COMPANY LAW ADVISORY COMMITTEE
TAKE-OVER OFFERS

Application of Public Borrowing Provisions:

1. The first question raised in this paper arises out of a practice that has developed, of offeror corporations including in the terms offered a requirement that the offeree will accept, or will authorise the offeror to apply for, debentures, either in the offeror corporation, or in the offeree corporation, in lieu of receiving a cash payment. Another possibility that has to be provided for is that the debentures to be allotted will be debentures of another corporation altogether.

2. Where such an offer is accepted, the result may be that a corporation will make a large issue of debentures, but that the provisions of Part VI, Division 4 will not apply, as the debentures will not have been issued in response to an invitation to the public. Under the existing provisions of section 5(6), it might be argued that, as the offeror corporation could hardly make its offer without the concurrence of the corporation that was to issue the debentures, that corporation could be taken to be offering those debentures to a section of the public, not being shareholders of that corporation (so that the exception in paragraph (c) would not apply); but this argument would not be available in cases such as the Federal Hotels case, in which the offerees were to take debentures in Federal Hotels itself. In any case, under the amendments that we proposed in our Fifth Report, an offer made in conjunction with a takeover offer would be excluded from the category of offers to the public.

3. It seems desirable that an issue of debentures of the kind now under consideration should be subject to the requirements as to appointment of a trustee, periodical reporting, and provision of half-yearly accounts provided for in Division 4 of Part IV. This could be achieved by inserting a provision to the effect that where a takeover scheme contemplates the issue or transfer of debentures of any corporation to the offerees, any such debentures shall for the purposes of Division 4 of Part IV be deemed to have been offered to the public by that corporation for subscription or Purchase, and the corporation shall be deemed to be a borrowing corporation.

Review of Tenth Schedule:

The second point raised by the paper arises out of the Federal Hotels offer, a term of which was that the offerees should

apply for shares in Australian National Hotels, the amount payable on those shares being taken as part satisfaction of the purchase money. Again, on the assumption that such an offer could not be made unless Australian National Hotels had assented to the proposal, and was therefore a party to the offer, it might be said that Australian Hotels was inviting offers from a section of the public within the meaning of section 5(6); but again, the adoption of the proposals in our Fifth Report would enable such an offer to escape the prospectus requirements. The situation had, however, been foreseen by the officers in their paper of October 1968, to which we referred in paragraph 46 of our second interim report. In accordance with the recommendation there made, the revised Tenth Schedule Part A, clause 7, requires the same information to be given, so far as it is available to the offeror, as if the corporation in which marketable securities are to be issued were the offeror. It may, however, be a question whether a term requiring the offeree to apply for shares in another corporation satisfies the terms of clause 6 of that part, viz. "Where the consideration to be offered in exchange for shares in the offeree company consists, in whole or in part, of marketable securities issued, or to be issued, by a corporation". It might be said that the offeror is not offering those securities as part of the consideration, but merely stipulating that the offeree is to apply for the shares, and that the corporation is free to accept or reject that offer. An appropriate amendment of clause 6 may be desirable to meet this possibility.

5. Finally, the paper under discussion points out that this Committee has not made any recommendations for the amendment of the Tenth Schedule. The substance of the existing requirements would be covered by substituting in Part A clause 2(e)(i), references to clauses of the new Fifth Schedule, when the draft has been finalized. In our draft the reference would be to clauses 22 to 32 inclusive and 35.

6. There is, however, much to be said for the view that if the takeover involves the issue of debentures, either by the offeror corporation, or by some other corporation (not being the offeree corporation), the corporation issuing those debentures should be required to furnish all or most of the public. It would perhaps be unreasonable to require the submission of a prospectus for approval by the Registrar. To do so might make it very

difficult to organise a successful takeover scheme which included a debenture issue, though this might not be a bad thing.

7. It is to be noted that in the case where it is contemplated that the offeror will pay money to another corporation which will issue debentures to the offeree, the offeree will need just as much information as to the proposed use of the money, the ability of the corporation to service the debt, and like matters, as if the issue were a public issue. If the debentures are to be issued by an offeror corporation, which will acquire the shares being taken over, the need for such information may be less.

8. On the whole, it seems desirable to provide that where a takeover scheme contemplates the issue or transfer of debentures of any corporation to the offerees, the statement required by section 180C shall include all the information that would have been required in a prospectus if the debentures were being offered to the public for subscription.

9. It would also be desirable to state that the statement shall be deemed to be a prospectus for the purposes of Division of Part IV (see, for example, section 74H).

10. The Federal Hotels case does raise a point which was not considered important at the time of the presentation of our second interim report. Although clause 8 of Part B of the existing Tenth Schedule contemplates that unlisted shares may be offered as consideration for the shares to be acquired, such an offer would at that time have been very unusual. One reason why the offeror under a takeover scheme is allowed to give much less information than a company seeking share capital from the public may be that, as most offerors are listed companies, the offeree can usually make a comparison of market values. In the Federal Hotels case, however, two companies, Ipec Insurance Ltd. and Australian National Hotels Ltd. both of which are unlisted, were involved in this offer. It may well be thought desirable that in the case of an offer of shares in an unlisted company the offeror should provide all the information that would have been required in a prospectus if those shares were being offered to the public for subscription.

Chairman,
Company Law Advisory Committee.

26th October 1971.