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TABLE OF CONTENTS

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SECTION A. INTRODUCTION

1. In accordance with the intention indicated in our first interim report, we have continued our examination of the topics referred to in paragraph 55 of that report. We had given detailed consideration to the provisions of the Acts relating to investigations, and were in course of preparing a report on that subject when it became apparent that the question of takeover bids had become a matter of urgency, and we were asked to consider this question together with the related question of disclosure of substantial shareholdings, and if possible to submit recommendations on these matters to the next meeting of the Standing Committee on 7 March.

2. Arrangements were made for the views of certain interested bodies to be furnished for our assistance. We have been greatly assisted by the submissions that have been received, but we are aware that not all the bodies have been able to furnish their views in the time allotted, and that in these cases they may furnish submissions directly to the Attorney-General for the Commonwealth for transmission to the Standing Committee. It will be appreciated that a considerable amount of work has already been done by the officers in respect of this topic, and we have been fortunate in having available to us the material prepared by them and the drafts embodied in the General Revision Bill Draft of 20 February 1968.

SECTION B. DISCLOSURE OF SUBSTANTIAL SHAREHOLDINGS

3. Overseas legislation: In the United Kingdom Act of 1967 provision was made requiring the disclosure of substantial shareholdings in listed companies in cases in which any person was in a position to control the voting in respect of 10 per cent or more of the shares carrying full voting rights. This legislation was recommended by the Jenkins Report (paragraphs 141 to 147 inclusive) and followed the example set by the United States, which had for many years required such disclosure in respect of shares subject to the control of the Securities and Exchange Commission.

4. Reasons for requiring disclosure: Legislation such as that referred to above is, in our opinion, justified by the consideration that in the case of companies whose shares are traded on stock exchanges, shareholders are entitled to know whether there are in existence substantial holdings of shares which might enable a single individual or corporation, or a small group, to control the destinies of the company, and if such a situation does exist, to know who are the persons on whose exercise of voting power the future of the company may depend. The Acts, of course, do make provision for the registration of shareholders, but it has always been possible to conceal the identity of the person beneficially entitled by vesting the shares in a trustee. Indeed, the English Act of 1862 expressly provided that no notice of any trusts should appear on the register (see now section 156 (4) of the Victorian Act); this provision no doubt originated in a desire to relieve the company from the necessity of determining whether particular dealings were in breach of trust, although the objective could have been achieved in other ways. At all events, it is now a common practice for investors to have their shares registered in the name of nominees, sometimes for purposes of concealment, but in many cases merely for convenience in dealing with the shares, for example. in the case of investors who are permanently or frequently absent from Australia. In other cases, shares are registered in the name of trustees under wills or settlements. The introduction of a requirement that all beneficial interests should be disclosed would lead to an enormous amount of paper work much

of which would be pointless. We think, however, that the figure of 10% which has been adopted in the United States and in the United Kingdom is a reasonable one, and that provision should be made substantially along the lines of the United Kingdom legislation for the disclosure of interests giving rise to control of voting power where this reaches the 10% level.

5. The General Revision Bill Draft: We have examined the draft prepared by the Victorian Draftsman and embodied in section 7 (e) of the rough draft General Revision Bill of 20 February 1968. We find this draft to be generally satisfactory, subject to some detailed comments set out later in this report. There are, however, certain major requirements which we think should be written into the Act.

6. Territorial operation of legislation: We think it is important that the legislation should be so expressed as to leave no doubt that the obligation of disclosure is intended to apply to persons resident, or companies incorporated, outside the jurisdiction, as well as to persons or corporations within the jurisdiction. We do not intend that there should be any discrimination against foreign investors, and indeed we do not consider that our terms of reference contemplate that we should make any distinction between Australian and overseas investors. Questions of foreign control of Australian companies, such as gave rise to the ordinance recently brought into force in the Australian Capital Territory, are therefore outside our field, and have played no part in the formulation of our recommendations. If, however, the legislation were so worded that it could be read as subject to a territorial limitation, so that a beneficial owner outside the jurisdiction of a State or Territory could claim that the obligation to give notice of substantial holdings did not apply to him, such persons would be able to gain control of companies by stealth in circumstances in which residents could not. We realize, of course, that the enforcement of the provisions against non-residents may be difficult, but we indicate below certain sanctions for non-compliance which, although they may not be fully effective, will we think, discourage any individual or company, whether resident or non-resident, from ignoring the provisions.

