COMPANY LAW ADVISORY COMMITTEE

PRIVILEGE FOR AUDITORS

The following comments are made on the views of the N.S.W. Law Reform Commission.

1. Although the Committee agrees that there is no doubt that an auditor has a qualified privilege at Common Law, it still remains true that in the company failures of the sixties auditors more than once justified their failure to qualify accounts on the basis that they had been advised by their lawyers that there was doubt about their liability for defamation. The fact is that some lawyers are naturally timid and will play safe and say there is a doubt when there should be none. It was for this reason that the Committee recommended that a section should appear in the Companies Act where the auditors can read it for themselves.

2 With great respect to the draftsman of the N.S.W. Defamation Act of 1958, it does not seem to us to be by any means certain that all lawyers would regard Section 17 as covering the case, though we ourselves would regard it as affording sufficient protection.

3. We do not disagree with the comments made about the use of such words as "malice", or the difficulties of defining privilege in express terms.

4. On page 6 of the paper the Law Reform Commission suggests that it was not intended that the protection given to an auditor should extend to his duties as auditor generally, but only to the performance of his duties under the Act. We would agree that the protection that we envisaged was intended to extend only to the performance of his duties as auditor of that company, and not to audits he might perform for any other body or institution. But if a distinction is being drawn between the things he does because the Act specifically mentions them, and the things he does because they are incidental to the performance of the functions that any company auditor must perform, then we would suggest that the protection should extend to both. The N.S.W. draft, which refers to "functions or duties under this Act" would appear to provide adequately for the position.

5. We do not agree that the proposal in section 167B(2) (of the Victorian Bill) runs counter to the whole tenor of the law

of defamation. There are several statutory provisions that give protection to full and accurate reports of public meetings, and similar material, on the basis that the public have an interest to know about such matters even though the individuals who read the reports may not have a direct interest in the particular subject under discussion. Our proposal was much more limited, since the material to which we thought protection should be given would in due course be required to be filed in the Registry, and would then be in the public domain, though it is not clear whether a newspaper, for example, would be protected for publishing the contents of an auditor's report, even after it had been filed in the Registry. But the vital time at which publicity should be given to it is when the auditor's report first becomes available to the shareholders, and may therefore influence decisions to buy or sell shares.

(R. M. Eggleston)
Chairman,
Company Law Advisory Committee.

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