(Substantial Shareholdings and Take-overs)

Before commenting on particular provisions of the draft, I should like to say that I have for some time felt a growing concern at the impact that the draft Bill is likely to make on the business community. Despite the advantage of having studied successive drafts of these provisions, I still find it extremely difficult to envisage the full scope of the provisions, and anyone coming to the subject for the first time will require a high degree of intelligence if he is to grasp what it is that the Bill permits or forbids. While I realise that a considerable degree of complexity is inherent in the subject matter, unformed reader is unlikely to appreciate that the draft Bill is designed to embody in statutory form the general principles stated in our report of 28th January 1969 and accepted by the Standing Committee. It is obvious that given if it were thought desirable to return to more ancient methods of drafting under which general concepts were used and left to the Courts for interpretation, the time now available would not permit this course to be followed. Nevertheless, I think that some of the difficulties of comprehension can be lessened and I have tried, in what follows, to suggest some changes which might be made for this purpose. In addition I should like to suggest that some attention should be given before the Standing Committee meeting to the preparation of a Press Release which will provide some explanation of the Bill and which might subsequently be expanded into an Explanatory Paper. Before setting out my detailed comments, I would point out that in the nature of the subject, a good deal of publicity inevitably surrounds any takeover proposals, and it is therefore relatively easier to establish That parties are acting pursuant to a common plan than in cases which do not involve communication with a relatively large number of persons. For this reason some of the provisions of the present draft, which seem to me to be so widely drawn as to be likely to impose restrictions on persons who are not involved in a takeover scheme, could I think be more restrictively drawn without greatly affecting their

Definition of "Invitation" (section 180A(2)):

This definition as it stands could apply to a statement in the Financial Review or the Finance Section of The Bulletin that prices of B.H.P. were expected to fall. Taken in conjunction with section 180C(3), such a statement would be prohibited. I do not see why the words "may induce" are needed, but if there is some factor which I have not appreciated, I would suggest that a first-come first-served proposal can hardly succeed unless the "invitor" gives some indication of the price which should be asked by the person to whom the invitation is addressed. I would amend the definition of "invitation" to read:

"'Invitation' means a statement, however expressed, that is not an offer but which expressly or impliedly invites a holder of shares to offer to dispose of shares and which states or indicates the price at which the offer is to be made."

A similar amendment would be necessary in respect of sub-section (10).

"Associate"

One of the difficulties which faces the reader of the Bill is the fact that there are three different interpretations of "associate", namely, in section 6A(5), section 180A(6) (7) and (8), and section 180A(12) (13) and (14). In section 6A(5), and in sub-sections (6) (7) and (8) of section 180A, the interpretations are sufficiently close to each other to warrant the use of the same term, and because in each case the interpretation immediately follows the sub-section in which the term to be interpreted is used, the task of the reader is not great. Moreover the concept of a person "accustomed to act ..... in relation to shares in that company" is sufficiently narrow to indicate how the provision is related to the scheme of the Bill. Two observations, however, suggest themselves. The first is that in the case of newly acquired shares the time for establishing a customary pattern may be too short; perhaps if "or under a duty to act" were added after "accustomed to act" some relationships of shorter duration might be covered. The second is that paragraph (g) of section 180A(6) is ambiguous, since it may refer to either of the

persons mentioned in paragraph (f). If the order of paragraphs were reversed the ambiguity would be resolved in favour of what I take to be the intention of the provision.

So far as sub-section (12) of section 180A is concerned, no such limiting words are provided as are found in sub-section (6). A person who is accustomed to act in accordance with the directions or instructions of another would include employees of all kinds, service personnel, brokers, attorneys under power and the like. Section 180C(4) and (5) would impose very serious restrictions on any "associate" of a person who made a take-over offer, without regard to the question whether there was any association between them in relation to the transaction in question. Sub-section (12), as far as I can see, is operative only in respect of sections 180C(2)(b), 180C(4), 180D(1)(b) and (indirectly) 180M (1)(c). As it seems necessary to introduce some further limitation into sub-section (12), and a different one from that contained in sub-section (6), the risk of confusion would be reduced if a term other than "associate" were used in sub-section (12). If such a new term (say "related person") were employed, sub-section (12) of section 180A could be in somewhat the following form:

"(12) In sections 180C(2) (b) and (4) and 180D(1) (b) the expression "related person" means:

(a) a corporation that, by virtue of sub-section (5) of section 6 of this ordinance, is deemed to be related to the offeror;

(b) a person who, in relation to the offer or invitation dispatched or accepted by that person or the offer or invitation dispatched or accepted by the offeror:

(i) is acting under the instructions or with the authority of the offeror;

(ii) has given instructions or authority to the offeror;