7. **Sanctions for non-compliance:** In addition to the penalty for non-compliance provided for in section 69F of the General Revision Bill Draft, we think that it is necessary to provide some machinery to prevent a person who disregards the provisions of the legislation from exercising the rights which he has acquired. In our view the legislation should include the following:

(a) a provision enabling the Attorney-General to obtain an injunction to restrain a person claiming the benefits of a substantial shareholding from exercising the rights attaching to that holding in cases in which the notice required by the Act was not given in compliance with those requirements;

(b) a provision enabling the Attorney-General to seek an order of the Court restricting (in whole or in part) the exercise of voting rights in respect of the shares in question;

(c) a provision enabling the Attorney-General to seek an order of the Court directing the sale of all or part of the holdings in question within such times and under such conditions as the Court directs and empowering the Court if it thinks fit to impose conditions to ensure that the sale is not made to other persons who have substantial holdings or who will become substantial shareholders by reason of the purchase.

8. It should be specifically provided that the Court is not to exercise these powers where it is satisfied that the failure to give notice was due to inadvertence or mistake or that the person

concerned ought reasonably to be excused for the failure, subject to an exception that in such cases the restriction of voting power may be applied for such period as is fixed by the Court to any such excess of voting power over ten per cent as exists at the date of the order.

9. It should also be provided that in exercising its powers under paragraphs 7 and 8, the Court shall have regard to the interests of innocent third parties who may be affected by the order.

10. We think it would also be desirable to provide that in cases in which shares were not disposed of in accordance with an order under sub-paragraph (c) of paragraph 7 above, they should vest in the Registrar, who should have power to dispose of them, accounting to the owner for the proceeds.

11. **Notification by nominees:** We have considered whether it would be desirable to impose an obligation on nominees to notify the company of the names of their principals. As stated above, any general requirement applicable to all nominees would impose a heavy burden and would for the most part serve no useful purpose. So far as it was aimed at detecting breaches by the ultimate beneficial owners, it would merely result in the creation of an intermediate nominee or trustee. We think, however, that there is much to be said for requiring all nominees or trustees to bring to the attention of any non-resident principal or beneficiary (who may be unaware of the requirements) the provisions of the Act requiring disclosure, and we therefore recommend that the Act should include a provision requiring any registered holder who is aware that he holds on behalf of a non-resident to furnish to that person information in a prescribed form as to the requirements of the legislation. Failure to give such information would not involve the sanctions referred to in paragraph 7 above, but would be an offence punishable under the general penalty provisions of the Act.

12. **Particular provisions of the General Revision Bill:** The provisions of section 7(e) of the General Revision Bill Draft of 20 February 1968 follow closely the substance of the provisions of the United Kingdom Act of 1967, although the provisions have been re-arranged and the drafting has been, in our view, considerably improved as a result. There are, however, some minor points to which we think attention should be drawn:

(a) In section 698 (1) the expression 'in accordance with section 69c' should read 'in accordance with section 69c, 69D or 69E' or, more simply, 'in accordance with this Division'.

(b) Section 69c allows a period of seven days after the provisions come into operation, for giving notice, or if the person concerned does not know at that time of the subsistence of the interest, seven days after he comes to know of it. The period in the United Kingdom is 14 days. On the assumption that ample warning will be given of the intention to bring the provisions into operation the first period of seven days might be adequate. In the second case, it might well be too short. We think the period should be 14 days in both cases and that power should be given to the Registrar to extend the time in either case.

(c) Section 69D deals with the case where the obligation to give notice arises as a result of the company being listed, or of a particular class of share capital becoming voting capital. Again the period allowed is seven days. The section provides in effect that time does not begin to run until the person concerned is aware of the subsistence of the interest, but does not provide for the case where he is unaware of the listing or of the change in voting rights. It is to be noted that in the United Kingdom Act (section 33 (5) (a)) where the obligation to give notice arises out of an event occurring after the commencement of the Act, the person under obligation must not

only know of the occurrence of the event, but 'of the fact that its occurrence gives rise to the obligation', before time begins to run against him. It is difficult to see why ignorance of facts should be an excuse in some cases but not in others. In our view the best way to deal with this situation is to provide in all cases for notice to be given within a certain time of the coming into operation of the Act, or the occurrence of the event giving rise to the interest, or the listing of the company, or the change in voting rights, as the case may be, and then to provide a general defence to a charge of failing to give notice, that the person under obligation, by reason of his ignorance of the facts relating to any of the above matters, was unaware of his obligation.

