 55 of the Interim Report. In our Second Interim Report, dated 28 February 1969, we indicated that we had temporarily suspended work on the provisions of the Acts relating to Investigations, in order to concentrate our attention on Disclosure of Substantial Shareholdings and Takeover Bids. The Committee has now considered the Investigations provisions of the Acts and presents this Third Interim Report dealing only with those provisions. The primary material available consisted of the Investigations Draft of 29 December 1966 (prepared by the Legislative Draftsman for the Territory of Papua and New Guinea), the redraft of these provisions in the General Revision Bill of 20 February 1968 (reprinted without alteration in the General Revision Bill of 20 February 1969) and comments on the Investigations Draft made by the following bodies:

Law Institute of Victoria;
Law Society of New South Wales;
Law Society of South Australia;
The New South Wales Bar Association;
The Queensland Company Legislation Standing Committee; and
The Victorian Bar Council.

We also considered the statement of the Law Council of Australia forwarded to the Secretary of the Standing Committee under cover of a letter of 18 August 1967 and a report of a Sub-Committee of the Law Council of Australia, together with reports of the Law Society of New South Wales and the Victorian Bar Council, relating to the publication of reports of inspectors under the Companies Act (see Law Council Newsletter for July 1966 page 5), The last-mentioned document was prepared before the Investigations Draft came into existence but deals with the general considerations applicable to publication of reports. The Committee also had available to it the re, ports of investigations into a number of companies, a list of which is set out in Appendix 'B', together with such material in the general submissions made to the Committee as was relevant to the present topic.

2. We propose to deal, first, with the existing provisions of the Acts and to refer to the principal criticisms which have been made with respect to those provisions. We shall then deal with the main topics of controversy and express our views upon them, and finally with particular criticisms of the existing Acts and the proposed drafts and our recommendations in respect thereof. References to

the Companies Act throughout this report are to the sections of the Victorian Act upon which the G.R.B. is based.

## SECTION B. INVESTIGATIONS PROVISIONS OF THE ACT

3. Provisions relating to the investigation of the affairs of companies existed in the Companies Acts for many years. These were of two kinds. The provisions now contained in sections 249 and 250 relate to the examination of certain classes of person in the winding up. The U.K. original section 249 was passed in 1844 and attained substantially its present form in 1862, whereas the original of section 250 was first enacted as section of the (U.K.) Companies (Winding Up) Act 1890. Prior to winding up, the affairs of a company could (until 1934) only be investigated under provisions now contained in Division 3 of Part VI. These provisions originated in the English Joint Stock Companies Act of 1856 and were copied into the Victorian Act of 1864 (sections 54-59). The operation of these provisions depended upon an application by the members or a proportion of them, or the passing of a special resolution by the company itself. In 1934, in Victoria, the Companies (Special Investigations) Act was passed by virtue of which the Governor in Council was empowered to declare that a company was a company to which the provisions of that Act applied. When such a declaration was made the Governor in Council could appoint an inspector in the same way as if an inspector had been appointed pursuant to an application made under the existing provisions of the Companies Act of 1928. So far as is known, only one company was investigated under these provisions (see Re The Producers Real Estate and Finance Co. Ltd. (1936) V.L.R. 235). The operation of the 1934 Act was limited to one year, though its operation was extended for another year by Act No. 43 of 1935. These Acts were repealed as spent by the Act of 1938, and no corresponding provisions were contained in the Act of 1938. However, they were re-enacted in 1940 and late in 1949 several companies (The Rubenstein group) were declared and investigated under the Act (see In re Chemical Plastics (1951) V.L.R. 136). When the Uniform Acts were adopted in 1961, the special investigations provisions were incorporated in the Acts of the States and the Ordinances of the Territories. The list of investigations in Appendix 'B', which is not necessarily complete, indicates that extensive use has been made of the provisions. The reports that have been furnished cover the activities of companies whose transactions would run into many millions of dollars.

The present legislation consists of two divisions:

Division 3 which represents the old provisions which enable an inspector to be appointed either by the company itself by special resolution or by the Governor in Council on the application of a proportion of the members; and

Division 4 which represents the special investigations provisions of Victorian Act of 1934.

There have also been added other provisions which enable investigation of the membership of a corporation (section 177), and the ownership of shares or debentures or the circumstances under which they were acquired or disposed of (section 178) and also provisions enabling the 'freezing' of shares which are under investigation under sections 177 or 178, where there is difficulty in finding out the relevant facts due wholly or mainly to the unwillingness of persons concerned to assist the investigation (section 179). These three sections were first enacted in the U.K. in 1947, and are now sections 172-174 of the U.K. Act of 1948, though our section 178 is now in a different form from its U.K. parent, as a result of difficulties encountered by Mr. F. J. O. Ryan in investigating certain share transactions in Ducon Industries Ltd. To some extent the two sets of provisions in Division 3 and Division 4 of Part VI overlap, but the powers conferred in respect of different kinds of investigation are not necessarily the same. Thus, the penalties under section 176 for sending documents out of the State with intent to defeat the purposes of the Division apply only to special investigations and not to inspections under Division 3. Broadly speaking, however, both Divisions enable the inspector to examine officers and agents of the corporation, the term 'officer or agent' being given an extended meaning which includes, for example, persons who are indebted to the corporation or are capable of giving information concerning the affairs of the corporation. Each Division empowers the inspector to take possession of books and documents, to examine witnesses on oath, to reduce the notes of examination to writing and require them to be signed by the person examined, and to make a report to the Governor in Council.

4. A further provision of the Act should be noted. Section 222 (1) (g) provides as a ground for winding up that 'an inspector appointed under section 169 or section 170 or section 173 has reported that he is of opinion:

(i) that the company cannot pay its debts and should be wound up; or

(ii) that it is in the interests of the public or of the shareholders or of the creditors that the company should be wound up.'

The original provisions did not include this special ground for winding up and if the inspector reported that in his opinion the company should be wound up, it was still necessary for the Attorney-General, in the winding up proceedings, to prove the existence of one of the ordinary grounds, e.g., that the company was unable to pay its debts or that it was just and equitable that the company should be wound up (see re Chemical Plastics above). In proceedings based on this ground, it has been held that the Court

still has a discretion as to whether to make a winding up order, and in re Testro Bros Consolidated Ltd. (1965) V.R. 18 Sholl J. refused to make a winding up order, although the ground existed in that the inspector had expressed the requisite opinion. Probably therefore, at the present time the existence of this ground does no more than to provide a convenient means of proving the existence of grounds for winding up and to cast the onus of proof on those opposing the winding up order.

5. In the Investigations Draft and subsequently in the G.R.B., the draftsman has combined many of the provisions of the old Divisions 3 and 4 of Part V with a view to providing a more logical and consistent arrangement an eliminating the anomalies which arose mainly from the somewhat piecemeal nature of the previous legislation. In the draft which we have annexed to this report we have followed substantially the arrangement and wording of G.R.B. draft but we have, of course, considered each provision for ourselves. In some cases we have inserted new provisions and in others have either deleted or amended provisions of the G.R.B. draft.

## SECTION C. PRINCIPAL CRITICISMS OF THE PROVISIONS

6. The principal criticisms of the existing provisions are:

(1) The provisions place in the hands of the Governor in Council a powerful instrument which is capable of seriously affecting the credit of a company against which it is applied, without providing any safeguard to the company against a hasty declaration, either in the form of a right to make representations to the Minister before declaration or of an appeal to a judicial authority against the making of a declaration. This criticism, therefore, has two aspects: the first is whether power to order an investigation should exist at all, the second it whether, if it is to continue, any safeguards should be provided against its misuse.

(2) The publication of notice of the appointment of an inspector may be said to be harmful to a company and if it turns out that there is no justification for the investigation, the company will have no redress for the injustice done to it.

