SOUTH AUSTRALIA

FIFTY-SEVENTH REPORT

of the

LAW REFORM COMMITTEE

of

SOUTH AUSTRALIA

to

THE ATTORNEY-GENERAL

RELATING TO THE COMPANIES BILL, 1980

1980

The Law Reform Committee of South Australia was established by Proclamation which appeared in the *South Australian Government Gazette* of 19th September, 1968. The Members are:

THE HONOURABLE MR. JUSTICE ZELLING, C.B.E., *Chairman.*

THE HONOURABLE MR. JUSTICE WHITE, *Deputy Chairman.*

THE HONOURABLE MR. JUSTICE LEGOE, *Deputy Chairman.*

D. W. BOLLEN, Q.C.

M. F. GRAY, S.-G.

J. F. KEELER.

D. F. WICKS.

The Secretary of the Committee is Miss J. L. Hill, c/o Supreme Court, Victoria Square, Adelaide 5000.

The Honourable Mr. Justice White was on long service leave and the Honourable Mr. Justice Legoe was on Circuit and accordingly neither of them signed this report.

FIFTY-SEVENTH REPORT OF THE LAW REFORM COMMITTEE OF SOUTH AUSTRALIA RELATING TO THE COMPANIES BILL 1980

To:

The Honourable K. T. Griffin, M.L.C.,
Attorney-General for South Australia.

Sir,

You have referred to us for consideration and report the Companies Bill 1980 which is intended to be introduced into the Commonwealth Parliament in the Budget sittings 1980 with the intention that mirror legislation will be passed in every State including South Australia. We have principally dealt with the Bill on the supposition that we were considering a Bill in identical terms introduced into the South Australian Parliament although many of our criticisms are valid in relation to any Bill of this type. We have been greatly assisted in our discussions by the presence of the Commissioner for Corporate Affairs. His lucid explanations of the various sections and the part they are intended to play in the administration of the law relating to bodies corporate has proved most helpful. Nevertheless the report is that of the Committee and the Commissioner bears no responsibility for the decisions we have come to in the course of our deliberations on the Report.

The object of this Bill no doubt is to tighten up company legislation so as to prevent frauds being perpetrated by the use of companies. That is a wholly admirable intention and one with which this Committee is in agreement. We should however make two observations in limine. The first is that in pursuing this objective the proposed Bill on a number of occasions subverts the ordinary liberties of the subject. This in the view of the Committee is fundamentally wrong and we shall expound this as we go along. Where precedents of this sort are established for a laudable purpose they can afterwards be used in *pari materia* for far less laudable purposes by Governments of the far left or the far right. For the preservation of the civil liberties of the people, they provide a precedent which ought not ever to be set in Australia. The ancient philosophers pointed out many times that it was possible to pursue a particular good so far that it became an ill. The motto is in fact enshrined in Law Latin—*summum jus summa injuria*. The Bill ought to be redrafted in those areas with this fundamental criticism in mind.

The other criticism of a general nature which we would make is that not sufficient thought has been paid to the needs of exempt proprietary companies. This distinction has always existed in South Australian legislation hitherto. Under the 1934 Act it was possible to register private companies and under the 1962 Act, exempt proprietary companies, which did for all practical purposes what the private company legislation had always done in this State. The reason for this is obvious. The private company or exempt proprietary company as it now exists, is used by families for holding land, by one man businesses and by other small concerns who cannot afford the elaborate apparatus of accountants, lawyers, company secretaries and other highly paid and highly skilled personnel whose services are required by public companies. This distinction has not been sufficiently or steadily borne in mind in the drawing of this Act. The Act has as its major objective the regulation of large companies to which members of the public are invited to subscribe for shares or debentures or other interests. To

regulate the participation of the public in large companies is in our opinion admirable. However it should not be achieved at the cost of forcing the small private company into a disadvantageous position in relation to the costs and overhead of the company. We understand that this Government favours a free enterprise economy and is in favour of protecting small businesses. If that is so, then there are changes required in this Act to exclude exempt proprietary companies from onerous provisions of the Act which are appropriate only in the case of large public companies seeking cash inflows from the public.

We also think that a number of the sections are cast in terms so wide as to have no certain connotation and denotation and problems of the kind dealt with in *Victorian Stevedoring Company v. Dignan 46 C.L.R. 73* may arise.

We turn then to a consideration of the Act section by section. Where we do not refer to a section at all, we have no comment to make in relation to the section concerned. *Section 5:* This is the definition section of the Bill.

Definition of "affairs". This definition is reasonable in relation to a large public company. It is not reasonable in many respects in connection with a small exempt proprietary company. The message is clear from the definition of "affairs": If you do not want your private business to become public property, have nothing to do with companies and this is reinforced by Section 7 (1) *(b)* which speaks of "any person". The Affairs of an exempt proprietary company with which the Commission should be concerned refer solely to the compliance by the exempt proprietary company with the general provisions of the Bill which have been in the Act for a very long time. Where it is sought to bring an exempt proprietary company into an investigation, the company should have power to apply to a court for an injunction showing that it was solvent and had done nothing to bring it within the investigatory net.

Definition of "banker's books". We point out that subclause *(c)* of this definition is wide enough to include the contents of private safe custody boxes which have nothing to do with the affairs of any corporation.

Definition of "corporation". As at present drawn it includes a trades union and a charitable body formed by letters patent. Is the Bill intended to cover either of these groups?

Definition of "executive officer". What does "take part" mean? Does it include the boss's secretary or the departmental head who merely transmits orders to other ranks? See Section 6AA for reasons why this definition needs to be circumscribed.

Definition of "investment contract". This would appear to catch an ordinary tenancy in common of land of which a company is one joint proprietor if there is a contract, scheme, or arrangement behind it, which would not ordinarily be thought to be within the purview of this Act: see also the definition of "prescribed interest".

Definition of "marketable securities". The words "and any prescribed interest" at the end are too wide. It should be "any prescribed interest of a like kind".

Definition of "officer". The word "employee" is too wide, as we pointed out in our previous report on the projected Securities legislation. "Officer" should mean a director, secretary, executive officer, or somebody in a managerial position, for the reasons which we

set out in detail in that report: See also *In re a Company (1980) 2 W.L.R. 241,* and except in Part VIA it should not include an auditor.

Definition of "prescribed business". The definition of "prescribed business" is too wide. It would for example cover the legal profession, although one would hardly think that that was the likely intention of the draftsman.

Definition of "trading trust". This again is too wide. It includes an executor or administrator carrying on the business of his testator or intestate although from the legislation, as appears later, it is obvious that that is not what is intended.

In Section 5 (4) we think it would conduce to a much better understanding of the first long paragraph if the sentence ended at "any section of the public" and if a new sentence then commenced: "Without derogating from the generality of the foregoing an offer may be an offer to the public notwithstanding" &c.

Section 6A: This deals with what is a "relevant interest" in a share.

We comment again, as we did under the Securities legislation, that the drafting is lax and loose. How does one have an informal power?

In subsection (3) there is no power in the world that cannot be exercised wrongfully and the subsection is too wide. As with a number of other sections in this Act, it assumes wrongfulness as a criterion of the exercise of the power instead of there having to be an actual wrongdoing before the power comes into force. Every power in the world is capable of being exercised in breach of the law and the relevant criterion should be expressed far more adequately by the draftsman.

The same observations apply *mutatis mutandis* to Section 6AA.

Section 6AA: This deals with the concept of "associated persons".