(d) In section 69H (4) (b) the word 'present' should read 'presently' or 'immediately'.

(e) Section 28 (4) of the United Kingdom Act excludes power to vote as a proxy or to act as representative of a company from the circumstances which give rise to an interest within the meaning of the section. A similar exception should in our view be made in section 69H (4) (c).

(f) Section 69H (10) is in the same terms as section 28 (11) of the United Kingdom Act. The reference to 'debentures' is inappropriate in the Australian context, but in any event we find the wording of this sub-section obscure and we question the necessity for its inclusion. If it is to be retained we think it should be redrafted to express more clearly what is intended. On a literal interpretation of the words, it would appear to enable a person to declare a decrease in interest in cases where he had directed a transfer to a third person who was to hold the shares as his trustee. It would also appear to enable a person who had contracted to buy shares, and was in consequence thereof entitled to control the voting in respect of them, to declare a decrease in his interest if the vendor failed to deliver in pursuance of the contract, even though the purchaser still had the right, in terms of the contract, to direct the vendor how to vote.

13. **Exemptions from disclosure:** In paragraph 21 of our first interim report, we referred to the provisions of the U.K. Act of 1967 (sections 34 (5), 3 (3) and 4 (3)) exempting certain companies (subject to the approval of the Board of Trade) from disclosure. In paragraphs 22, 23 and 24 of that report, we discussed a similar provision in section 5 (2) of the U.K. Act regarding the disclosure by a subsidiary company of the name of its ultimate holding company and of the country in which it is incorporated. As we pointed out in the first report, there may be reasons of policy unconnected with the protection of investors which would move the Ministers to decide that similar exemptions should be included in Australian legislation. As in the case of the proposed amendment dealt with in paragraphs 22 to 24 of our first report, we do no more than draw this matter to the attention of the Ministers, with the observation that if power of exemption is to be included, it is a power which would fall within the class of matters which we have suggested should be vested in the Companies Commission which we recommended in Section D of our first report.

SECTION C. TAKEOVER OFFERS

14. **General considerations:** There appears to be general agreement that some regulation of takeovers is necessary to ensure fair treatment of shareholders. At the same time, looked at from the point of view of investors, it cannot be said that takeover bids are disadvantageous. In many cases they enable an investor to obtain a greater price for his shares, and to reinvest the proceeds to obtain a higher income, than if the company remained under its original management. Moreover, the possibility that such a bid will be made must operate as a spur to management to improve its performance and to disclose to shareholders the true worth of their holdings. Although varying views have been expressed as to the extent to which the freedom of

bidders should be controlled, most of the suggestions that have been made for amendment have been directed towards closing loopholes in the present legislation, or improving the effectiveness of the controls already existing.

15. In making the recommendations which follow, we have not been actuated by any desire to discourage the making of takeover bids in cases in which the safeguards for the protection of shareholders are observed. We have, however, recommended the widening of the scope of the legislation in order to ensure as far as practicable that those safeguards are observed in cases in which it is possible under the present Acts to avoid compliance with them.

16. We agree with the general principle that if a natural person or corporation wishes to acquire control of a company by making a general offer to acquire all the shares, or a proportion sufficient to enable him to exercise voting control, limitations should be placed on his freedom of action so far as is necessary to ensure:

(i) that his identity is known to the shareholders and directors;

(ii) that the shareholders and directors have a reasonable time in which to consider the proposal;

(iii) that the offeror is required to give such information as is necessary to enable the shareholders to form a judgment on the merits of the proposal and, in particular, where the offeror offers shares or interests in a corporation, that the kind of information which would ordinarily be provided in a prospectus is furnished to the offeree shareholders;

(iv) that so far as is practicable, each shareholder should have an equal opportunity to participate in the benefits offered.

17. Under the present legislation (section 184 of the Victorian Act) the first three of these conditions are fulfilled if the offeror is a company, but not where an individual makes the offer. We recommend that the provisions should apply to offerors who are natural persons. If, however, an offeror corporation offers shares in another corporation the legislation does not require information as to that other corporation (see paragraph 46 (e) below).

18. **Equality of opportunity:** So far as equality of opportunity is concerned, three classes of case have to be considered:

(a) Where the offer is to purchase all the shares, or a high proportion. In such a case it is desirable that dissentients should not be left as a small minority. This situation is dealt with in part by section 185 of the Act.