(3) A strong objection is taken to the unrestricted publication of reports, particularly because, it is said, some of the persons criticised in reports have not had an adequate opportunity to answer allegations made against them, and unless some action is taken against them on the reports they may never have such an opportunity. Further, the persons criticised may be persons who are not directly concerned in the affairs of the company and, accordingly, they may never be able to answer criticisms effectively.

(4) It is argued that some safeguards should be imposed against unrestricted use of evidence taken by an inspector or by a person authorised by him to make inquiries.

(5) It is objected that the use of the inspector's opinion as a ground for winding up is unfair and that where the Attorney applies

for a winding up order he should be compelled to prove his case in the ordinary way.

(6) Objection is taken to the power to order that the expenses be paid by the company or by a person who requested the investigation, particularly since there is no appeal from an order of the Governor in Council directing such expenses to be paid and no provision for the assessment of the amount of such expenses, except presumably the ordinary requirements of proof in an action to recover them.

## SECTION D. DESIRABILITY OF PROVISIONS FOR INVESTIGATIONS

7. The Companies Acts have for many years provided that, in a liquidation, officers and agents of the company may be examined for the purpose of obtaining information regarding the promotion, formation, trade dealings, affairs or property of the company, either privately under section 249 or, where the liquidator had reported fraud or concealment of material facts, publicly under section 250. A witness examined in private under section 249 may only refuse to answer on the ground of self-incrimination or professional privilege, though if it is sought to ask him irrelevant questions he may apply to a judge to release him from the obligation to answer. The liquidator may use the power of examination to enable him to decide whether to continue or commence an action by the company, or whether or not to defend an action against it. The depositions of a witness so examined are evidence against him (as admissions) but are not evidence against others. Unless filed by the liquidator they are not available for inspection by other persons. On the other hand, in the case of a public examination under section 250, the notes of the examination may be inspected by any creditor or contributory. They are similarly available as admissions against the person examined, and it would seem that in the case of a public examination the person examined cannot refuse to answer on the ground that the answer might incriminate him (see **re Paget, ex parte the Official Receiver** (1927) 2 Ch. 85, a decision under the Bankruptcy Act). We mention these aspects of the power to examine in liquidation because some of the objections made to the powers of inspectors would apply equally to the powers conferred by sections 249 and 250.

8. Part at least of the justification for enacting provisions enabling an investigation to be made before winding up lies, we think, in the fact that by the time the winding up stage has been reached, it is too late to save the company from ultimate dissolution. In some of the cases reported on, the company has not in fact been wound up but has been able to carry on after reorganisation. We think it is important that there should be a power of investigation which will enable facts to be ascertained in cases where the known facts concerning, o the company give rise to a suspicion that the company is being mismanaged or fraudulently

managed. In the report of the Law Council Sub-Committee referred to above, four possible uses were suggested for the

reports of inspectors, though the Sub-Committee did not agree that all the, uses were legitimate. They were:

(1) to place before the Crown Law authorities the facts elicited by an inspector, thereby both assisting in the preparation and conduct of criminal or civil proceedings against persons who have been concerned in the affairs of the company and also enabling decisions to be made whether to institute such proceedings where this might otherwise be a matter of doubt;

(2) to provide, by its contents, a ground for winding up of a company under section 222 (1) (g);

(3) to state the evidence which was given before the inspector so that, as so stated, it may be used in criminal or civil proceedings against persons who are witnesses before the inspector;

(4) to express to Parliament and through it to the public at large the inspector's views as to the reason for a company's financial situation and the conduct of persons who have had the control of the company's affairs.

9. To these four reasons, we would add two further justifications for the appointment of inspectors and the presentation of reports by them. The first of these is that stated above, namely, that the appointment of an inspector may often be instrumental in arresting the deterioration in a company's affairs and in enabling it to continue in existence. The second is that the reports of inspectors provide much valuable material as to the causes of company failures, the dangers of particular practices, and the areas in which reform of the law is called for. This is, of course, to some extent merely an extension of the fourth use suggested by the Sub-Committee of the Law Council, but we think it goes further and is of more general significance.

10. The Sub-Committee considered that the first of the four uses suggested by it was the only legitimate one, although the Victorian Bar Council considered that No. 4 was a legitimate objective (though it suggested some limitations on disclosure). The Victorian Bar Council also thought that the report should be available not only to the Crown Law authorities but to legal practitioners acting for shareholders, debenture holders and, possibly, creditors of the company, if they are bona fide contemplating legal proceedings. The Law Society of New South Wales agreed with this last point and also considered that in some cases the public interest might require publication for the fourth reason stated above. While the Law Society of New South Wales thought that the report might properly state the evidence given before the inspector so that it might be used for the purposes of civil or criminal proceedings, this statement appears from the context to

have meant no more than that the report, if made available to interested parties, would inform them that certain evidence had been given before the inspector, but would not make the evidence itself available in civil or criminal proceedings.

11. In our view, the first of the four uses for the report is by far the most important, and we think that the Crown Law authorities should be primarily responsible for taking action on the report. While traditionally the Crown Law authorities in such matters have only concerned themselves with criminal proceedings, the legislation contemplates that they may in appropriate cases take civil proceedings in the name of the company (see section 169 (7)). Such proceedings would be 'for the recovery of damages in respect of any fraud misfeasance or other misconduct in connection with the promotion or formation of that company or in the management of its affairs or for the recovery of any property of the company which has been misapplied or wrongfully retained'.

12. So far as we are aware, this power has never been exercised. In our view, it should be regarded as the responsibility of government to take civil proceedings in the name of the company in cases where there are seen to be good prospects of recovery, but in which, by reason of the relative poverty of the shareholders or creditors, the inability of the company itself to finance proceedings, or the practical impossibility of organising financial support for the litigation, it is impossible that action will be taken without the support of government. Such support would need to extend to the provision of security for the defendant's costs (see section 363). If the action were successful, the Crown's costs would be recouped if and so far as the defendant had assets to meet the judgment. While we consider it important in the interests of shareholders and creditors that this obligation to take court proceedings should be accepted by the Crown, we do not suggest that any attempt should be made to write such an obligation into the legislation, since it would in our view be impossible to specify in advance the circumstances in which the power should be exercised. Much would depend on the strength of the legal opinion in support of the claim, and on the financial circumstances of the prospective defendant. Accordingly, we do no more than express the view that it would be in accordance with modern views as to the responsibility of the State for enabling under-privileged citizens to enjoy the benefits of the legal system if governments considered themselves as bound to lend them assistance in circumstances of the kind we have described. The fact that circumstances may exist in which it would be proper for them to do so is already recognised by section 169 (7). It may be noted here that, if it were accepted as a matter of policy that it was one of the responsibilities of government to see that civil justice was done as well as criminal justice in such cases, one of the reasons suggested for publication of reports would have much less force. We think, however, that the fourth of the uses listed by the Law Council Sub-Committee, and the extension of it which we have suggested above, provide an independent justification not only for the appointment of inspectors, but also for publication of their findings, despite

the risks inherent in the system, and in particular the possibility of injustice to persons criticised in the reports. We shall, in a later part of this report, indicate to what extent we think safeguards should be provided against the risks we have mentioned. Some, for example the right of persons examined

to be represented by counsel, have already been written into the drafts submitted to us. Subject to the provision of such safeguards, we are strongly of opinion that the power to order an investigation should continue.

13. There remains the question whether some limitation should be placed on the power to appoint an inspector, either by giving the company an opportunity of making representations to the Minister, or by empowering the company to apply to the Court for an order terminating the investigation. The Law Council of Australia has suggested that because of the loss of public confidence which will almost certainly result from the appointment of an inspector, provisions should be inserted in the Act:

(a) effectively preventing publication of the fact that an inspector has been appointed for a period of (say) 28 days after the date of the appointment;

(b) permitting the company, immediately upon the appointment, to have access to the material on the basis of which the appointment was made;

(c) permitting the company to place material before the appropriate Minister in opposition to the appointment;

(d) empowering the Governor in Council to revoke the appointment at any time;

(e) empowering the Supreme Court on the application of the company (either before or after the expiration of the above mentioned period) to make an order revoking the appointment on the ground that there was no prima facie case for the original appointment or that there is no reasonable basis for the continuation of the investigation.