For the same reasons as in our previous report, we refer to the words "agreement, arrangement, understanding or undertaking whether formal or informal and whether express or implied". We think these words are far too wide. No one would be able to give content to them in advising a client and they ought to be put into a form which has more adequate content. This Bill has to be used by the business community, and the business community, and indeed the community at large, are entitled to know exactly what it is that they have to do to comply with the law. This is a criticism which can be made of many of the new sections in this Bill.

Section 6AB: The act is to bind the Crown.

This section is within power as far as the Commonwealth is concerned, but if it is intended to include a similar section in the State Act it would merely be a trap as a State Act cannot bind the Crown in right of the Commonwealth: see *The Commonwealth v. Cigamatic Pty. Ltd. (1962) 108 C.L.R. 372* and there is some doubt as to whether it can bind the Crown in right of another State, a matter of some importance where there are interlocking provisions of the kind found in this Act.

Section 7: This gives power to the Commission to require production of the books of a company.

There should be express provision in this section that any compliance with Section 7 does not defeat a solicitor's lien or the lien of a person such as a book binder who has done work on books. It should be provided that the possession of the Commission is the possession of the lienor for the purpose of the continuance of the lien. As we said in our

previous report, it is not right for the Commission to hold the books of a company for any substantial period. To do so would put any company out of business. Photostat copies should be taken of what is required and the books returned. There should be a provision in the Bill that the photostat copies are of equal validity as the originals in the law of evidence. Whilst the books are in the hands of the Commission there should be power for the company to come in and write up the books from day to day, as would be necessary with the business of any company which is continuing whilst the investigations go on, which will mean in practice most companies.

Section 7A: This gives power to a Magistrate to issue a warrant for the seizure of company books.

For the reasons which we gave in our previous report, we think that the powers in this section are too wide in any event, and should not be exercised by anyone of lower degree than a District Court Judge. In England the equivalent is a High Court Judge (that is: in Australia a Supreme Court Judge): see *In re a Company (supra).* The order should be capable of being made subject to conditions. There should be a right of action for damage sustained if the books are not in the property searched and have never been there. Why should a person be able to come into anyone's house and damage property just on mere suspicion and then get off scot free? In subsection (2) *(b)* the warrant should have to be executed by day if the premises to be searched are being used as a dwelling house. As to retaining possession of books under subsection (4), we make the same comments as we made in relation to Section 7. Again under Section 7A the possession of the Commission should be the possesion of the lienor for the purpose of preserving liens or any other possessory rights.

Section 7B: This deals with legal professional privilege.

As we pointed out in our previous report, a legal practitioner must know the name of his client but he may not know his present address and the offence created is in terms absolute. The practitioner should be compelled to furnish in writing to the Commission or the authorized person the name of the person, but the present address only if the solicitor knows it.

Section 8: This deals with applications for registration of an auditor or liquidator.

Subsection (3) should not apply to a natural person who is appointed in a member's winding up of an exempt proprietary company. The identity and capacity of such person is no business of the Commission's.

Section 11G: This covers cancellation or suspension of the registration of an auditor or liquidator.

There should be an appeal to the Court, particularly under subsection (7) where there is no appeal by virtue of Section 12 (9) because the decision is said to be final in Section 11G (7).

Section 11H: This deals with the power of the Commission to hold inquiries.

In Section 11H subsection (5) the power to order payment should only arise if the finding of the Commission is adverse to the party enquired into and after the party has had an opportunity of being heard.

Section 12: This deals with registers kept by the Commission.

Under Section 12 (8) this, as in the case of stamp legislation and other similar legislation, should only arise if there is some reason on the face of the document why it does not appear to be in order.

Section 17: This deals with membership of a holding company.

In subsection (2) *(b)* does "beneficially interested" in subclauses (i) and (ii) include a right to trustee's commission? There is a misprint in the first line of the subsection where "subsection (10)" should read "subsection (1)".

Section 18: This deals with the requirements for the memorandum of association.

This raises the question of what "printed" means in the first line. If it is taken literally it will impose a quite disproportionate expense on small proprietary companies. There has always been a definition clause previously to include typing, lithography, and other similar methods and the Committee thinks it should be inserted here or in Section 5.

Section 19: This deals with implied powers of a company.

Does this include existing companies at the time of coming into force of the new Act or only companies registered under the 1980 Act? The matter is, we realize, dealt with to a certain extent by the Companies (Transitional Provisions) Bill but we should like the matter placed beyond doubt.

Section 22: This deals with names of companies.

It should be possible to challenge the opinion of the Commission or the Ministerial Council by the appropriate proceedings in Court. The same observation applies to Section 23 subsection (2). There is a misspelling of "identity" in Section 23 (4) *(b)*.

Section 23: This deals with changes of name.

This section should provide for a certificate to be issued by the Commission which it does in practice, and the change should be effective from the first moment of the day the certificate is issued.

Section 27 (7): Having regard to the wide definition given to "investment contracts", does this mean that a proprietary company which is in trade cannot accept lay-bys?

Section 27A: These are general provisions dealing with alterations to a Memorandum of Association.

Subsection (3) is unworkable in relation to increases of capital. We suggest that subsection (3) be deleted and that each section or subsection which affects a memorandum should state specifically the date on which the act regulated by the section or subsection respectively comes into force.

Section 28: This deals with alteration of the provisions of the memorandum.

It should be possible to abridge the six weeks time limit if all shareholders (and debenture holders if there are any) agree to the abridgment, and the consent of the Commission is also obtained.

Sections 35A and 35B: These deal with contracts made on behalf of a company yet to be formed.

We have dealt with these sections as a substantive report—the Sixty-Second Report of this Committee.

Section 36: This prohibits a company from carrying on business with less than the statutory minimum number of shareholders.

This should provide for the case where there are only two shareholders and one is the executor of the other's will—a situation which must frequently arise when the only two shareholders are husband and wife.

Where A and B are the only shareholders and A dies leaving a will of which B is sole executor, there should be a provision that the company can be carried on with only one shareholder until say six months after the date of the grant of probate. The same should apply *mutatis mutandis* where A dies intestate or without naming an executor by his will and B his wife (or husband) has the first right to take a grant of letters of administration or letters of administration with the will annexed, as the case may require.

Sections 36A, 36B and 36C: These deal with transfer of incorporation.

It should be provided that nothing in the transfer of incorporation or change of incorporation of a company shall defeat or modify any existing right or liability of the company.

Section 36E (2): This deals with the effect of incorporation of a company.

This covers only procedural law and not substantive law in relation to proceedings. In relation to substantive law and proceedings the subsection does not really cover the position, as the company automatically becomes subject to the general law of the new State on registration of the transfer of incorporation.

Sections 40 (2) and 40A (2): These deal with publication of notices of prospectuses and of reports referred to in prospectuses.

We do not think the State has any power with regard to broadcasting or television which are Commonwealth powers and in respect of which the Commonwealth appears to have covered the field.

Section 42 (2) (e): This deals with registration of prospectuses.

The offence in subsection (1) is said in the notes attending the Bill to be an indictable offence. This however does not appear anywhere in the Act. Presumably there is some Commonwealth legislation which decides what are indictable offences and what are not. There is no similar legislation in South Australia and problems have already arisen under the current Companies Act as to whether an offence is to be dealt with summarily or as a minor indictable offence. We think that there ought to be a specific provision in our Act saying that where the penalty is a fine the matter shall be dealt with summarily; where the penalty or one of the penalties is a term of imprisonment not exceeding twelve months the matter shall be treated as a minor indictable offence, and where the penalty or one of the penalties is imprisonment for over twelve months the matter shall be treated as an indictable offence. There are many sections in this Act where there is imprisonment provided for over twelve months so that it is important to make this distinction. We do not pretend that this is a complete list but it includes most in which there is a subsection providing for imprisonment for more than twelve months. The ones we have noted are Sections 7AA, 37AA, 37, 38, 63, 67, 124, 164B, 174, 179A, 278, 306, 367A, 374A, 374C, 374FA, 374G, 375A and 376.