(b) Where an offer is made, and is accepted by some, and subsequently market pressures force the bidder to offer more to the remaining shareholders. In such a case there are two views possible. One is that those who came in early should receive the same benefits as those who held out. The other is that, provided each was given time to consider, the early acceptors, who were presumably more anxious that the deal should go through, should not share in the benefits obtained by the more cautious or more reluctant shareholders who forced an increase in the price.

(c) Where the offeror seeks only a proportion (say 60%) of the total shareholding. In these cases it has been suggested that the offer should be capable of acceptance by every shareholder for that proportion of his shareholding. The difficulties which could arise from such a proposal are discussed below (paragraph 21).

19. There is another situation which raises similar consideration to that referred to in (b) above. It has been indicated to us that in some cases the offeror has made a general offer to shareholders, but has privately offered a larger sum to the holder of a substantial parcel of shares to induce that holder to sell. Of course, if the higher price is offered (say) to a director, to obtain the advantage of an announcement that he has agreed to participate, the director would be party to a fraud on the shareholders if he allowed it to be suggested that he was agreeing to the offer made to the other shareholders without disclosing that he was getting a higher price.

20. Such variations in price may, however, represent no more than the difference in bargaining power between a large holding and a small one. The danger is that by paying a fair price to some shareholders, the bidder may in effect force acceptance of a price that is less than fair by sellers who fear that if they do not accept they will become a minority. On the whole, we feel that the best solution of the situation referred to in paragraph 19 above, and in sub-paragraph (b) of paragraph 18, is to require that an offeror who increases the price offered in respect of some shareholders must pay the increased price to those who have already accepted. The provisions of the proposed sub-sections (7A), (7B), (7C) and (7D) of section 184 (General Revision Bill pp. 98 and 99) appear appropriate to deal with the variation of offers, save that we would recommend that in sub-section (7D), for the words 'Where a person accepts a takeover offer within three months before offers which were made to holders' there should be substituted the words 'Where a person accepts a takeover offer and offers which were made at the same time to holders ....' We think also that there should be added a further sub-section to prevent the evasion of these provisions by acceptance of a counter-offer from the offeree. The suggested sub-section would be in some such form as the following:

'(7E). During the currency of a takeover offer the offeror shall not pay or agree to pay to any offeree a higher price or in any other way increase the benefits received or to be received by the offeree except in pursuance of a variation made in accordance with sub-section (7A) or in the course of a purchase in the ordinary course of trading on any Stock Exchange.'

Sub-sections (7E) and (7F) of the G.R.B. Draft (p. 99) relate to the questions discussed in paragraphs 38-41 below.

21. **Offers for a limited proportion:** In many cases the offeror seeks only to acquire enough shares to obtain voting control, and is not anxious to acquire the whole of the shares. If he already has a 25% holding, an offer to acquire a further 10% will involve him in compliance with section 184. He need not, however, make his offer to all shareholders, nor need the scheme be such as to ensure that all shareholders are entitled to dispose of an equal proportion of their holdings. It has been suggested that in such a case as this, every shareholder should be entitled to accept for 10% of his holding. Such a rule would, we think, involve great difficulties, and we do not see any escape from the position that it is impossible to secure complete equality in this respect.

22. **'First come first served' invitations**: Considerable criticism has been expressed of the practice of making 'first come first served' invitations under which, as we understand the process, a broker or other agent (or, in some cases, the buyer himself, invites offers from

shareholders at a stated price, indicating that he has instructions to accept the first offers received up to a stated percentage of the share capital. This practice has been criticised on the following grounds:

(a) As the invitation is not itself an offer, it does not fall within the definitions in section 184. So far as we are aware, no one has yet issued such an invitation with an indication that he will accept more than one-third of the shares (the limit at present fixed for takeover offers) but there appears to be nothing to prevent this being done, unless it were held as a matter of law that an invitation to make an offer with a promise (express or implied) to accept the first offers up to a stated percentage is itself an offer.

(b) Even if the invitation were held to be an offer, provided the intimation is that less than one-third is sought, there does not appear to be anything to prevent acceptance of more than the stated proportion. Thus control may be gained by a scheme which on its face is not within section 184.

(c) The identity of the buyer need not be disclosed.

(d) Since sellers do not know whether the buyer intends to accept more than the stated percentage, they must make an immediate decision, without the information which would become available if section 184 were complied with.