These suggestions recognise that there may be cases in which it is necessary to appoint an inspector without warning to the company concerned in order to prevent the destruction or falsification of records before the inspector can obtain access to them. Hence the proposal for a 28 day period after the inspector has been appointed.

14. It will be seen from our proposed draft (following those prepared by the draftsman) that where the Governor in Council appoints an inspector at the request of an applicant or applicants (e.g., a specified proportion of the shareholders or debenture holders, or a trustee for debenture holders, or the company itself) the application must be supported by such evidence as the Governor in Council requires for the purpose of showing that the applicants have good reason for requiring the investigation. Where the request is made in respect of a foreign company by the appropriate authority

of a place outside the State it is assumed that some similar requirement will have been satisfied in that other place. Where the Governor in Council acts without any request, he must be satisfied as to the matters set out in subparagraph (h) of the section.

15. In our view these safeguards are adequate. Our study of the published reports of inspectors does not reveal any case in which it could have been said that the investigation was not justified in the circumstances, and although we are aware that there have been cases in which the investigation revealed

that nothing was amiss, in our view the known circumstances at the time when the inspector was appointed were clearly such as to warrant an investigation. The appointment of an inspector is a serious step, but it is also likely to be an expensive one, and we do not think that there is any substantial risk that the power of the Governor in Council will be exercised without a due sense of responsibility, particularly having in mind the fact that a Minister who recommended the appointment of an inspector without having adequate grounds for doing so would ultimately have to answer for his action if the inspector's report revealed that there were no grounds for criticism of the company or its officers.

## SECTION E. PUBLICATION OF APPOINTMENT OF INSPECTOR

16. We have said above that the obligation to declare a company by proclamation published in the Government Gazette under Division 4 of Part VI has been criticised on the ground that publication of the fact that an inspector has been appointed may have serious effects on the credit of the company if, in fact, the suspicion of it is ill-founded. It has been suggested either that no publicity should be given to the appointment of an inspector or that the Minister should have a discretion. While we recognise that there are arguments both ways, in our view it is desirable that the appointment of the inspector and the terms of his appointment (i.e., the specification of the matters on which he has to report) should be published because there is an even greater risk that when the fact of the appointment is known, as it almost inevitably will be, rumour will do more harm than the truth. In some cases only one subsidiary may be under investigation in a group of companies; in others, the investigation may only be into a particular transaction not affecting the company's general credit or capacity to carry on business. We would add that, in most of the cases in which inspectors have been appointed, the facts in relation to the company concerned have been so notorious that it is obvious that little damage could have accrued from the mere fact of appointment of an inspector.

## SECTION F. PUBLICATION OF REPORT

17. We have indicated earlier that, on the assumption that the power of inspection is to continue, two possible courses are open. The first is to forbid publication of any part of the report and for governments to accept the responsibility of all action, civil or criminal, which may result from an inspector's report. The second is to allow publication not only so that appropriate civil action may be taken by private persons, but so that the community will become aware of the cause of the failure or the difficulties of the company concerned and of the dangers of particular practices

or the defects of the existing law. We have said that we prefer the second course. We think, however, that it should be recognised that the power to publish the report is

fraught with serious dangers unless it is used with a due sense of responsibility. We do not suggest that Ministers do not have regard to this factor, but we think that the legislation should provide a safeguard which would make it clear that the Minister in authorising publication should exercise a discretion as to which parts of the report should be published, and should be responsible for eliminating any passages which might do harm to the persons concerned unless in his opinion overriding considerations of public interest require publication. We therefore suggest that there should be a provision in the Act that the report, or part of it, cannot be published unless the responsible Minister has certified that he has considered the probable effect of publication on the interests of the company, its shareholders and creditors, and any other persons mentioned or referred to in the report, and is satisfied that the public interest requires that the report, or that part of it, should be published. The necessity for such a declaration would, we think, also help to ensure that inspectors did not include in their reports gratuitous criticisms of persons who were not under any liability in respect of the matters reported on. We think, too, that there should be excluded from publication any recommendations made by the inspector as to criminal proceedings. As we understand it, two views are at present taken with regard to this matter. In some cases the view has been taken that if criminal proceedings are to be instituted the report should not be published, at least until those proceedings have been disposed of. In other cases, inspectors themselves have taken the view that they should not express an opinion with regard to the commission of offences. In our view, it should be the responsibility of inspectors to express opinions as to the commission of criminal offences and to recommend action. Indeed, it is our view generally that investors will be better protected by a determined and thorough enforcement of the criminal provisions of the existing Acts than by any amendments which we can suggest. While there may be cases in which a conclusion that there is civil liability in itself logically involves the conclusion that a criminal offence has been committed, we do not think that publication of a finding as to civil liability should thereby be prohibited, but we do think that no part of the report which expressly states a finding or opinion that a criminal offence has been committed or which recommends criminal proceedings should be published.

18. It should therefore be provided that, while it should be the duty of the inspector to make recommendations as to whether or not criminal proceedings should be instituted, any findings, opinions or recommendations as to criminal proceedings should be embodied in a separate document to which the provisions relating to publication would not apply.

19. We have considered to what extent the limitations imposed on publication should be considered as impinging on the privileges of Parliament. In our view, it would be undesirable that the limitations should be expressed in such a way as to imply that the report of an inspector could not be subject to discussion in Parliament unless the Minister had authorised publication to the world at large. But we think it should be expressly provided that

no report of the proceedings of either House relating to any part of such a report should be published outside Parliament unless either the report itself or that part of it had been so published, or the House had expressly authorised publication of those proceedings.

20. We should add that, although we have indicated that we favour the retention, subject to limitations, of the power to publish the reports of inspectors, the existence of that power casts a corresponding burden on the inspector not to criticise without cause, and without giving the persons affected an adequate opportunity to explain their conduct. This aspect is dealt with more fully in section H below.

## SECTION G. PUBLICATION OF EVIDENCE

21. There is no provision for the general publication of evidence given to an inspector, though in many of the reports the inspectors have quoted extensively from the transcript of evidence taken before them and so have made that part of the transcript generally available when the report itself has been published. There is, however, provision that the inspector may cause notes of an examination to be recorded and signed by the person examined and that such notes, except for incriminating answers, may be used in evidence in any legal proceedings against that person. Although not expressly stated in the Act, it seems clear that oral evidence may be given of statements made by a witness where it is desired to rely on such state-meats as admissions by that person, subject to the like protection in respect of incriminating answers. In our view, subject to the safeguards against self-incrimination, evidence given by a witness before an inspector should be available as an admission in legal proceedings against that person not only on behalf of the Crown but on behalf of civil claimants. We have already referred (page 5 above) to the use that can be made of evidence given in examinations under sections 249 and 250. We think, however, that the suggestions made by the Victorian Bar and the Law Society of New South Wales might be adapted to cover the use of notes of evidence, that is, that it should be provided that the record of evidence should only be made available by the Minister to a qualified legal practitioner who-certifies that he is acting for a person who is bona fide contemplating legal proceedings arising out of matters investigated by the inspector and upon condition that such evidence is not to be published except insofar as it may be necessary to do so for the purposes of the proceedings or insofar as reports of the proceedings themselves are published in the ordinary course.

## SECTION H. PROTECTION OF WITNESSES

22. We have said above that objection has been taken that witnesses who are subject to examination by inspectors do not have adequate protection against injustice. There are two possible solutions. The first is to make the whole proceeding into a judicial proceeding and to require that charges or allegations be formulated and the person concerned be given an opportunity

to present evidence before any findings adverse to that person can be made. The second is merely to enable that person to be represented and be examined by his own legal representative for the purpose of explaining any matters as to which he has been questioned. In our view the first course would make the conduct of an investigation impossibly complicated. The inspector would be under the necessity of constantly re-assessing the effect of the information he had obtained, of formulating and re-formulating allegations and of recalling witnesses to enable them to be cross-examined by persons affected by their evidence. We think that the second course, which has in fact been adopted by some inspectors (see **Testro Bros Pty Ltd. v. Tait** 109 C.L.R. 353) and is proposed to be given a statutory basis in the drafts submitted to us, will provide adequate protection so long as the safeguards against publication of injurious material, which we have recommended elsewhere, are adopted.