(iii) is acting under the instructions or with the authority of a person pursuant to whose instructions or authority the offeror is acting;

(iv) has an agreement arrangement or undertaking, whether formal or informal and whether expressed or implied, with the offeror by reason of which he or the offeror may exercise, or directly or indirectly control the exercise of, the voting power attached to a share in the company; or

(v) is associated whether formally or informally with the offeror in relation to the proposed acquisition by the offeror of shares in the company." Sub-section (13) could then be omitted. I do not think that sub-section (14) is really necessary. Sections 180C and 180D would need to be amended by substituting the expression "related person" for "associate". In section 18OM(1)(c), for the expression "a person who is associated with the offeror .... of this Ordinance" a suitable provision could be incorporated embodying the substance of sub-paragraphs (iv) and (v) of (12)(b) above.

Spouses, parents and children:

It is not impossible that father and son could be on opposite sides in a takeover battle. The provisions requiring the shares of a parent or child to be counted in assessing the 15% would in some cases have the effect of carrying the transaction into the "takeover" class. This in itself might not be too serious a burden to impose. But the inclusion of parents and children in the prohibition of section 180C(4) would prevent one of them from adding to his holdings (otherwise than by purchase on the Stock Exchange) or even from dispatching a takeover offer of which notice had already been given, during the period specified by the other in an invitation referred to in section 180C(3). I would suggest that serious consideration be given to the omission of references to parents and children in section 180A(12) or any provision which replaces it. I am not so concerned about the reference to "spouses" but I think, it unlikely that the omission of spouses would lead to any substantial possibility of evasion.

A definition of "like take-over offers" (I would prefer "similar take-over offers")would make for easier reading of the sections in which the expression occurs.

Section 180C (3):

Unless the interpretation of "invitation" is amended as suggested above, this sub-section will have a much wider operation than is justified. Even with such amendment, it might still be desirable to include some of the exemptions applicable to offers. Paragraph (a) of this sub-section leaves the invitor free to specify any period he chooses in the invitation. As pointed out above, an "associate" under the current draft could in fact be an opponent, and paragraph (a) would enable the invitor to keep the opponent out of the field for such period as the invitor specifies. I sin not sure whether it is intended that an invitation under this section should become subject to penalties for false statements as provided in the amended section 375(2) (G.R.B. p.72).

Section 180C(4):

This sub-section departs from the recommendation made in paragraph 25 of our Report, which contemplated that when a "first-come first-served" bidder sought less than 15%, he should be precluded from acquiring (otherwise than by Stock Exchange transactions) more than 15% (including existing holdings) within four months, but that he should be free to go up to 15% within that time. Under the present scheme he can acquire 14% by "first-come first-served" methods within the time specified pursuant to paragraph (a) of sub-section (3), and then acquire the shares of other "invitees" by accepting their offers after the period specified in the invitation. On the other hand, if he specifies (say) 5% in his invitation, and a period of (say) two weeks, he cannot acquire any shares in excess of 5% during those two weeks, even if they are offered to him by someone who was acting independently of the invitation. In my view: sub-section (4) should be amended by substituting for "during the period specified in the invitation" the words "during a period of four months from the date of the 'invitation', and by substituting for the words "specified in the first-mentioned invitation as the number of shares proposed to be acquired during that period" some such expression as the following:

"which the invitor could have specified in the first-mentioned invitation without complying with sub-section (5), unless sub-section (g) was ill fact complied with in respect of those shares"

Section 180C (2)(c):

This paragraph should, I think, read:

"(c) all offer to acquire shares in a company, not being voting shares and not being shares to which the offeror or, where two or more persons constitute the offeror, any of those persons, is entitled immediately before the offer is dispatched, unless the offeror proposes to acquire the whole of:

(i) those shares; or

(ii) such of those shares as are included in one or more classes of shares in the company;....."

Section 180M:

This section should have an exemption in favour of purchases on the Stock Exchange. See paragraph 20 of our Report.

Section 180X(2):

Does this sub-section mean any more than:

"Where the shares in a company are not divided into classes, the whole of the shares shall be deemed to constitute a class"?

If it is intended to mean more than this, it seems to me that where there are no classes of shares, an offer made for all the shares other than those held by X might under sub-section (2) be deemed to be for all the shares included in a class. Hence, if X would, if asked, have been a dissenter, the section might apply in a case where the actual dissenters, plus X~ exceeded 10% of the shareholders.

Sections 180X(14) and 185(9):

These sub-sections should be qualified by some such expression as "unless it has paid or transferred the money or other property to the person entitled"

Tenth Schedule clause 2:

In paragraphs (c) and (d), the word "beneficially" should, I think, be omitted.

R. M. EGGLESTON,

Chairman,
Company Law Revision Committee.

2nd December, 1969.