(e) Inequality between shareholders is inevitable since many will be unaware of the offer until too late.

23. In our view it is impossible to provide complete protection against all these criticisms. In a sense, every buying bid on a stock exchange is a 'first come first served' offer, and if a buyer instructs his broker to buy a stated number of shares at a price above the current market price, those in close touch with the market will benefit, and others will not. If, as we recommend hereafter, the proportion now fixed by section 184 at one-third is reduced to 15%, and if steps are taken to prevent 'first come first served' offers from being used to avoid the requirements of section 184, we think the normal play of market forces can be left to operate in the rest of the field.

24. We therefore recommend that an invitation to make an offer be treated as if it were itself an offer with a corresponding provision regarding acceptance. It would be desirable also to include provisions relating to offers to acquire options or invitations to offer options.

25. In order to prevent a bid for a lesser number of shares from being used to acquire a greater number, there should be a provision that an offeror who announces that he is seeking less than the proportion fixed by section 184 shall not acquire additional shares which would take his holdings above that proportion within four months from the making of the announcement, unless he does so by means of a takeover scheme. In case this provision is sought to be evaded by an announcement which does not state any fixed number or proportion, it should be provided that a person shall not make an offer to buy shares to shareholders generally or to any substantial number of shareholders or announce to shareholders generally or to any substantial number of shareholders his intention of acquiring shares, unless the offer or announcement states the maximum number or percentage of the shares to be acquired or is made in connection with a takeover offer. This provision should, however, be subject to an exemption to make it clear that it does not apply to offers made in the normal course of trading on a Stock Exchange.

We do not think that a person making an ordinary buying bid on a Stock Exchange should be required to state the number of shares that he is prepared to buy. Each such bid is, as we understand it, for a marketable parcel, and the parties do not disclose the total amount offered or sought. We would add that, in the same way as is indicated in paragraph 28 below, the prohibitions proposed should extend to other persons and corporations under common control.

26. If these recommendations are adopted, we would expect a substantial decline in the number of 'first come first served' offers. Moreover, since this form of bid could not be employed where the effect would be to give the buyer more than 15% of the voting power, those who did not accept the proposal could normally expect to find a continuing market for their shares, which might indeed be enhanced by the speculative activity which such an offer would provoke.

27. **Voting control**: As already stated, section 184 specifies one-third of the voting power as the criterion for its operation. It seems to be generally agreed that this figure is too high. In the case of a company with large numbers of small shareholders it is unlikely that any one shareholder would need to control as much as one-third of the voting power to gain control of the company. Various lower figures have been suggested, and it is not easy to determine a figure which will be appropriate in all cases. However, we consider that any person who is seeking to gain control of 15 % or more of the voting power is likely to be aiming at control of the company itself, and we do not see any disadvantage in fixing the figure at that level rather than at some other level between 15% and the present 33½. We therefore recommend that '15%' be substituted for 'one-third' in sub-paragraph (b) of the definition of 'takeover scheme' in section 184.

28. Section 184 defines the proportion of voting power in terms which require the aggregation of the shares held or to be acquired by the offeror corporation with those held by 'related' corporations within section 6 (5) of the Act. We think it is necessary to widen the circumstances in which such aggregation must be made, and for this purpose the provisions of the General Revision Bill requiring the disclosure of substantial shareholdings afford a model. What is required is a provision that would oblige the offeror to bring into account, in determining the proportion of voting power referred to in sub-paragraph (b) of the definition of 'Takeover scheme' in section 184, all shares which would have to be taken into account under Division 3A of Part IV in determining whether the offeror, or any person having an interest in the shares of the offeror within the meaning of Division 3A, had a substantial interest, if the company were a listed company and the shares in question carried full voting rights in all circumstances. The object of expressing the requirement in this way is to prevent the use of a company as offeror which, although not itself controlling any votes in the offeree company, is itself controlled by another person or company having a substantial shareholding within the purview of Division 3A of Part IV. In the same way, the statement required by Part B clause 1 (c) should be similarly extended to cover shares held by or controlled by the offeror or a person or company to whose control the offeror is subject.

29. **Joint offers:** It has been held in the Ready Mixed Concrete Case (41 ALJR. 189) that section 184 does not apply to the case of a joint offer by more than one offeror corporation. This decision is under appeal to the Privy Council but whatever the final outcome of the case, we recommend that the section should be applied to offerors who act jointly or in concert.