23. In saying this we do not mean to imply that inspectors should consider themselves to be free from any obligation of fairness towards persons examined by them, still less that they should regard themselves as having licence to castigate the officers or former officers of a company as a substitute for those criminal or civil proceedings which, if their criticisms were justified, should be taken against the persons criticised. Although we do not think that an obligation to act judicially should be imposed on the inspectors by law, we think that they should recognise that common fairness will ordinarily demand that a person be not condemned without a hearing. Complaints have been made that this principle has not always been observed, and that in some cases, although the person criticised has given evidence before the inspector, he has not been made aware that his conduct might be the subject of adverse comment. We have not attempted to determine whether these criticisms are justified in respect of any particular case, but the fact that they have been made demonstrates the necessity for care on the part of the inspector. Nor do we think that the problem is necessarily solved by making the process a judicial or quasi-judicial one, since we have no reason to believe that inspectors have not been conscious of the need to act fairly. It may be observed that, in the course of judicial proceedings, a judge may find it necessary to criticise a person who is not a party to the proceedings, and hence is not represented.

## SECTION I. CONSEQUENCES OF ADVERSE REPORT

24. As we have said, objection has been taken to the provisions which make the opinion of the inspector a ground for winding up (section 222 (1)(g)). Having regard to the decision in **Re Testro Bros Consolidated** (1965) V.R. 18 (see paragraph 4 above), we think that where a responsible person is investigating the affairs of the company and forms the opinion that the company should be wound

up, it is reasonable to place the onus of proof on those who contest that conclusion, and we would favour the retention of section 222 (1) (g) as a ground of winding up.

## SECTION J. LIABILITY FOR EXPENSES

25. The present provisions of Division 3 of Part VI of the Act enable the Governor in Council to direct that the expenses of and incidental to an investigation (including the costs of any proceedings brought by the Minister in the name of the company) shall be paid (a) where a prosecution is instituted, out of public funds, or (b) in any other case, by the company investigated or, if the Governor in Council so directs, by the applicant or partly by the company and partly by the applicant (see section 171 (8)).

26. In the case of an investigation under Division 4, the Governor in Council may order the expenses to be paid by the company or by any person who requested the appointment of the inspector (section 173 (3)). There is an additional provision in Division 3 that the Minister may require security to be given before ordering an investigation, and that, if the company is ordered to pay the expenses and fails to do so, the applicants shall make good the deficiency up to the amount of the security given by them. This seems to us particularly unjust, since the assumption on which it proceeds is that the Governor in Council has already decided that the company rather than the applicants should be responsible and has therefore presumably concluded that the applicants had good grounds for requesting an investigation. It seems to us, however, that the concept of ordering the expenses to be paid otherwise than out of public moneys is wrong. In our view, the primary object of the investigations provisions is to inform the Crown of the facts relating to the company so that appropriate action can be taken. In many cases the reason for investigation is a suspicion that some criminal offence has been committed but even where this situation does not exist, it is our view, as we have said above, that the Government should accept the responsibility for seeing that justice is done, both criminal and civil, and in these cases especially persons who have civil remedies are often incapable of financing litigation or of organising the co-operation between injured parties and arranging the provision of the necessary finance to enable litigation to be instituted. We think that it must at least be recognised that there is no justification for ordering a person who has requested an investigation (perhaps from completely altruistic motives and without being personally interested in the result) to pay the expenses, which may be extremely heavy.

27. We would agree that there may be some cases in which it might be just to require the company itself to pay the costs of the investigation. Such cases would be those in which the company had enriched itself at the expense of the public in circumstances in which it was likely that it would have a surplus of funds above those required to make restitution. If this last condition were

not fulfilled an order on the company to pay the expenses of the investigation would tend to diminish the funds available for those whom the investigation was intended to assist. But if the power to order the company to pay the expenses were to be retained, we think it would be necessary to provide some judicial procedure for the determination of the

question whether this obligation should be imposed. Under the procedure provided by the existing Act the Governor in Council may impose what may be an extremely heavy liability by Order in Council, without any right of prior representation or subsequent review on the part of the person affected by the order. If any such judicial procedure were established, it would be likely that the opportunity would be taken to re-agitate in such proceedings the questions investigated by the inspector in order to determine the ancillary question of who should bear the expense. Our inquiries suggest that few orders have been made under either section 171 (8) or section 173 (3) and that not all these orders have been complied with. In our view, taking all the above considerations into account, the costs of all investigations should be borne out of public funds. We have considered whether there might not be cases in which the Minister, before recommending the appointment of an inspector, might seek an undertaking or security from the person requesting the appointment for payment of the expenses or part of them. We do not think the drastic powers conferred by these provisions should be 'for sale', nor should the Minister be influenced by financial considerations in deciding whether or not they should be exercised. The expense involved is, in our view, as much an expense of government as the maintenance of the police force. We therefore recommend the omission of the provisions both for payment of expenses and for the giving of security.

28. We think that different considerations apply to investigations of the ownership of shares and related questions under the powers conferred by sections 177 and 178 of the Act. These powers may be invoked in cases where the principal purpose is to supply the company or some of its shareholders with information as to the true owners of particular holdings of shares in the company. Where there is no element of public interest involved, it may be thought appropriate to require security for the costs of the investigation, and also to confer on the applicants a right to have an inspector appointed, if the applicants are prepared to give such security. Although the existing Act makes no provision in relation to security or payment of expenses by the applicants in this class of case, we have adopted the draftsman's suggestion that such a provision be introduced, but with a limitation of the applicant's liability to the amount for which security has been given.

## SECTION K. PARTICULAR PROVISIONS

29. In addition to the general questions discussed in the preceding sections of this report, we have considered a number of detailed criticisms contained in the material referred to in paragraph 1 above. Our conclusions in respect of these matters of detail are embodied in the draft in Appendix 'A', and we do not propose to comment on verbal changes or relatively unimportant matters. Some of the provisions of the draft do, however, merit discussion

additional to what is already contained in this report. References to the

section numbers used in Appendix 'A' precede the discussion of these matters in what follows:

**Section 171 (1)(g):** Under the existing Act (section 172(3)(b)) a foreign company may be 'declared' if a request is made by 'the appropriate authority' of another country, State or Territory. The expression 'appropriate authority' is not defined, and it is thought that the provision should be confined to cases where the 'authority' has substantially similar powers to those conferred on the Governor in Council.

**Section 173 (3):** This is a new sub-section designed to enable revocation of the appointment of an inspector, but providing that the revocation shall be by notice to the inspector, to avoid the possibility of his attempting to exercise powers in ignorance of the fact that he no longer has them.

**Section 174 (1):** Under the existing Act (section 171 (1)) an inspector may investigate the affairs of a 'related' corporation or of a corporation which formerly was, but is no longer, 'related'. In our view it is desirable, as suggested in the General Revision Bill, that the exercise of this power should be subject to the consent of the Governor in Council.

**Section 174 (8):** Under the existing Act (section 171 (4)) a person who is being examined risks punishment for contempt if he takes a genuine objection to answer a question on the ground that it does not relate to the affairs of the corporation. The proposed sub-section limits his liability to punishment to the case where the Court is satisfied that in failing or refusing he was not acting in good faith. In other cases he will merely be ordered to answer, and will become liable to be dealt with for contempt if he still refuses.

**Section 174 (13):** This sub-section gives a person who has signed a copy of the notes of his evidence a right to receive a copy. It seems reasonable that a person who is compelled to sign a statement should be entitled to a copy of what he has signed.