Section 48: This deals with prohibition of allotment where the minimum subscription is not attained.

This reverses the present onus with regard to the liability of a director of a company to be made personally liable. We think that the present Section 48 subsection (6) is fairer and that the reversal of onus is not justified.

Section 58: This deals with payments made in consideration of subscription for shares in a company.

The usual exception in relation to payment of brokerage is left out of this section. We think that the provisions of Section 58 (3) of the present Section 58 are useful and should be retained.

Section 61: This deals with redeemable preference shares.

In subsection (3) in subclause (d) redemption shall not take place unless the shares are fully paid up. That has been in the Act for a very long time. The Chairman remembers being asked, when lecturing C.R.T.S. students in company law in 1947, why there was any magic in having the shares fully paid up if in fact they could only be redeemed if partly paid up with the sanction of the Court. He did not know the answer to that then and the Committee does not now. The Committee thinks the section should be reviewed.

Section 64: This deals with reduction of share capital.

The Committee feels that it is very important to mark out clearly when each event is deemed to happen. It feels that the drafting of the previous section was better. We were told that the intention is that the reduction should take effect on lodgment of the documents with the Commission. If that is correct, the section should say so.

Section 65: This deals with rights of holders of classes of shares.

The requirement of ten per cent is onerous in the case of a large company. The figure should be: not less in the aggregate than ten per cent or x shares whichever is the less and we leave it to Government to say how many should be the proper minimum.

Section 67: This deals with the prohibition of financial assistance by a Company to buy shares in that Company.

The question of what constitutes giving financial assistance has been troublesome for many years. The section might read better if after the word "assistance" were inserted the words "or otherwise procure". We also point out that as the drafting stands the word "acquire" in subsection (1) *(b)* appears to be tied to monetary acquisition.

Section 67A: This works out the consequences of the prohibition in the last preceding section.

In relation to subsection (3) *(b)* we do not see any reason why the contract cannot be avoided between the company and the immediate party so as to attract the provisions of Section 67A (4), whilst preserving the right of the bona fide purchaser for value. We doubt also whether the section covers all the matters adverted to in the recent judgment of the Court of Appeal in *Belmont Finance Corporation v. Williams Furniture Ltd. (No. 2) (1980) 1 All E.R. 393.*

Section 69: This deals with the power of a company to pay interest out of capital.

In subsection *(d)* does "other rate" mean a less rate than eight per cent? If not, the clause does not achieve anything.

Section 69A (2) (c): This power is too wide. In any event if it is not a company and does not have shareholders, how do you apply Section 69C?

Section 69C (3) (f): This purports to deal with "substantial" shareholdings.

This is legal gobbledygook. The section has no ambit at all and it is impossible to say what cases it strikes down and what cases are outside the purview of the subsection. It should be redrawn.

Section 69E: This requires a "substantial" shareholder to notify changes in his holdings.

Why is a Section 69E change not itself a "prescribed change"? Section 69E and 69F:— It seems difficult to see how many shareholders could possibly cope with this if you read Section 6A in via Section 69G as has to be done. It is unreasonable. This should be put outside the purview of Section 69L in the same way as it is made a defence to Section 69N proceedings by Section 69N (7).

Section 72: This deals with perpetual debentures.

The word "possible" should be inserted before "contingency" in the fifth line. The rule against perpetuities is concerned with possibilities not actualities.

Section 74: This deals with the qualifications of a trustee for debenture holders.

The exception in subsection (6) *(a)* (ii) creates a clear conflict of interest and should be rethought.

Section 74A: This deals with the retirement of a trustee for debenture holders.

Subsection (3) is unwise. There is competition for these positions. Obviously if a trustee company thinks that the position is untenable and wants to retire, there is every inducement for the borrowing corporation to shop around for the most complacent company which qualifies under Section 74. We think the appointment should be made subject to getting an order of the Court.

Section 74B: This deals with the contents of a trust deed to safeguard debenture holders.

This does not touch one major evil. Where trust deeds for debentures have collapsed in the past, it has not infrequently happened because some of the assets covered by the debenture were interests in one or more of a chain of related companies. The chain was no stronger than the weakest link in the chain and when that failed it brought all the rest down with it. We think that the intending investor needs to know not only what the borrowing company's assets are, but what assets pass through or around its inter-related companies.

Section 74D: In our opinion this is not strong enough. Trustee companies have in a number of cases in the past neglected their proper duties and have got themselves into all sorts of conflict of interest situations. First there should be a subclause *(h)* that the trustee for the holders of debentures shall not permit himself or itself to be or become in a conflict of interest situation, and secondly trustee companies taking on these positions which are extremely well paid ought to be made personally liable for any loss through failure to comply with their duties under Section 74D. Section 75 leaves this to the general law, whereas it is possible that an argument could be mounted that the section was directory only and did not create a civil remedy.

Section 74F: This deals with the obligations of borrowing corporations.

In subsection (10) why is the United States exempted? Many of their company laws, especially those in Delaware and Florida, are lax in the extreme and are deliberately made so to attract companies to those particular States. The exemption in relation to the United States should only apply if it is a State in respect of which the Commission is satisfied that they have company laws as stringent as our own.

Section 74H (4) (c): This deals with the repayment of loans and deposits where the purpose or project is not achieved or completed as the case may be.

This should not be a reason for excusing giving notice but should be a reason why the trustee having given notice may agree with the company issuing the debentures to extend the period for a time reasonable to compensate for the unforeseen events which have taken place.

Section 80: This deals with covenants to be inserted in deeds of trust for debenture holders.

Subsection (2) is an unwise provision in its present form. It in effect provides for people to invest on the faith of a deed which may not remain the same during the term of the security. This should be rethought. There should be a specific subsection in Section 80 making the management company liable to compensate persons who sustain loss arising out of any breach of the section. It may well be that a Court would spell such a provision out of the provisions of Section 80 (9) but it would be wise to have it set out in so many words.

Section 90 (1) (c): This deals with the nature of shares.

This is the present law, and has been for many years, but it is productive of much injustice in small companies where in effect there are two families engaged in a small business and by reason of the fact that one head of a household dies and the transmission of his shares cannot be registered, his family's share of the enterprise is thereupon outvoted to the advantage of the one which remains. For a typical example see *In re Trade Typesetters Limited 1946 S.A.S.R. 124.* It might be wise if in this section, and in all sections relating to proprietary companies and particularly exempt proprietary companies, there was a provision that if a company refuses to register a transmission by death, lunacy or bankruptcy, there should be a right of appeal to the Court against the refusal. Presumably the right of appeal should be attached to Section 97.

Section 102: This relates to the requirement of registration of charges.

In subsection (1) subclauses *(h)* and *(j)* the words should be "the mere deposit" in each case if it is to carry out the ideas set out at page 113 of the explanatory paper. We are not sure in any event whether it really carries out the recommendations at the top of page 114 of the explanatory paper. We feel that these should properly be set out expressly in the section.

The Committee draws attention to the fact that the Bill omits any reference to a section such as Section 100 (9) of the existing Act.