30. **Territorial limitations:** Section 184 in its present form applies to 'offeree corporations', that is to say, to companies incorporated outside the State or Territory concerned as well as to those incorporated within it. Difficulties have arisen as to whether more than one 'takeover

code' will apply where a company is incorporated in one State but the shareholders reside in another or others, and also as to whether an offer posted in one State to a shareholder in another is made in the former State or the latter. Various suggestions have been made to deal with these difficulties (see the memoranda of the Victorian Solicitor-General and the Commonwealth Solicitor-General, and the paper prepared by the Officers for the Perth Conference in October last). The solution proposed has the difficulty that it would involve provision to extend the jurisdiction of some State and Territory courts to enable them to deal with offences committed outside the present territorial limits of their jurisdiction. There is the further difficulty that none of the citizens of the State or Territory which has power to prosecute may be involved in the breach, and the State or Territory whose citizens are involved may be unable to take any action for their protection. The solution which we recommend is as follows:

(a) Confine the operation of the takeover code in each Act or Ordinance to 'offeree corporations' incorporated in that State or Territory.

(b) Provide that a person (including a company) who despatches in (Victoria) or to a person in (Victoria) an offer which does not comply with the takeover provisions of the State or Territory in which the 'offeree corporation' is incorporated, or who, being a resident of (Victoria) or a company incorporated in (Victoria) fails to perform or observe any requirement of those takeover provisions shall be guilty of an offence against the (Victorian) Act.

31. This solution (like that proposed by the Officers) has the advantage of establishing that only one takeover code need be observed in any given case. An offeror who fails to comply with it can be prosecuted either in the place where the offeree corporation is incorporated (if he is amenable to the jurisdiction) or in the place from which he despatches the offer or in the place in which the shareholder receives the offer. It would not provide for cases in which the 'offeree corporation' is a foreign corporation not incorporated in any State or Territory, but the same is true of the solution proposed by the officers. It is possible that the provisions might be avoided by a foreigner who remained out of the jurisdiction, but the possibility of a prospective buyer obtaining control of an Australian company while not venturing into any Australian State or Territory seems remote. Moreover, we propose (see paragraph 46 below) that the Attorney-General should have power to restrain proceedings under any offer which is in breach of the relevant takeover code and this remedy would be available wherever the offeror was.

32. We think it is especially important that only one takeover code should apply to any given 'offeree corporation', since the exemption provided for under section 184 (9) might otherwise have to be sought in respect of several Acts or Ordinances, although if our proposals made in paragraph 36 below as to exemptions are accepted, there would be uniformity as between the various jurisdictions.

33. **Exemptions from section 184:** Sub-section (9) of section 184 provides that regulations may be made making provision for and in relation to the granting of exemptions from all or any of the provisions of the section or the requirements set out in the 10th Schedule. Pursuant to this provision, regulations have been made in Victoria exempting offers made in respect of a proprietary company if every member thereof has agreed in writing that the requirements should not apply. The Officers have recommended that an offer to acquire the shares in any company that has fewer than fifteen shareholders (two or more persons holding shares jointly being counted as one shareholder) should be exempted. We agree with this proposal but we think that the exemption should also apply in the case of a proprietary company having more

than fifteen shareholders if all the members have consented in writing to dispense with the requirements and the offer is covered by the terms of the consent given.

34. There is a further exemption which we think should be embodied in the Act itself. It arises from the use of the word 'scheme' in the definition of 'takeover offer'. As was said by Dixon C. J. in Australian Consolidated Press Ltd. v. Australian Newsprint Mills Holdings Ltd. 105 C.L.R. 473 at p. 479, '" Scheme" is a vague and elastic word. Doubtless it connotes a plan or purpose which is coherent and has some unity of conception.' In the section under consideration in that case (corresponding to the present section 185) little difficulty could arise, since a corporation would be unlikely to acquire more than 90% of the shares of any class except in pursuance or' some plan which would amount to a scheme. Where takeover offers are concerned the definition applies where the shares already held by the offeror, together with those to be acquired, carry the right to control one-third (or if our recommendation is accepted, 15 %) of the voting power. Thus a shareholder who holds (say) 40% and wishes to acquire any additional voting shares, will have to comply with section 184 if the offer is made under a 'scheme involving the making of offers for the acquisition' of those additional shares. No doubt the making of one offer would not of itself bring the section into operation, nor would the acceptance of a succession of selling offers made by others, not as a result of an invitation by the buyer. But we think that an offeror should be free to approach a limited number of shareholders in pursuance of a 'plan or purpose' without having to go through the procedure prescribed by section 184. In New Zealand, section 3 of Act No. 136 of 1963 provides that 'Nothing in this Part of this Act shall apply in respect of any scheme involving the making of offers for the acquisition of ... any shares in any company, if offers are made to not more than six members of that company.' We think that a similar exemption should be provided in the legislation in the States and Territories of Australia, except that we would limit the exemption to cases where not more than three members were involved.