**Section 174 (15):** It has been suggested that witnesses who are not in the literal sense officers or agents of the company being investigated should be entitled to expenses. In our view all witnesses should be entitled to their expenses. Apart from the fact that the company may have no funds, it cannot be assumed that it either will, or ought to, pay for its own staff to attend for examination.

**Section 176:** Under the existing Act (section 169 (3)) the Governor in Council (or the Minister in cases falling within section 173

(2)) must forward a copy of the report to the company and (if asked) to those who applied for the investigation. The draft in the General Revision Bill gave the Governor in Council an undefined discretion to withhold interim reports, and power to withhold final reports if he was of opinion that there was 'good reason' for not divulging the contents. In our view, the company is entitled to know

the contents of reports that have been made in respect of its affairs, and the persons who requested the appointment of an inspector, while perhaps they have no claim of right, ought in general to be told what the inspection has revealed. There may, however, be cases where legal proceedings or contemplated legal proceedings might be prejudiced by premature disclosure, and if so, the Minister should be entitled to withhold the report. Sub-sections (2) and (3) are designed to achieve this result.

**Section 176 sub-sections (4) to (9) inclusive:** These sub-sections have been drafted to give effect to the views expressed in paragraphs 17 to 21 of this report.

**Section 176 (10):** This sub-section replaces section 169 (6) of the existing Act, but omits the words 'and all officers and agents of the company (other than the defendant in the proceedings) shall on being required by the Minister so to do give all assistance in connection with the prosecution which they are reasonably able to give.' These words have been criticised by the Law Society of New South Wales Wales as creating a new offence equivalent to misprision of a misdemeanour. When the extended definition of 'officer or agent' is taken into account, the existing section certainly imposes a heavy obligation of lending assistance on persons whose only connection with the company may be that they are capable of giving information as to its affairs. We see no reason why prosecutions arising out of an inspector's report should be in a favoured position as compared with any other kind of prosecution. We would add that if these words were not to be omitted, it would be necessary to provide some safeguard against self-incrimination.

**Section 176 (12):** The decision of the High Court in Testro v. Tait, 109 C.L.R. 353 at p. 364, has, in effect, limited the use of the inspector's opinion in legal proceedings to cases of winding up under section 222 (1) (g). We think the legislation should be so expressed as to incorporate the effect of that decision.

**Section 177:** This section is drafted to give effect to our proposals regarding the expenses of investigations, contained in paragraphs 26 to 28 of this report. We have also-made provision (sub-section (3)) giving the Minister power to provide security for costs in a civil action brought by him in the name of the company (see paragraph 12 of this report) and also (sub-section (4)) removing any doubt as to the right of the crown to reimbursement of its costs in a successful civil action brought in the name of the company.

**Section 178 (3):** It has been suggested that the use of the words 'by the company' in section 175 (1) (c) of the existing Act might have the effect of rendering it unnecessary to serve the company

with a petition presented under the section. We have therefore made express provision for such service.

**Section 180:** The draft submitted to us did not contain the provision for an application to the court contained in section 179 (2) of the existing Act. We have restored this provision.

30. It will be noted that our draft omits entirely the provisions contained in section 170 of the existing Act. Under that section, a company can, by special resolution, appoint one or more inspectors to investigate its affairs. The inspector reports his opinion in such manner and to such persons as the company in general meeting directs. Such an inspector has the same power to examine witnesses on oath, to call for, and take possession of, books and documents, to require witnesses to sign the notes of their examination, and to extend the investigation to cover the affairs of related, or formerly related, companies as an inspector appointed by the Governor in Council. The report of an inspector appointed under section 170 of the existing Act would not, however, be covered by the provision for publication under section 169 (4), and accordingly could not be made public without the risk of defamation proceedings.

31. It has been suggested by the New South Wales Bar and by the Law Council of Australia, and we agree, that any company desiring to invoke the drastic powers conferred on inspectors should have to satisfy the Governor ill Council in the same manner as would a minority group of shareholders applying for an investigation. Section 171 (1)(f) of our draft enables an appointment to be made on application by the company pursuant to a special resolution. In our view, therefore, it is unnecessary and undesirable to continue the power now contained in section 170 of the existing Act.

32. At the end of Appendix 'A' will be found some references to sections which require consequential amendment because of renumbering, and also a redraft of section 367 of the Act, incorporating suggestions which have been put forward for its amendment.

## SECTION L. CONCLUSIONS AND RECOMMENDATIONS

33. Our main recommendation, which embodies all the legislative changes recommended in this report, is that the draft contained in Appendix 'A' should be enacted to replace Divisions 3 and 4 of Part VI of the Act. For convenience, we set out hereunder our other conclusions and recommendations so far as they relate to important matters of principle:

(a) The power to order special investigations of the affairs of companies should be retained for the main purpose of revealing the facts to the Crown Law authorities for use in connection with civil and criminal proceedings, but also for other reasons, of which the most important are that such investigations assist in the discovery of the factors involved in company failures, and are a valuable aid to law reform.

(b) The primary responsibility for action on reports of inspectors should rest on the Crown, not only for instituting criminal proceedings, but also, in appropriate cases, for taking civil proceedings in the name of the company.

(c) It is desirable that the fact of the appointment of an inspector and the terms of his appointment should be published in the Government Gazette.

(d) There should be power to publish the whole or part of a report, but before doing so the responsible Minister should certify that he has considered the probable effect of publication on the interests of the company, its shareholders and creditors, and any other persons mentioned or referred to in the report, and is satisfied that the public interest requires that the report or that part of it should be published.

(e) It should be the duty of inspectors to make recommendations as to criminal proceedings, but such recommendations should be contained in a separate document to which the provisions relating to publication would not apply.

(f) The record of evidence given to an inspector should not be made available, except to a legal practitioner acting for a person bona fide contemplating legal proceedings relating to matters investigated. Subject to safeguards against self-incrimination, evidence so given should be admissible in legal proceedings.

(g) Inspectors should not be compelled to act judicially, but persons appearing before them should have a right to legal representation, and inspectors should recognise that a man should be heard in his own defence before he is criticised.

(h) The inspector's opinion that the company should be wound up should be retained as a ground for winding up by the court.

(i) The expenses of all investigations should be borne out of public funds, except in the cases of investigations into the ownership of shares and related questions, in which cases a power to require security for expenses from those requesting the investigation should be available, but the liability of such persons should be limited to the amount of the security.

R. M. EGGLESTON
J. M. RODD
P. C. E. COX

2 June 1969

**APPENDIX A**

## PART VIA – INVESTIGATIONS

### Division 1. Preliminary

168. In this Part, unless the contrary intention appears:

'Affairs' in relation to a corporation, includes the promotion, formation, membership, control, trading, dealings, business or property of the corporation; 'Interest' means an interest as defined in section 76; 'Officer or agent', in relation to a corporation, includes:

(a) a person referred to in paragraph (a), (b), (ba) or (c) of the definition of 'Officer' in sub-section (1) of section 5, and a banker, solicitor or auditor of the corporation;

(b) a person who at any time:

(i) has been a person referred to in paragraph (a) of this definition; or

(ii) has been otherwise employed or appointed by the corporation;
(c) a person who:

(i) has, or has at any time had, in his possession any property of the corporation;

(ii) is, or was at any time, indebted to the corporation; or

(iii) is capable of giving information concerning any affairs of the corporation; and

(d) where an inspector appointed under this Part has reasonable grounds for suspecting or believing that a person is a person referred to in paragraph (c) of this definition – that person.

169. This Part does not authorise an investigation into the affairs of a corporation in relation to any business of the corporation that is life insurance business for the purposes of the Life Insurance Act 1945-1966 of the Commonwealth.