In subsection (7) this differs from our bills of sale legislation in relation to fixtures which are severable and become severed. The fact is that the bills of sale legislation in South Australia has followed a course different from that in the Instruments Acts of the eastern States and it will be necessary at various points for the draftsman in South Australia to consider the impact of the differing bills of sale legislation in this State. For example at Section 110 *(c)* the draftsman obviously has not had in mind the requirement of the keeping up of registration which is necessary under our Bills of Sale Act where bills of sale are valid only for five years unless renewed. Consideration will also need to be given to Section 18 of our Bills of Sale Act and to the priorities prescribed by that Section.

Section 107 (which must be read with Schedule 7B): This deals with priority of charges *inter se.*

In schedule 7B *(b)* (3) and in the definition, why does the exemption apply only to a retail buyer? There is a very fine line of distinction between small wholesaling and retailing and we cannot see why the words "of letting on-hire to other persons" are necessary. Many who buy by retail may intend to make some monetary use of what they are buying.

In schedule 7B (1) *(e)*: does this mean whichever is the later or whichever is the earlier?

There is no Section 106 in the new Bill. We think that Section 106 of the present Act which gives power to the Court to rectify the register of charges is a valuable provision and should remain in the Act.

Section 108: This deals with assignment and variation of charges.

In subsection (2) the word "Extending" the obligations should be "altering" the obligations. Provided the obligations are altered in any way whether or not by way of extension, everybody should have access to the terms of the alteration.

Section 115: This places restrictions on the appointment or advertisement of a director.

The Act does not spell out adequately when a director is required to give consent and this carries over into Section 134 (2). We think that a director should sign and lodge with the Commission a form of consent to be prescribed, before his appointment takes effect.

Section 120:

The power to order costs in subsection (4) against somebody who is not a party to the application is wrong in principle. There should be provision for the man to be heard before any order is made against him.

Section 123: This is the disclosure of interest section.

We think the section as it stands is too limited. In particular we think that subsection (3) should read in the terms of the 1979 amendment to our present Companies Act.

Section 124: This deals with the duties and liabilities of officers of a company.

Subsection (3) is too wide as it stands. It can be used as a new form of restraint of trade on an employee which is backed up by the threat of a long term of imprisonment. We think that there should be added to subsection (3) the words "nothing in this clause is intended to alter or amend the law relating to restraint of trade".

In subsection (5) in the fifth line the word "connected" should read "convicted".

Section 125 (6): This deals with loans to directors.

We do not like this type of provision. Similar provisions have been in the Moneylenders Acts for years. They have allowed more frauds than they have ever prevented. There should be a provision that a Court, on being apprised of the circumstances, should make such order in the circumstances as to the Court seems just.

Section 127 (1) (a): This section deals with the duties of disclosure cast on a director.

Does this mean what it says, or does it mean "unless the director is a director of the holding company" etc.?

Section 128: This deals with the prohibition of tax free payments to directors.

We have always wondered why this mattered at all. It does not seem to be regarded as heinous outside Australia. We suspect that it originally went in simply as an adjunct to the tax laws in the days when the States imposed their own income tax. We find it difficult to see what it validly contributes to the morality of directors or their proceedings. If the director gets his emoluments tax free, then they are grossed up for the purpose of imposing income tax.

Section 129 (8): This deals with payments for loss of or retirement from office.

Presumably the date for South Australia is 6th December, 1934, in other words, the date on which Section 168 of the 1934 Act come into force. It hardly seems worthwhile in that event to put subsection (8) into our Act.

Section 131: This gives power to require the disclosure of directors' emoluments.

This is capable of abuse by those who want to abuse the provision. It has in fact been abused in the past. We think that there should be a subsection that such a notice cannot be served more than say once every year, or once every six calendar months, or some other length of time, which seems reasonable to the Government.

Section 134: This deals with the register of directors and other officers.

We comment in relation to subsection (10) that the effect of a certificate being *prima facie* evidence was the subject of a division of opinion between Bray C.J. and the Full Court: see *Lemmer v. Considine 1969 S.A.S.R. 211* and *Considine v. Lemmer 1971 S.A.S.R. 39.* It would be better in our opinion to say that the matters contained in the certificate are evidence of the facts unless the contrary is proved by the defendant.

Section 137: This deals with requisitioning a general meeting.

This again is very useful for a public company. It is not useful for an exempt proprietary company. In the case of an exempt proprietary company any one member should be capable of requisitioning a general meeting. After all the requisitioners have to put up the fees for the general meeting so that it is unlikely that the provisions will be abused.

Section 138: This deals with convening meetings of a company.

The Committee draws attention to the absence of an equivalent to the present subsection (5) dealing with the accidental omission to give notice.

Section 139: This deals with the right to demand a poll.

It should be sufficient in the case of an exempt proprietary company if any one member of the company demands a poll. The Committee draws attention to the use of the word "void" in subsection (1). It is not clear in relation to paragraph *(c)* for example whether if the period fixed is longer than forty-eight hours the result is that there is no period at all or whether the period is by force of the Act cut down to forty-eight hours. This problem arose in relation to the litigation over the Bank of Adelaide. The problem is discussed in Clyne's Law of Meetings.

Section 140 (2): This deals with quorum and voting.

The power to vote either way should apply to a person entitled to more than one vote or to a person holding proxy for such a person. Section 141 does not seem to make this clear.

Section 141: This deals with proxies.

Because of the great complexities involved in conducting a general meeting of a large public company, the Committee queries the value of allowing two proxies at the option of the proxy holder.

Section 142 subsection (3): This deals with the power of a Court to order meetings.

Why should this not be applicable to any meeting of a company for the reasons which we set out earlier? This is a constant problem particularly with small companies and Section 142 subsection (3) should apply to any meeting at least of an exempt proprietary company. Our comments above with regard to a poll would require an amendment to Section 144 (5) of the Act as well, to provide that one member can in the case of a meeting of an exempt proprietary company claim a poll.

Section 145: This deals with resolutions requiring special notice.

In the opinion of the Committee this Section should apply to all proprietary companies bearing in mind the limitation of their total membership. In subsection (2) provision should be made for signature by agents duly authorised in writing.

Section 151: This deals with the index and the register of members.

Such a detailed index is not necessary in the case of an exempt proprietary company and it is somewhat unlikely in our experience that detailed registers of this sort will *(a)* be kept or *(b)* provide any greater information than the members of an exempt proprietary company already know. Provided the register of an exempt proprietary company complies with Section 151 (1) *(a)* and *(b)* that should be sufficient.

Section 156: This deals with limitation of liability of trustees executors and administrators registered as shareholders.

This section should apply also to committees in lunacy and persons appointed as managers under the Aged and Infirm Persons Property Act.

Section 158: This covers annual returns of companies.

The annual return should prescribe only very limited particulars in the case of an exempt proprietary company, as the position is at present. A requirement of all the matters which have to, and quite rightly have to, go into the annual return of a large company are quite inappropriate for a small exempt proprietary company. The section only refers to "such particulars as are prescribed" so that the Committee cannot comment in greater detail.

Section 159A: This deals with auditor's statements.

We cannot find anywhere in the Act where the exempting clause is or indeed who shall have to lodge returns with the Commission. In subsection (2) the section should not apply to any exempt proprietary company. The cost of such auditor's certificates and reports is a not insubstantial proportion of the costs of a small company.

Section 161: This is an interpretation section.

Neither Section 161, Section 162 (8) nor Section 162A (2) really tie Schedule 9 into the Act. Neither does Section 341. This area needs to be redrafted.