35. The further question arises, whether section 184 should apply to a person who seeks additional shares by purchase on the Stock Exchange. Again, a holder of (say) 40% of the voting shares would not have to comply with section 184 if he made one buying bid for a marketable parcel of shares. But if he gave instructions to his brokers to buy a quantity which involved the making of offers for several marketable parcels, it might well be that those offers would be held to have been made under 'a scheme involving the making of offers.' We have considered whether the law should require that once a person or corporation has acquired control, he should be prevented from acquiring further shares by ordinary market transactions on the Stock Exchange. In our view he should not be so prevented, and we recommend that a further exemption be provided excluding such purchases from the operation of section 184.

36. We think also that it is important that these exemptions should be written into the sub-section itself, rather than embodied in regulations. If the Ministers are in agreement as to the scope of the proposed exemptions, it is desirable that they should be available to anyone who is provided with a copy of the Act, rather than that it should be necessary to investigate the regulations in force in the relevant State or Territory. We would nevertheless favour the retention of the powers of variation and exemption contained in section 184 (8) and (9), to provide additional flexibility. In accordance with our recommendations in our first interim report, these powers could in our view appropriately be vested in the Companies Commission.

37. **'Bluffing' offers:** It has been suggested to us that the very existence of the provisions requiring notice of intention to make an offer affords a method by which an unscrupulous person may defeat a takeover offer or run up the price by announcing his intention to make an

offer without having any such intention. It has been suggested that some form of security might be required as evidence of good faith. We see practical difficulties in making such provision, but we think it should be an offence to make a takeover offer, or to give notice of intention to do so without having any real intention of doing so, or without having any reasonable or probable grounds of expectation of being able to provide the consideration for the offer or proposed offer. It would often (but not always) be difficult to prove the offence, but the existence of such a provision would, we think, discourage the making of irresponsible announcements which could have the effect of creating a false market. In making this recommendation we are not so much concerned with offerors who may find that as a result of a bluffing statement they have been induced to pay more than their first offer. Presumably they will not pay more than the shares are worth to them. We are, however, concerned that a bluffing statement may be used to defeat a genuine takeover bid, or to create a false market where no takeover bid is in fact contemplated by anyone.

38. **Conditional offers:** Provision is made in the Act for offers which are conditional on acceptance in respect of a minimum number of shares. In such a case, clause 4 of Part A of the 10th Schedule provides that the offer shall specify:

(a) a date as the latest date on which the offeror corporation can declare the offer to have become free from the condition; and
(b) a further period of not less than seven days during which the offer will remain open for acceptance.

The Act does not, however, provide for the form of the declaration referred to in (a), nor for the result of failure to make the declaration.

39. Apart from any statutory provision, we would think that if such a condition is attached to the offer, neither party would be bound unless the condition is fulfilled. If, however, the offeror retained the right to declare the transaction unconditional in respect of any lesser number, he would have the option of so declaring and so binding the accepting members. The object of clause 4 appears to be to enable undecided shareholders to have a period within which they can accept the offer after they become aware that it has become unconditional in respect of other members. If they are to exercise a sound judgment at this point of time, however, they should know not only that the offer has become unconditional, but how many shares the offeror has obtained. The notice under Part B will have told the non-assenting shareholders how many shares were already controlled by the offeror, and a member will be able to decide whether he wishes to remain as a shareholder, having regard to the extent of the interest which the offeror is known to have acquired.