### Division 2. Official Investigations

170. In this Division 'inspector' means an inspector appointed under this Division.

171. (1) The Governor in Council may appoint an inspector to investigate the affairs of a corporation, or such aspects of the affairs of a corporation as are specified in the instrument of appointment:

(a) in the case of a corporation (not being a banking corporation) having a share capital - on the application of not less than one

hundred members or of members holding not less than one-tenth in number of the shares issued or of members holding not less than one-tenth of the paid up capital of the corporation;

(b) in the case of a banking corporation having a share capital - on the application of members holding not less than one-third in number of the shares issued;

(c) in the case of a corporation not having a share capital - on the application of not less than one-tenth in number of the members of the corporation;

(d) in the case of a corporation (not being a banking corporation) which has issued debentures - on the application of the trustee for the holders of the debentures, or of persons holding not less than one-tenth in nominal value of the debentures issued;

(e) in the case of a corporation which has issued interests - on the application of the trustee for or representative of holders of interests, or of one-tenth in number of the holders of interests;

(f) in the case of a corporation - on application by the corporation in pursuance of a special resolution that such an application be made;

(g) in the case of a foreign company - if an authority of a place outside the State having in relation to that foreign company substantially similar powers to those conferred on the Governor in Council by this section has requested the Governor in Council that an appointment be made under this section in respect of the foreign company; or

(h) if the Governor in Council is satisfied that:

(i) for the protection of the public or the holders of debentures of or interests issued by, or the members or creditors of, the corporation, it is desirable that the affairs of the corporation should be investigated under this Division;

(ii) it is in the public interest that allegations of fraud or misfeasance by persons who are or have been concerned with the affairs of the corporation should be investigated under this Division; or

(iii) for any other reason it is in the public interest that the affairs of the corporation should be investigated under this Division.

(2) An application under paragraph (a), (b), (c), (d), (e) or (f) of sub-section (1) shall be supported by such evidence as the Governor in Council requires for the purpose of showing that the applicants have good reason for requiring the investigation.

172. (1) good reason) Where it appears to the Governor in Council that there is so to do, he may appoint an inspector

(a) to investigate the membership of any corporation and otherwise with respect to the corporation for the purpose of determining the true persons who are or have been financially interested in the success or failure (whether real or apparent) of the corporation or able to control or materially to influence the policy of the corporation; or

(b) to investigate the ownership of any shares in, debentures of or interests issued by a corporation, or the circumstances under which a person acquired or disposed of or became entitled to acquire or dispose of any shares in, debentures of or interests issued by a corporation.

(2) The terms of appointment of an inspector under this section may define the scope of his investigation, whether as respects the matters or the period to which it is to extend or otherwise, and in particular may limit the investigation to matters connected with particular shares, debentures or interests.

(3) Where an application for an investigation under this section with respect to particular shares in, debentures of or interests issued by a corporation is made to the Governor in Council by persons who would be entitled to make application under paragraph (a), (b), (c), (d) or (e) of sub-section (1) of section 17I or by the corporation in pursuance of a special resolution that such an application be made, and security is given of such amount as the Governor in Council thinks fit for payment of the costs of and incidental to the investigation (including the costs of the inspector), the Governor in Council shall appoint an inspector to conduct the investigation unless he is satisfied that the application is vexatious, and the terms of an inspector's appointment shall not exclude from the scope of his investigation any matter which the application seeks to have included therein, except insofar as the Governor in Council is satisfied that it is unreasonable for that matter to be investigated.

(4) Subject to the terms of an inspector's appointment, his powers extend to the investigation of any circumstances suggesting the existence of an arrangement or understanding which, though not legally binding, is or was observed, or likely to be observed, in practice and which is relevant to the purposes of his investigation.

(5) For the purposes of an investigation under this section, the provisions of this Division, mutatis mutandis, apply to and in relation to any person whom the inspector has reasonable cause to

believe to be capable of giving any information in connection with the investigation as they apply to and in relation to an officer or agent of a corporation under investigation.

173. (1)The terms and conditions of appointment of an inspector (including terms and conditions as to remuneration and as to the indemnifying of the inspector by the Governor in Council) shall be as determined by the Governor in Council.

(2) An appointment of an inspector shall be published in the Government Gazette.

(3) The Governor in Council may by notice given to the inspector terminate his appointment at any time and notice of such termination shall be published in the Government Gazette.

174. (1) If an inspector appointed to investigate the affairs, or any aspect of the affairs, of a corporation thinks it necessary for the purposes of the investigation to investigate also the affairs, or any aspect of the affairs, of any other corporation which is or has at any relevant time been deemed to be related to that corporation by virtue of sub-section (5) of section 6, he has with the consent of the Governor in Council, the power so to do in accordance with the provisions of this Division for those purposes.

(2) Every officer or agent of a corporation the affairs of which are being investigated under this Division shall, if so required by an inspector, produce to the inspector all or any books relating to the affairs of the corporation (whether or not the books are books of the corporation) in the custody or power, or under the control, of the officer or agent, and shall give to the inspector all assistance in connection with the investigation which he is reasonably able to give.

(3) An inspector may, by notice in writing in the prescribed form, require any officer or agent of a corporation, the affairs of which are being investigated under this Division to appear for examination on oath or affirmation (which the inspector is hereby authorised to administer) in relation to its affairs, and the notice may require the production of all or any books relating to the affairs of the corporation (whether or not the books are books of the corporation) in the custody or power, or under the control, of the officer or agent.

(4) A person required under sub-section (3) to appear for examination may be represented by a solicitor with or without counsel, who may put to him questions for the purpose of enabling him to explain or qualify any answer given by him.

(5) Where, in relation to a corporation the affairs of which are being investigated under sub-section (1) of this section by an inspector, the inspector makes a requirement under sub-section (2) or sub-section (3), he shall furnish to the person to whom the

requirement is addressed a certificate in the prescribed form that the corporation is a corporation to which sub-section (1) applies and that the person to whom the requirement is addressed is an officer or agent of such a corporation.

(6) A person who complies with a requirement of an inspector under sub-section (2) or sub-section (3) shall not incur any liability to any person

by reason only of his compliance with the requirement, and for the purposes of this sub-section a certificate under sub-section (5) is conclusive evidence of the facts therein stated.

(7) An inspector who, under this section, requires the production of any books in the custody or power, or under the control, of any officer or agent of a corporation:

(a) may take possession of all or any of those books;

(b) may retain all or any of those books for such time as he considers to be necessary for the purposes of the investigation; and

(c) shall permit any person who would otherwise be entitled to have access to all or any of those books to have such access at all reasonable times so long as the books are in the possession of the inspector.

(8) If an officer or agent of a corporation fails without lawful excuse (the burden of proof of which lies on him) to comply with a requirement under sub-section (2) or (3), or fails or refuses to answer a question which is put to him by the inspector with respect to the affairs of the corporation, the inspector may certify the failure or refusal under his hand to the court which may thereupon inquire into the case and, after receiving any evidence against or on behalf of the alleged offender and any statement offered in defence, either order him to comply with such requirement or to answer such question or (if the court is satisfied that in so failing or refusing he was not acting in good faith) punish him in like manner as if had been guilty of contempt of the court.

(9) An officer or agent of a corporation is not entitled to refuse to answer any question which is relevant or material to the investigation on the ground that his answer might tend to incriminate him.

(10) Where an officer or agent of a corporation claims that the answer to a question put to him might tend to incriminate him, neither the question nor his answer shall be used in any subsequent criminal proceedings except in the case of a charge of false swearing committed by him in answer to that question.

(11) An inspector may cause notes of any examination under this Division to be recorded and reduced to writing and to be read to or by and signed by the person examined, and any such signed notes may, subject to sub-section (10), thereafter be used in evidence in any legal proceedings against that person.

(12) Any person who fails or refuses without lawful excuse (the burden of proof of which lies upon him) to sign the notes of his examination may be dealt with under sub-section (8) as if he had failed to comply with a requirement under sub-section (2).

(13) A copy of any notes signed by any person pursuant to sub-section (11) shall, if such person so requests in writing, be supplied to that person! without charge.

(14) Nothing in sub-section (11) affects the general law as to the admissibility of oral evidence.