Section 162: This deals with profit and loss accounts, balance sheets and group companies.

This again is tailored to the needs of a large public company. It should be sufficient in the case of an exempt proprietary company if the profit and loss account and balance sheet satisfies the conditions of subsections (1) and (2) of the section.

Section 162A: This concerns director's reports.

The same comment applies to Section 162A. The matters referred to in practically all of this section are the sort of thing that one would require of a large company. To expect these things to be carefully done by a small exempt proprietary company is ridiculous. If the director's report of an exempt proprietary company covers clauses *(a)* to *(f)* of subsection (1) that should be sufficient.

Section 165: This deals with qualifications of auditors.

The exemption with regard to an exempt proprietary company should be general and not limited to the matters set out in Section 165 (1) *(f)* which is not of any great importance in the affairs of most exempt proprietary companies. The fact is that in the case of small exempt proprietary companies the use of Section 165 in full is only an invitation to them not to appoint an auditor under Section 165B. It is better in most cases for companies to have auditors, but if the complicated accounts are to be kept which the Bill requires, then the cost of accountancy and audit is going to be out of all proportion to the small exempt proprietary company because most accountants, for professional and other reasons, do not regard accounts and group accounts as being properly prepared by a competent person if that person is not an accountant. The result is that it costs just as much to have the accounts looked over by the auditor as it does in most cases to hand in the books as an accountant and get his office to do them. The cost in either case is presently sky-rocketing.

Section 167B: This deals with qualified privilege for auditors' reports.

Does this mean that an auditor has to disprove malice in order to be within the protection of the section? Normally the plaintiff has to prove malice to displace qualified privilege. The same comment can be made as to a liquidator at Section 277C. It should be made explicit that it is for the plaintiff to prove express malice and not for the defendant to disprove it.

Section 168: This deals with an extended meaning of company for the purposes of Part VIA of the Act.

Most of the subclauses in Section 168 (1) *(b)* will not survive a challenge as to power. There is not a sufficient nexus even when one uses the wider of the two tests in the judgment of the High Court in *Trustees Executors & Agency Co. Ltd. v. Federal Commissioner of Taxation (1933) 49 C.L.R. 220.* In particular that comment must be true of subclause (iii), particularly if the company was only brought in as a defendant under the provisions of Order XI or Sections 4 and 11 of the Service and Execution of Process Act. The same can be said with regard to subclause (viii). We doubt that the mere collection of a debt, particularly one whose proper law was elsewhere, from a resident of South Australia, would provide the necessary nexus.

Part VIA:

We have had to deal stringently with this Part of the Act. We are repeating a number of the criticisms which we made in relation to the Securities Industry Bill. We regret the necessary iteration. Unfortunately this Part of the Act denies to citizens fundamental rights and liberties which have been laboriously built up over the centuries. It will

be a very bad precedent, which others may use in other circumstances later, if any of the matters to which we object ever become law. The fact is that this Part of the Act has in it a substantial element of over-kill. It is necessary that some provisions be brought in to prevent what is often referred to as white collar crime but it is not necessary to sacrifice the liberty of the subject in the process. It is necessary in all things in this life to maintain a golden mean and not to swing from one extreme to another and that we fear is what has happened to this Part of the Act.

Section 170: This deals with investigations under this Part.

We repeat the comments we made before. This section simply gives *carte blanche* to any politician to "get even" with a company he does not like or which has been game enough to stand up to him. The section should be withdrawn and completely reconsidered. We thought that formulas like "appears to be" or "have reasonable cause to believe" had been given their quietus by the oft-quoted dissenting judgment of Lord Atkin in *Liversidge v. Anderson 1942 A.C. 206.* We regret to see them reappearing in this legislation. We think it should be necessary in each case to prove that it is factually in the public interest or in the national interest as the case may be and not simply be so because some minister takes it upon himself to say so. If what we suggest becomes law, at least any unwarranted exercise of that power is examinable in the Courts as it ought to be. This is even more important when under Section 172A the politician concerned may not necessarily be a politician of the same State.

A politician from the same State might at least fear some electoral backlash in his own State from an ill-advised decision, but even that democratic sanction will not apply in the circumstances envisaged in Section 172A.

Section 173: This deals with powers of inspectors.

Under subsection (4) we repeat the comments that we have made earlier that it is not necessary to embarrass a company which is in business, by depriving it of its books. It is only necessary to take copies and have an evidentiary rule that the copies have the same value for proof as the originals. In any event there ought to be a provision for access to the books by the authorised officers of the company in order for them to be written up from day to day.

Section 176: This deals with records of exminations made under this Part.

Having regard to the serious consequences envisaged by this Part, the word "may" should be altered to "shall" in the first line of subsection (1). It is quite wrong that anything as draconian in its consequences as this should depend upon casual notes by counsel or by the inspector or worse still on mere recollection. The Committee understands that Section 176 is predicated on a person other than the inspector making a written record, and that that record is to in some way be authenticated by a person other than the inspector. However, the section is expressed in such wide terms that it is capable of enabling notes made by an inspector to achieve the evidentiary effect without more and as such the section is unacceptable.

Section 176A: This deals with the admissibility of records of examination in other proceedings.

This is a scandalous section in relation to criminal proceedings other than for perjury in relation to the investigation. A man has to take the objection then and there, without consideration of what criminal proceedings may hereafter eventuate, and in an atmosphere quite

different from that of a criminal trial. One can only say that courts treat murderers more carefully than that.

Section 176B: This deals with the admissibility of questions and answers at examinations in other proceedings.

The same comments may be made as for Section 176A. Cross-examinations (if allowed at all) in proceedings in an investigation are quite different from the sort of cross examination that would be directed in a criminal trial in a Court. There is no likeness between this section and proceedings at common law where evidence in relation to parties or their privies may be used in another matter. This is evidence which is garnered for a completely different purpose and Section 176B is wrong in fundamental principle.

The section also seems to us to suffer from other basic defects. It does not contain any protection against prejudice that might be caused where the evidentiary weight may be slight or where it would otherwise be contrary to the interests of justice to admit the questions and answer (c.f. Section 45b Evidence Act 1929-1979). On one reading the effect of Section 176B *(b)* will permit the question and answer to be given in evidence where the person is called as a witness and may therefore be used as a confirmatory or even corroborative fact. This is totally offensive and disregards the rules as to self-serving statements.

Section 176D: This deals with the credibility of persons whose answers are sought to be tendered in other proceedings.

Subsection (3) seems to override subsection (1) because it is apparently to be assumed for the purposes of subsection (3) that the party concerned would would always deny a matter which affected his credit. That *(a)* is not true as a matter of practice, and *(b)* if the person concerned did do it in the witness box he is always liable, when his manner is visible to the tribunal, to be branded as a liar anyhow. That safeguard does not exist with regard to this proposed evidence.

Section 176E: This deals with objections to admissibility.

This section, so we were informed, is designed to obtain admissions of fact and admissible portions of evidence to see that formal matters do not have to be proved and trials may thereby be shortened.

The Committee of course accepts that that is a desirable thing, at least in civil cases where the liberty of the subject is not in peril, but the section as drawn goes far beyond its stated aims, as conveyed to us.

If the section was drawn in those specific terms and was restricted to civil cases, the Committee would have thought it a useful innovation.

