COMPANY LAW ADVISORY COMMITTEE

451 Law Courts Place,
MELBOURNE. 3000.

October, 1968.

The Secretary
Standing Committee of Attorneys-General,
459 Lonsdale Street,
MELBOURNE, 3000.

Dear Sir,

In paragraph 60 of the Interim Report of the Company Law Advisory Committee it was stated that a separate memorandum would be forwarded by me dealing with some points of drafting arising out of provisions of the General Revision Bill which did not concern this Committee.

The memorandum in question is enclosed herewith.

Yours sincerely,

(Signed) R. M. EGGLESTON,

Chairman,

Company Law Advisory Committee.

MEMORANDUM BY CHAIRMAN OF COMPANY LAW ADVISORY COMMITTEE

In the course of my examination of the provisions of the General Revision Bill Draft of 20th February, 1968, I noted the following matters which I felt should be drawn to the attention of the draftsman for consideration by him:-

Page 2, Section 2(a)(i):

In Essendon Corporation v Criterion Theatres, 74 C.L.R. 1, it was decided that in a Victorian Statute the expression "the Crown" meant "the Crown in right of the State of Victoria". While the intention of the proposed amendment seems clear, it may be desirable to add express words referring to the Crown in right of the Commonwealth or other States.

Pages 3 and 4, Section 2 (f) :

Sub-paragraph (i): The repeal of paragraph (a) of section 9(7) would, I think, have the (probably unintended) effect of preventing a person whose qualification depended on his having been registered prior to 1961 from obtaining renewal of his registration without satisfying the Board as to his knowledge of accounts etc. under sub-paragraph (f) of section 9(7).

Sub-paragraph (iii): The insertion of the words proposed would, strictly speaking, require the Board to examine afresh the experience and capacity of every registered company auditor before renewal of his registration. In fact, this difficulty exists under the present Act in relation to "general conduct and character". In practice, I imagine the Board does not make an annual investigation of the conduct and character of auditors, but renews their registration automatically. If their conduct or competence is in question, they will be dealt with by an inquiry under sub-sections (11) to (13). The difficulty could be overcome by omitting the words "or, if he is a registered company auditor, to renewal of his registration" from the end of sub-section (7) and substituting for sub-section (8) (proposed to be repealed as spent) a provision that a registered company auditor is entitled on payment of the prescribed fee to renewal of his registration. He would, of course, be liable to removal under sub-sections (11) to (13) and would then be subject to sub-section (16). If the proposals suggested above were adopted the amendments proposed in section 2(f) would not create any difficulty.

Page 4, Section 2(h):

Sub-paragraph (i): It has been suggested to me that some of the leading accountants who practise as registered liquidators do little, if any, audit work. I have not made any specific investigation of the question, and no doubt even if they do not act as auditor of any particular company, they hold themselves out as ready and willing to do so, but I have thought it desirable to mention the point.

Page 4, Section 2(k): Three months before 31st March falls on 31st December, which seems an inconvenient time for lodging an application for renewal. I note that line 4 of the proposed sub-section (10A) refers only to a "registered liquidator", although line 10 refers to both auditors and liquidators. It would seem that the words "registered company auditor or" have been omitted from line 4.

Page 7, Section 3(d):

I note that the words "that affects the memorandum of a company" have been omitted from the proposed new section 21(3). It seems to me that these words are necessary, unless the word "Act", where first appearing, is altered to "section".

Page 7, section 4(a): "paragraph (c) of section 22" should read "paragraph (c) of sub-section (7) of section 22".

Section 4(d): It is to be noted that where a company has changed its name without the approval of the Registrar and without his direction, in the circumstances set out in the first part of section 23(2), there is no provision for the issue of a new certificate, or that the change of name becomes effective on its issue. Should not this case be provided for?

Page 8, Section 4(h): It is suggested that after the word "or" in line 2 of the proposed sub-section (10) the words "(where the alteration has been confirmed, either wholly or in part, by the Court)" should be inserted, since the order lodged may be an order cancelling the alteration, in which case there is nothing to take effect.

Page 11, Section 5(d): The word "or" (immediately preceding "proposed corporation") should also be repealed.

Page 28, Section 9 (c): "54" should read "84".

Pages 30 and 31, Section 11(a)(b) and (c):

It seems to me that the provisions about registered offices are anomalous. A "registered" office must, one would think, be the office the situation of which is registered with the Registrar. The existing section 112(1) contemplates that a company may have a registered office for a period up to one month before any notice is given to the Registrar, and that it might change its registered office without change of registration provided notice of the change is given within one month thereafter. The proposed amendment (rightly, as I think) would require the situation of the registered office to be notified on the day of incorporation, but then requires notice of the change to be given within seven days and provides that the old office is to be deemed the registered office until notice of the change is given. I would suggest that the Act should provide-

(a) that notice of the situation of the registered office be given on the day of incorporation;

(b) that that office shall continue to be the registered office until notice of change is given.

This will require attendance by the secretary or his agent at the old address until notice of change is given. Under the existing law (and under the proposed amendments) the secretary can attend at a new registered office for a month (or seven days, under the amended section) and not at the old one, without giving notice to the Registrar and without any breach of section 132(3).

Page 31, Section 11(d) and (f): Paragraph (f) provides that in the case of companies incorporated after the commencement of the General Revision Act, the first two subscribers to the memorandum shall (in the absence of appropriate provision in the articles) be deemed to be directors, but no machinery has been provided for appointment of a second director of a proprietary company incorporated prior thereto. If the articles provide that there is to be only one director, it seems to me that some machinery will need to be provided for the election or appointment of a second one.

Page 38, Section 15(a)(i): Considering that the secretary may be present by his agent or clerk, it seems to me that this amendment is hardly necessary, unless it is assumed

(a) that if the resident secretary is in attendance he cannot be considered the agent of the non-resident one; or

(b) that the same agent or clerk cannot act for both secretaries.

As the amendment is drafted, and on the assumptions on which it appears to be based, if the non-resident secretary is personally present, the resident secretary (or his agent or clerk) must be there also. Would it not be sufficient to amend the existing section by inserting the words “a secretary" before the words "shall be present"? There would be some difficulty in obtaining a conviction for breach of the section, but the same difficulty would arise under the existing section or under the proposed new provision. If the clerk or agent failed to attend when instructed to do so, who would be liable? Perhaps it would be desirable to provide

expressly that in case of default each of the secretaries (not being a person who does not ordinarily reside in the State?) shall be guilty of an offence.