(15) Any person required to attend for examination under this section or section 175 shall be entitled to the same allowances and expenses as if he were a witness in the Supreme Court.

175. (1) An inspector may employ such persons as he considers necessary and in writing authorise any such person to do anything he could himself do, except to examine on oath or affirmation.

(2) Any officer or agent of a corporation who, without reasonable excuse (the burden of proof of which lies upon him):

(a) refuses or fails to produce any book to any person who produces a written authority of an inspector given under sub-section (1); or

(b) refuses or fails to answer any question lawfully put to him by any such person:

is liable to be dealt with in the same manner as is provided in sub-section (8) of section 174 for failing or refusing to comply with the requirement of an inspector or to answer any question put to him by an inspector.

(3) An officer or agent of a corporation is not entitled to refuse to answer any question which is relevant or material to the investigation on the ground that his answer might tend to incriminate him.

(4) Where an officer or agent of a corporation claims that the answer to a question put to him might tend to incriminate him, neither the question nor his answer shall be used in any subsequent criminal proceedings.

176. (1) An inspector may, and if so directed by the Governor in Council shall, make interim reports to the Minister and on the completion or termination of the investigation the inspector shall report his opinion on or in relation to the affairs of the corporation or corporations which he has investigated, together with the facts upon which his opinion is based, to the Governor in Council and the Minister.

(2) Subject to sub-section (3), a copy of each interim or final report shall be forwarded by the Minister to the registered office,

in the place of its incorporation, of the corporation investigated, and a further copy of any report so forwarded shall at the request of any applicant under paragraph (a), (b), (c), (d) or (e) of sub-section (1) of section 171, or sub-section (3) of section 172, be delivered to him.

(3) Where the Minister is of opinion that any legal proceedings which have been instituted, or which he considers should be instituted, against any

person in respect of matters dealt with in a report may be prejudiced if a copy of such report is forwarded or delivered pursuant to sub-section (2), he is not bound so to forward or deliver a copy unless the court otherwise orders. (4) Subject to sub-section (5) the Governor in Council may, if he is of the opinion that it is necessary in the public interest so to do, cause the whole of any part of the report, or of any interim report, to be printed and published.

(5) No part of any report shall be published unless the Minister certifies that he has considered the probable effect of publication on the interests of the company its shareholders and creditors and any other persons mentioned or referred to in the report and is satisfied that the public interest requires that that part of the report should be published.

(6) Nothing in sub-section (5) shall prevent the disclosure of the contents of any report to either House of the Parliament but neither the contents so disclosed nor any account of the proceedings of either House relating thereto shall be published outside the Parliament without the express authority of that House unless such contents have been published pursuant to sub-section (4).

(7) The inspector shall not include in his report any finding or opinion that any person has committed a criminal offence or any recommendation that criminal proceedings be taken against any person but he shall deliver to the Minister a separate written communication, not forming part of his report, stating whether or not in his opinion any criminal offences have been committed, and whether or not he recommend that proceedings be instituted in respect thereof.

(8) Where an inspector has caused notes of any examination under this Division to be recorded and reduced to writing, the notes shall be forwarded to the Minister with the report to which they relate, and a copy of the notes may be supplied to any legal practitioner who certifies that he is acting for a client who is bona fide contemplating legal proceedings in respect of matters which were the subject of investigation by the inspector.

(9) A legal practitioner to whom a copy of notes has been supplied pursuant to sub-section (8) shall not publish or communicate the contents of such notes to any person otherwise than-for the purpose of obtaining advice and instructions in relation to the institution of legal proceedings or for the purposes of such legal proceedings when instituted.

(10) If from any report under this section or from the notes of any examination under this Division it appears to the Minister that

an offence may have been committed by a person and that the case is one in which a prosecution ought to be instituted, the Minister shall cause a prosecution to be instituted accordingly.

(11) If from any report under this section or from the notes of any examination under this Division it appears to the Minister that proceedings ought in the public interest to be brought by any corporation dealt with by the report for the recovery of damages in respect of any fraud, misfeasance

or other misconduct in connection with the affairs of the corporation or for the recovery of any property of the corporation which has been misapplied or wrongfully retained, the Minister may himself bring proceedings for that purpose in the name of the corporation.

(12) A copy of a report of an inspector certified as correct by the Minister is admissible in proceedings for winding up by the court as evidence of the opinion of the inspector for the purposes of paragraph (g) of sub. section (1) of section 222.

177. (1) The expenses of and incidental to an investigation under this Division (including the expenses incurred and payable by the Minister in any proceedings brought by him in the name of a corporation) shall be paid out of moneys provided by Parliament.

(2) Where security has been given in accordance with sub-section (3) of section 172, the person giving such security shall be liable to reimburse the Crown in respect of the expenses for which the security was given, but shall not be liable for any amount in excess of the amount of the security.

(3) Where the Minister brings proceedings in the name of a corporation pursuant to sub-section (11) of section 176 the Minister may give security for costs on behalf of the corporation.

(4) Where proceedings brought by the Minister in the name of a corporation are successful, costs may be awarded in favour of the corporation as if they had been incurred by it, and any amount received by the corporation in respect of such costs shall be held on behalf of and paid to the Crown.

178. (1) Application to the court:

(a) in the case of a company, for the winding up of the company;

or

(b) in the case of a foreign company, for the winding up of the company so far as the assets of the company within the State are concerned:

may be made on petition of the Minister at any time after a report has been made in respect of the company or foreign company by an inspector under this Division, whereupon the provisions of this Act shall, with such adaptations as are necessary, apply as if:

(c) in the case of a company - a winding up petition had been duly presented to the court by the company; and

(d) in the case of a foreign company - a petition for an order for the affairs of the company so far as assets within the State are concerned to be wound up within the State had been duly presented to the court by a creditor or contributory of the company upon the liquidation of the company in the place in which it is incorporated.

(2) Where, in the case of a foreign company, on a petition under sub-section (1) an order is made for the affairs of the company so far as assets within the State are concerned to be wound up within the State, the company shall not carry on business or establish or keep a place of business within the State.

(3) A petition of the Minister under sub-section (1) shall be served on the company.

179. (1) A person who, with intent to defeat the purposes of this Division or to delay or to obstruct the carrying out of an investigation under this Division:

(a) conceals, destroys, mutilates, alters or falsities, or is privy to the concealment, destruction, mutilation, alteration or falsification of, any books affecting or relating to the affairs of a corporation the affairs of which are being investigated under this Division; or

(b) sends, causes to be sent, or attempts to send or conspires with any other person to send, out of the State any such books or any property of any description belonging to or in the disposition or under the control of the corporation:

is guilty of an offence against this Act.

Penalty: $2,000 or imprisonment for two years.

(2) If in a prosecution for an offence against this section it is proved that the person charged with the offence:

(a) has concealed, destroyed, mutilated, altered or falsified, or has been privy to the concealment, destruction, mutilation, alteration or falsification of, any books affecting or relating to the affairs of a corporation the affairs of which are being or have been investigated under this Division; or

(b) has sent, caused to be sent, or attempted to send or conspired to send, out of the State any such books or any property of any description belonging to or in the disposition or under the control of the corporation:

the onus of proving that in so doing he had not acted with intent to defeat the purposes of this Division or to delay or obstruct the carrying out of any investigation under this Division lies on him.

180. (1) Where, in connection with an investigation under section 172 it appears to the Governor in Council that there is difficulty

in finding out the relevant facts about any shares (whether issued or to be issued), and that the difficulty is due wholly or mainly to the unwillingness of the persons concerned or any of them to assist the investigation as required by this Act,

the Governor in Council may by Order served on the corporation and published in the Government Gazette direct that the shares are, until further order, subject to the following restrictions:

(a) That any transfer of those shares or any exercise of the right to acquire or dispose of those shares, or in the case of unissued shares any transfer of the right to be issued therewith and any issue thereof, is void;

(b) That no voting rights are exercisable in respect of those shares;

(c) That no further shares shall be issued in right of those shares or in pursuance of any offer made to the holder thereof; and

(d) That, except in a liquidation, no payment shall be made of any sums due from the corporation on those shares, whether in respect of capital or otherwise:

and those shares are thereupon subject to those restrictions until an Order is made by the Governor in Council or the court directing that the shares have ceased to be subject thereto.