But in respect to criminal trials the position is very different, and the section as drawn can only be denominated a splendid recipe for aborting criminal trials and increasing criminal appeals. The man who drew this has clearly never been involved in a criminal trial before a jury in his life or if he has he has not profited from the experience. If the matter is decided beforehand the Judge has no way of knowing what course the trial will take. If it is decided half way through, the Crown Prosecutor cannot open on it, and the cross examiner does not know until the decision what is likely to come later. Either way it will in practically every case, if the ruling goes against the accused, provide grounds for appeal if the Judge does not decide to abort the trial and thus cause the State and the parties the expense of a new trial.

As to subsection (6), when this is viewed in relation to criminal trials it can only be described as an appalling subversion of the liberty of the subject. No Government with any respect for civil liberties should

countenance it for one moment. One cannot possibly foresee all the twists and turns of a criminal trial so as to be able to take such objections safely beforehand in relation to prospective criminal proceedings.

In relation to the use of the section in civil proceedings, the Committee think that the parties should have to go before a Judge or Master with a schedule of facts sought to be admitted and a reply by the defence stating what it is prepared to admit and what it denies. The resulting document for the consideration of the Judge or Master would resemble a Scott schedule in building cases. The Judge or Master would then hear both parties and give directions as to what should be treated as admitted and what should fairly be left to the plaintiff to prove in the ordinary way.

The Committee point out that the fourteen day period in the present section is unrealistic. The defendant may not be able to get a long transcript read, annotated and if necessary submitted to counsel with his answers in fourteen days. If the defendant has applied for legal assistance, and that has happened before today in this State in relation to directors of a failed company, it is unlikely that solicitors and counsel would have been assigned in fourteen days.

The application should be made in civil proceedings on reasonable notice to the defence and the defendant should have sufficient time to be properly advised by his solicitors and counsel before the hearing of the interlocutory application.

Then there should be a power vested in the trial Judge, in circumstances of surprise or the like, to order that the defendant be at liberty, where the interests of justice so require, to adduce evidence on a given point, notwithstanding the interlocutory order.

If the section were redrawn in those terms and restricted to civil cases, the manifest injustice now apparent in the present section would be considerably abated.

Section 177: This relates to the delegation of an inspector's duty.

It is difficult to understand why an inspector is permitted to delegate his powers and functions to any person when Section 180AA considers the actual appointment of an inspector to carry out an investigation to be a matter not capable of delegation.

Subsection (5). This means that part of the investigatory trial can be done by A and part by A's delegate B. That is fundamentally wrong and should be excised.

The section should commence "Subject to the provisions of Section 180AA".

Section 178AA: This deals with the availability of reports and their publication.

An accused person should have an absolute right to a copy of the report. It should not be at the discretion of anyone, even a Court.

Subsection (7). There should be a power given to an accused person to apply to a Court—Attorney-General's certificate or no Attorney-General's certificate—to restrain publication of a report in the interests of a fair trial.

Subsection (9) presumably permits the Commission to require wives/husbands to inform upon their husbands/wives and that requirement has the sanction of Section 379 attaching to it.

Subsections (12) and (13). These may be justifiable in civil proceedings even though not easy to operate in practice. They are blatantly and fundamentally wrong in relation to criminal proceedings and should have no place in an Act such as this.

Section 178A: This is a provision relating to the Commission's power regarding books of a company.

We have already commented before on depriving people of their books and as to the admissibility of copies, and on the necessity for being able to write books up from day to day. We simply repeat what we have previously said.

Section 178B: This deals with legal professional privilege.

As before, we point out that the lawyer may not know the present address of his client. He should be liable to give the name but not the address unless he knows it.

Section 179 (3), (4) and (7): This deals with the expenses of investigations.

In each case any order made against a person should be by Court order. It is fundamentally wrong that the Commission should be judge and jury in its own cause.

It is apparent from what we have written that this Part of the Act is a disgraceful contravention of the liberties of the subject. The only arguments which may be adduced in favour of it are those which, as Lord Atkin said in Liversidge's case at page 244, "might have been addressed acceptably to the Court of King's Bench in the time of Charles I".

It is necessary that white collar crime be put down. The Committee entirely agrees with this. It is not necessary, and is fundamentally wrong and unacceptable, to subvert the liberty of the subject in the process. This Part of the Act may justly be described as the slippery slope towards a totalitarian state. What is found here could be used in other circumstances by Governments of the far left or the far right to say: this has been done before, we are doing nothing new in subverting the liberty of the subject.

The whole Part should be withdrawn and completely recast.

Section 181: This covers the power to compromise with creditors and members of a company.

In subsection (3) there should be included in the required particulars information as to whether the debt is a preferred debt and whether it is owed to the Crown in right of the Commonwealth or a State. As we have already said, Section 6AB cannot possibly bind the Crown in right of the Commonwealth and it is arguable that it cannot do so in relation to the Crown in right of another State.

This section enables the Court to convene meetings of creditors and members for the purpose of considering a scheme of arrangement. The Court should have power to give all necessary directions with respect to the holding and conduct of the meeting. A section enabling the Court to give directions in the matter is included as Section 388 of the existing South Australian Companies Act. This section also appears in the Australian Capital Territory Ordinance but not in any other of the existing Companies Acts. Such a section would avoid the difference of opinion expressed in *Re Metropolitan Fuel Pty. Ltd. (1962) V.R. 675* and *Re Mount Isa Mines Limited 1970 Q.W.N. 48.*

Subsection (2) requires the Commission to have twenty-one days prior notice of an application to convene meetings. This period of notice

is quite unreasonable and unnecessary. There are many schemes where it is utterly essential to get to the Court quickly. It is often essential in the interests of creditors to withdraw the company from the hands of its directors and place it into the hands of some responsible person. At any time, a scheme of arrangement involves considerable labour and time before the applicant is even in a position to approach the Court in the first instance. To add a further twenty-one days to the whole process before application to the Court can be made would seem to be totally unreasonable.

What the Section is really intending to say is that the Court should not deal with the preliminary application (i.e. there should be no hearing) before the Commission has first been given a reasonable opportunity to study the papers and prepare representations, should it wish to make them. If that is what is intended, the subsection should say so. The Court will not hear an application immediately and there will inevitably be a delay of a week or ten days from the lodgement of the application. If the subsection were expressed as we suggest, then this time could be occupied by the Commission in perusing the documents and deciding whether or not it proposes to make representations to the Court. But it seems totally unreasonalbe that the applicant should be precluded from filing his application for twenty-one days. The important thing is that the matter should not be heard before the Commission has had an opportunity to consider it.

In any event, the period of twenty-one days is far too long bearing in mind the urgency which often surrounds these matters. It should be shortened to seven days. If the Commission wants more time, it can ask the Court for an adjournment at the hearing and the Court can decide whether, in all the circumstances it is fair to grant the adjournment.

The Court should in any event have power to abridge the time in subsection (2) in urgent cases.

There is one other reason why objection is taken to subsection (2) drawn the way it is and that is that the powers in subsection (19) cannot be invoked until the application has actually been made. If an applicant cannot approach the Court for twenty-one days then none of these powers can be used during that period.

Subsection (5) restricts the right of the Court to order meetings of members and creditors in other States. It uses the expression "reside". It is submitted that the use of this expression in the context in which it appears is unsatisfactory particularly in relation to corporate creditors. For revenue purposes a company has been held to "reside" where it has its central management and control. Many public companies have branch offices in all States. In many cases, it would be quite inappropriate to classify the debt as being situated in a particular State simply because the head office of the company was situated in that State. The head office would in all probability know nothing of the debt as it would be due to the company through one of its State or local branches. A similar problem may well arise where a sole trader or partnership trades in more than one State. We contend that "residence" is not the true criterion here but the true test is where the debt is due and payable.