(2) Where the Governor in Council makes an order directing that shares are subject to the restrictions referred to in sub-section (1) or, having made such an order in relation to any shares, refuses to make an order directing that the shares shall cease to be subject to those restrictions, any person aggrieved thereby may apply to the court, and the court may, if it sees fit, direct that the shares shall cease to be subject to those restrictions.

(3) Any order of the Governor in Council or of the court directing that shares cease to be subject to the restrictions referred to in sub-section (1) which is expressed to be made with a view to permitting a transfer of those shares may continue the application of paragraphs (c) and (d) of sub-section (1), in relation to those shares, either in whole or in part, so far as those paragraphs relate to any right acquired or offer made before the transfer.

(4) Where any shares are for the time being subject to the restrictions referred to in sub-section (1), any person who, having knowledge that the shares are subject to any such restrictions:

(a) exercises or purports to exercise any right to dispose of those shares, or of any right to be issued with shares;

(b) votes or attempts to vote in respect of those shares, whether as holder or proxy, or appoints a proxy to vote in respect thereof; or

(c) being the holder of any of those shares, fails to notify the fact of their being subject to those restrictions to any person whom he does not know to be aware of that fact but does know to be entitled, apart from those restrictions, to vote in respect of those shares whether as holder or proxy:

is guilty of an offence against this Act.

Penalty: $1,000 or imprisonment for six months, or both.

(5) Where shares in a corporation are issued or sums are paid in contravention of the restrictions imposed under sub-section (1), the corporation and every officer of the corporation who is in default is guilty of an offence against this Act.

Penalty: $1,000.

(6) A prosecution shall not be instituted under this section except by or with the consent of the Minister.

(7) This section applies in relation to debentures and interests as it applies in relation to shares.

**Division 3 - Investigations in other States**

181. (1) Where:

(a) under a law of another State or Territory of the Commonwealth corresponding with this Part an Inspector has been appointed to investigate the affairs of a corporation; and

(b) the Governor in Council determines that, in connection with that investigation, it is expedient that an investigation be made in the State:

the Governor in Council may order that the inspector so appointed have the same powers and duties in the State in relation to the investigation as if the inspector had been appointed under this Part, and thereupon the inspector has those powers and duties and shall, for the purposes of this Act, be deemed it) be an inspector appointed under section 171 or 172 (as is appropriate) to investigate those affairs.

(2) An order under this section shall be published in the Government Gazette.

Note: The following consequential amendments will be necessary:

In paragraph (e) of sub-section (1) of section 221 of the Principal Act for the expression 'section 175' there should be substituted the expression 'section 178'.

In paragraph (g) of sub-section (1) of section 222 of the Principal Act for the expression 'an inspector appointed under section 169, 170 or 173 of this Act' there should be substituted the words 'an inspector appointed under Division 2 of Part VIA'.

We also recommend that section 367 of the Principal Act should be amended to read as follows:

'367. Neither an inspector appointed under this Act nor a person authorised by him pursuant to section 175 of this Act shall require disclosure by a duly qualified legal practitioner of any privileged communication, whether oral or written, made to or by him in that capacity, except as respects the name and address of his client.'

**APPENDIX B**

**REPORTS OF SPECIAL INVESTIGATIONS MADE AVAILABLE TO THE COMMITTEE**

| Year | Companies investigated | Inspectors | State | Section under which appointed |
|---|---|---|---|---|
| 1961 | K. Rees Emploriums Ltd. and others | J. A. Nimmo | Victoria | S. 148 Vic. Act of 1958 |
| 1961 | Labrador Estates Pty Ltd. | F. A. Waxham | Queensland | S. 145 (8) Qld Act 1931-60 |
| 1961 | Tropic Isle Ltd. | F. A. Waxham | Queensland | S. 145 (8) Qld Act 1931-60 |
| 1962 | Markthorn Mutual Managers Ltd. and others | P. H. N. Opas | Victoria | 173 |
| 1963 | Ducon Industries Ltd. | F. J. O. Ryan | New South Wales | 178 |
| 1963 | G.I. Home Builders Pty Lid | B. W. Nettleford | Victoria | 173 |
| 1963 | J. W. Maxtin Pty Ltd. | H. V. Reilly | Western Australia | 173 |
| 1963 | Reid Murray Holdings Ltd. and others | B. L. Murray and B. J. Shaw | Victoria | 173 |
| 1963 | Reid Murray Holdings Ltd. and others (Interim) | H. C. Stewart and B. L. Murray | Western Australia | 173 |
| 1963 | Reid Murray Holdings Ltd. and others (Final) | H. C. Stewart and B. L. Murray | Western Australia | 173 |
| 1963 | Silhouette Health Studios Pty Ltd. | N. Mills | Tasmania | 173 |

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|---|---|---|---|---|
| 1963 | Testre Bros Consolidated Ltd. and others | J. B. Tait | Victoria | 173 |
| 1964 | Commonwealth Land and Investment Co. Ltd. | L. W. Street and J. G. Wheeler | New South Wales | 173 |
| 1964 | Lewis Development Pty Ltd. | C. Brettingham-Moore | Tasmania | 173 |
| 1964 | Motel Holdings Ltd. and others | J. S. O'Hair and G. F. Magee | New South Wales | 173 |
| 1964 | New Investments Ltd. and others | A. F. Mason and N. F. Stevens | New South Wales | 173 |
| 1964 | Reid Murray Developments (Qld) Pty Ltd. | P. D. Connelly | Queensland | 173 |
| 1964 | Rural Developments Pty Ltd. | F. S. McAlaxy and C. A. Gray | New South Wales | 173 |
| 1964 | Staxdrill Development Finance Ltd. and others | P. Murphy | Victoria | 173 |
| 1964 | Sydney Guarantee Corporation Ltd. | F. S. McAlary and C. A. Gray | New South Wales | 173 |
| 1965 | Albion Quarries Ltd. | W. E. Paterson | Victoria | 177 |
| 1965 | Collier-Moat Ltd. and others' | A. G. Beckhouse | New South Wales | 173 |
| 1965 | International Vending Machines Pty Ltd. | K. G. Gee | New South Wales | 173 |

**REPORTS OF SPECIAL INVESTIGATIONS MADE AVAILABLE TO THE COMMITTEE**

| Year | Companies investigated | Inspectors | State | Section under which appointed |
|---|---|---|---|---|
| 1965 | Latec Investments Ltd. and others | R. A. Irish and others | New South Wales | 173 |
| 1965 | Reid Murray Holdings Ltd. and Paynes Properties Pty Ltd. | B. L. Murray and B. J. Shaw | Victoria | 173 |
| 1965 | Ron | H. C. Stewart | Western Australia | 173 |
| 1966 | Australian Stock Breeders Co. Ltd. | R. M. Wylie | Queensland | 169 |
| 1966 | Factors Ltd. and others | P. Murphy | Victoria | 173 |
| 1966 | Menzies Estates Pry Ltd. and others | M. J. L. Dowling | Victoria | 173 |
| 1966 | Neon Signs (Australasia) Ltd. | W. Crockett | Victoria | 173 |
| 1967 | Savoy Corporation Ltd. and others | J. G. Whelan | Victoria | 173 |
| 1967 | Stanhill Development Finance Ltd. and others | P. Murphy | Victoria | 173 |
| 1967 | Stonetex Coatings (Australia) Pty Ltd. | C. Brettingham-Moore | Tasmania | 173 |
| 1967 | Walana Investments Pty Ltd. | B. J. Shaw | Victoria | 178 |

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|---|---|---|---|---|
| 1967 | Wool Exporters Holdings Pty Ltd. and others | E. J. Dowling | Western Australia | 173 |