Subsection (6) prescribes the percentage vote of members or creditors which must be obtained before a scheme of arrangement can become binding. The subsection refers to voting either in person or by proxy. It is submitted that attorneys should be included. Most Articles of Association recognize that shareholders may vote through attorneys as

distinct from proxies and many companies have appointed attorneys with power to attend meetings of creditors and with power to appoint sub-attorneys for this purpose.

Subsection (7) prevents a creditor from attending and voting at more than one meeting of creditors. However, it overlooks the fact that there will be classes of creditors and classes of members and that it may be quite proper for a creditor or member to vote separately at each class meeting where the creditor or member concerned is properly entitled to vote at two or more meetings. For example, in a scheme involving both secured and unsecured creditors, a creditor may be entitled to vote in respect of an unsecured debt and also as a debenture holder in respect of a secured debt. Subsection (7), if read literally, would preclude such a creditor from voting in both capacities. Clearly, this is not the intention—the section is merely intended to prevent a creditor from voting more than once in respect of a debt in the same class where meetings of that class are called in two or more States.

Subsection (13) prescribes when an order is to have effect. As it stands, the subsection may, in some circumstances, be inconsistent with Section 27A (3). The latter section clearly needs attention to make it subordinate in its effect to the terms of a particular provision such as Section 181 (13), bearing in mind that some schemes do affect the Memorandum of Association.

Subsection (21) is intended to make schemes approved in one State binding on creditors who reside in another. It is submitted that again "residence" is an unsatisfactory test in this context. Whether or not a debt is recoverable from a company in a State other than its State of incorporation does not depend on the "residence" of the creditor but on the jurisdiction of particular courts to recover it under the rules set out in Section 11 of the Service and Execution of Process Act 1901 and rules of various courts equivalent to the South Australian Order 11 of the Supreme Court Rules.

There is no point in making "residence" the test under subsection (21). The true criterion is that the scheme should bind those creditors whose debts, but for the scheme, would be recoverable in the Courts of the participating State or Territory concerned. It may well be argued that a multi-national company whose central management and control is out of Australia is not resident in any State or Territory and would not therefore be bound by any scheme under Part VII.

Small Creditors—Special provision should be made in this Part to deal with the situation of small creditors, for example, persons owed less than say $200 (or such greater sum as is from time to time prescribed). It serves no useful purpose for small creditors to receive a full text copy of the scheme, explanatory statement, statement of affairs, list of creditors and all the other documents that are sent out. There will be cases where fifty or sixty pages of material are sent out at the cost of the company to creditors who are owed nothing more than $50. In these circumstances, the creditors concerned seldom have the time or the inclination to read this volume of material, particularly bearing in mind that any distribution ultimately made will generally be far less than one hundred cents in the dollar. It is submitted that it would be of benefit to all if the legislation made it clear that in the case of small creditors, they were only to receive the notice of meeting and a form of proxy. The notice of meeting should have endorsed on it the name and address of some person prepared to make the other documents available on request. A special summary for small creditors should not be required as this would be counter-productive.

Section 182: Information relating to a compromise.

This provides for the despatch of an explanatory statement to members and creditors. It is submitted that it is inappropriate that the statement should be "approved" by the Court. In fact, in South Australia, the Court has gone to some length to include a disclaimer on the explanatory statement. Without a full scale enquiry including the *viva voce* examination of the directors, it would seem impossible for the Court to actually be in a position to properly "approve" the explanatory statement. It should be sufficient that it has been submitted to the Court.

Section 185 (10): This should require the moneys to be paid out within a reasonable time after receipt to everybody whose identity and place of address are known.

Subsection (15). Why should the Minister not be liable for the normal duties of a trustee? If the object of this statute is to make people honest, why doesn't that objective include Ministers?

Subsection (20). The Committee disagrees with the recommendations of this section, bearing in mind that the Act intends to create a scheme whereby schemes of arrangement can be approved for all jurisdictions in the state of incorporations and where it would be unnecessary for separate claims to be mounted in each State.

Section 209 (4): This deals with provisions applicable to official management.

Section 277C should apply as well as Section 277 B if Section 209 (4) is to be effective.

Section 210: This gives power to the Court to terminate a scheme of official management.

It may be that a Court will want the cancellation order not to apply until a future date, when the Court is satisfied there can be an immediate handover from the Manager to those entitled to manage the company thereafter, and power to do this should be included in the section.

Section 218: This deals with liability as contributories of present and past members.

In subsection (1) *(b)* (ii) does this mean that present members are to indemnify past members? The whole section would benefit in clarity by redrafting.

Section 220 (2): This deals with contributories who die or become bankrupt.

This is probably beyond the power of a State Parliament to enact—the Commonwealth Bankruptcy Act covers the field.

Section 221: This deals with the presentation of a petition to wind up a company.

We think the present restrictions on presentation of a petition by a contributory should continue: see present Section 221 (2). This would also effect Section 225 (3) of the Bill.

Section 227: This avoids dispositions of property in certain cases.

The Committee think that the operation of this Section should be made dependent on the lodgment of the notice with the Commission or the presentation of the petition, whichever last happens.

Section 229: This deals with an application to wind up as a *lis pendens.*

A *lis pendens* has no effect in South Australia if the land is under the Real Property Act, as practically all real property in the State is: see the Real Property Act 1886 Section 250.

Section 230: Notices to be lodged with the Commission.

Service by post should be good service under subsection (2) *(b).*

Section 233 (2): This deals with custody and vesting of property in a liquidator.

Why should a liquidator have to give any indemnity if he is brought in as a defendant, e.g. to a summons for a declaration?

Section 251: This gives power to arrest an absconding contributory.

Why should this only apply to a contributory? Why should it not also apply in the case of a director or manager who did not hold any shares in the company?

Section 257: This deals with declarations of solvency.

We think that in this, as in other sections relating to a majority of directors, alternate directors should be counted in.

Section 260: This deals with the calling of meetings of creditors.

We think that it should be a sufficient compliance with subsection (2) if creditors under say $200 received only a notice of the meeting.

Section 277A: This enacts disqualifications to act as liquidator.

We consider that an auditor should not be disqualified in the case of a member's voluntary winding-up.

Section 277B: This deals with reports by a liquidator and their consequences.

In subsection (3) the words "has been guilty of an offence" should read "has probably been guilty of an offence"—it should not be necessary at this stage to demonstrate guilt to the Court beyond reasonable doubt.

Section 277C: This gives qualified privilege to liquidator's statements made in the course of duty.

We make exactly the same comment with regard to malice and qualified privilege as we did in relation to Section 177B.

Section 284: This relates to the preservation of books of a company.

Subsection (3) would appear to conflict with Section 262A of the Income Tax Assessment Act which requires records to be kept for seven years.

Section 287 (2): This deals with expenses of a winding-up where the property is insufficient.

This point often arises during contested court hearings so that the section should read "The Court or the Commission" throughout.

Section 291 (2): This deals with priority of debts in a winding-up.

This has proved difficult to apply in practice over the years. Lord Macnaghten once referred to legislation of this kind as "legislation by Chinese puzzle" and the description is very apt. The rights and liabilities under this Act should be set out in detail in the section and not done by reference to another Act, the provisions of which are not always easily adaptable to a winding up.

Section 292: Priority payments.

Does leave of absence in subsection *(e)* include long service leave? It would seem that it does by Section 292B (4) but this is not certain.

In general we comment on the scheme of priorities as follows:—

The Scheme of Priorities set out in Section 292ff and in Section 196 does not bind the Commonwealth: *Commonwealth v. Cigamatic Pty. Ltd. 108 C.L.R. 372.* At common law, the Commonwealth is entitled to priority in respect of debts due to the Crown in the right of the Commonwealth over all other unsecured debts.

In addition Section 221 of the Income Tax Assessment Act assures priority to the Crown in respect of income tax without limit as to amount or period covered over all other unsecured debts. Sections 221P and 221YU of the same Act assure group instalment tax deductions and withholding tax deductions of priority without limit as to period or amount over both secured and unsecured creditors in certain circumstances. An instance of where these sections come into play is where a secured creditor appoints a receiver under a floating charge. In these circumstances, outstanding group-instalment tax deductions and withholding tax deductions must be paid out of assets which come into the receiver's hands in priority to the debt of the secured creditor.

The priorities set out in Section 292ff and Section 196 should be a complete code. The proper positions of the income tax, group instalment tax deductions and withholding tax deductions in the list of priorities should be determined. The amounts for which priority can be claimed should be limited in each case (say one year's assessment). Sections 221, 221P and 221YU of the Income Tax Assessment Act should be repealed altogether or limited so as not to apply in any case where Sections 196 or 292 of any Companies Act apply. The Commonwealth should enact legislation to ensure that the priorities in Sections 196 and 292ff of the Companies Acts of all States and Territories will bind the Crown in right of the Commonwealth.

The present unsatisfactory state of the question of priorities (particularly in relation to income tax) is well illustrated in such cases as *Commonwealth v. Cigmatic Pty Ltd. 108 C.L.R. 372, Re John Wiper Limited 22 F.L.R. 206, Barnes v. Commissioner of Taxation 5 A.T.R. 713, Commissioner of Taxation v. Card 109 C.L.R. 177* and *Bank of New South Wales v. Federal Commissioner of Taxation 10 A.T.R. 483.*

Further the position of the Crown in relation to Crown debts due to the Queen in right of another State should be expressly dealt with in this legislation.

Section 292 (f) (ii). This is beyond power as far as the States are concerned. The reason of course is the *Cigamatic case* to which we referred earlier. Any priorities given by federal legislation in relation to income tax or any other federal tax or federal debt will apply notwithstanding anything in the State legislation so that the present section is merely a trap for the unwary.

Section 292B: This covers debts due to employees.

Subsection (1). It would seem that this should not apply where a company is only being wound up for the purposes of reconstruction or amalgamation.

Section 293: Undue preferences.

We draw attention to the distinction between being void as against the liquidator and being void as against the company and refer to *Re Yagerphone Limited (1935) 1 Ch. 392* and *Kratzmann v. Tucker 42 A.L.J.R. 164.*

Section 298: This deals with the effect of winding-up on prior executions and attachments.

Subsection (6) has the usual infirmity of sheriff sales in that the purchaser buys subject to unknown third party equities, therefore the property at the sheriff's sale realizes next to nothing. Surely it would be better to provide for notice personally where the person having an interest is known, and for reasonable advertisement of the sale in other cases. Then if no one, before the sale of the assets, puts in a claim (except for claims registered in the Bills of Sale Registry, the Office of the Commission or the Lands Titles Office), the purchaser gets a clear title. It would add greatly to the amounts realized at a sheriff's sale if this were done.

There are no Sections 300-305.

Section 312: This deals with the liability of the Commission and the Commonwealth as to property vested in the Commission.

This again will not be sufficient in a State Act to override claims arising under any law of the Commonwealth.

Section 313A: This is a reciprocity provision.

The Court in this State should have the same powers in respect of such an order as it has and could exercise if the order were originally an order of this Court.

Section 314: Winding-up of bodies other than companies.

Subsection (2) does not carry out the wording of the note in the explanatory paper at page 242. The note is correct and Section 314 (2) should be redrawn accordingly.

Section 324: This deals with provision for the sale of forfeited shares.

Subsection (3) is not well expressed. What it means no doubt is that no person is entitled to a vote based on the ownership of the shares and it should say so. On one reading of the section, as it stands at present, no one would have a vote in relation to those shares.

Section 334: This is an interpretation section.

In subsection (5) do the words "for the purposes of exercising control" mean control over the shares or control over the company? Do Divisions IV and V of this Part apply to recognized companies and recognized foreign companies which already own land in South Australia at the date of the coming into force of the new Act? They appear to need power under Section 343B to go on doing so. The same comment applies to Section 345.

Section 362: This deals with service of documents on a company.

The Court should be empowered to give directions in case of difficulty or doubt.

Sections 362AA and 362AB: These deal with service of documents.

Is this a general code for service on companies, or does this only mean service for the purposes of this Act as the 1962 Act by its heading expressly says? If the latter is not so, there will be conflicts between these sections and sections such as Section 276 of the Real Property Act.

Section 362D: This provides for the avoidance of certain provisions in contracts.

Why should this apply only to leases charges and hire purchase agreements? Why not for example to stock mortgages, crop liens, and so on, which may not be caught by subsection (2)?

Section 366A (3): This covers the power of the Commission to intervene in proceedings.

Subclauses *(a)* and *(b)* should give a right of appearance only to legal practitioners who are under the jurisdiction and control of the Court.

Section 367A: This deals with examinations and orders in connection with persons concerned with corporations.

The whole section needs redrafting. Subsection (20) is objectionable. It should not be possible to make any order of that kind unless proper proceedings have been commenced with proper pleadings. Also subsection (16) will involve unnecessary expense. It would be better if the section were limited merely to examinations so that evidence in rebuttal could be called from time to time when proper proceedings have been commenced.

Section 374A: This penalizes offences by officers of companies.

In subclause *(d)* it should be "wilfully makes". With the sort of penalty that this section carries, one should not have to prove innocence under subsection (2).

Section 374C: This covers offences relating to fraudulent obtaining of credit.

We have already said that in prosecutions carrying penalties as severe as these the onus of proof should not be inverted. We point out that this assumes even greater importance when the result of such proceedings may produce a certificate in terms of subsection (4) and then the results specified in Section 374D.

Section 374D: Powers of the Court.

This section should not permit the making of such a declaration in criminal proceedings. The defendant may have a reasonable answer to the claim other than the defence permitted by Section 374C (2) or he may be entitled to indemnity subrogation or contribution. In any event Section 374D should provide that the fact that the matter concerns an offence or offences under Section 374C should not prevent proceedings for indemnity subrogation or contribution. Otherwise it will simply be a case of what Lord Devlin called "pouncing on the most convenient victim": see *Reynolds v. G. H. Austin & Sons Ltd. (1951) 2 K.B. 135 at 149.* Under the present section a person who played only a minor part in the company and was not a major participant in what took place may be left to bear the whole brunt of the civil debt. This has only to be stated to show how manifestly unfair the operation of the section is as it is now drawn.

Section 374E: This is an interpretation section.

Subsection (1) *(c)* underlines the comments we have already made in respect of Part VIA and we will not repeat them.

Sections 378A and 378B: These deal with offences committed partly within and partly without the State and with acts committed outside the State.

There should be a clause providing that no one should be liable to be punished twice for the same act or omission.

Section 381B (5): This deals with the power of the Court to prohibit transfers of property.

As we pointed out in our previous report relating to the Securities Commission, the Commission like everybody else should have to give

the usual undertaking as to damages and there is no reason in the world why it should not.

We have the honour to be

HOWARD ZELLING
D. W. BOLLEN
M. F. GRAY
J. F. KEELER
D. F. WICKS
Law Reform Committee of South Australia

18th June, 1980.