40. It is necessary also to provide for what is to happen if no declaration is made. In the absence of a statutory provision, an offeree who had accepted would not know whether he was bound or not, since he would have no means of knowing whether the condition had been fulfilled. An offeree who had not accepted would have a further seven days after the last date for a declaration, but would not have the information required to make a decision. It has been suggested that if no contrary declaration is made the condition should be treated has having been fulfilled. This would impose a heavy penalty on an offeror who accidentally failed to make a contrary declaration. In our view, if the offeror fails to publish a declaration that the offer is free of the condition, the offer should be deemed to have lapsed, unless the condition has in fact been fulfilled by the date specified. The Act should also, however, impose on the

offeror an obligation to publish on that date a notice stating whether or not the condition has been fulfilled.

41. Therefore recommend:

(a) that where a takeover offer has been made conditional upon acceptances in respect of a minimum number of shares being received and has reserved the right to declare the offer unconditional in respect of any lesser number, the method of making such declaration shall be by publishing on or before the date referred to in clause 4 of Part A of the 10th Schedule in a newspaper circulating generally in the State, and by giving to each Stock Exchange on which the shares in the offeree corporation are listed, a notice declaring that the offer is free of such condition and including a statement of the total number of shares which have, to the knowledge of the offeror, been acquired by him or by others who are under the same control;

(b) that in any case in which a takeover offer has been made conditional upon acceptances in respect of a minimum number of shares being received, the offeror shall be required (whether or not he has made a declaration under (a) above) to make (by the same methods as are indicated in (a) above) a declaration as to whether or not the condition has been fulfilled and that such declaration shall be made on or within 24 hours after the date referred to in clause 4 of Part A of the 10th Schedule, and if it declares the condition to have been fulfilled, shall state the total number of shares known to have been acquired as at that date;

(c) that if the offeror fails to make a declaration under either (a) or (b) and within the times there specified, the offer shall be deemed to have lapsed, unless the condition has in fact been fulfilled.

42. **Authentication of statements:** No provision is made for the authentication of the statements required to be made by the offeror. In our view, if the offeror is a natural person, the copy of the statements required under the Regulations to be lodged with the Registrar should be signed by the offeror and if the offeror is a corporation the copy should be signed by two directors acting pursuant to a resolution of the Board of Directors.

43. **Relief against non-compliance:** We agree with the Officers that the Court should have power to excuse any failure to comply with the requirements of the 10th Schedule in appropriate cases (memorandum of October 1968, p. 7. We think, however, that this should not be done by amendment of section 366, which seems to us inappropriate for cases in which the offeror may be an individual and the 'offeree company' is not strictly a party to the transaction. We think, therefore, that the provision should form part of section 184 itself, and we also think that the Court should be specifically directed to consider whether injustice might be caused to third parties by the granting of relief (compare section 366 (3) (b)).

44. **Reimbursement of expenses incurred by directors:** It has been recommended that provision should be made entitling the directors of an 'offeree company' to reimbursement of expenses properly incurred by them on behalf of and in the interests of the members in relation to a takeover scheme. We agree with this suggestion, though we would substitute 'reasonably' for 'properly', since it may be said that expenses 'properly' incurred are limited to those incurred with the express or implied authority of the members or those incurred in performance of the obligations imposed by the Act itself. We think it desirable that the provision should be expressed in a declaratory form so as not to throw doubt on the propriety of past reimbursements.

45. It has also been suggested that the offeree company should be empowered to recover from the offeror expenses properly incurred by the offeree company (including those referred to in paragraph 44 above). We do not agree with this proposal. We think that as between the offeror and the 'offeree corporation' these expenses should be treated as a normal cost of being in business. To make an offeror pay the expenses of the offeree company would be to suggest that an offeror is presumed to be in the wrong. We have also in mind the complications that would arise in the event of competing takeover bids.

46. **Other proposals for amendment:** The Officers' memorandum of October 1968 makes a number of other proposals for amendment, most of which we have dealt with in other parts of this report. The following recommendations of the Officers have not been so dealt with, and we merely state that we agree with the recommendations made:

(a) that a takeover offer be deemed to be made at the registered address of the shareholder on the date which it bears (p. 3);

(b) that voting power is to be calculated as on the date upon which offers pursuant to the scheme are made (p. 6);

(c) that the Minister and the offeree corporation should have power to apply for injunctions restraining further proceedings on any offer in a scheme which contravenes the Act (p. 7);

(d) that the right to accept a takeover offer shall inhere in the shares of the offeree subject to the qualifications stated (p. 8);

(e) that the provisions of the 10th Schedule be extended to require information as to shares in companies other than the offeror in appropriate cases (p. 9). Such a requirement should be confined to the giving of such information as is available to the offeror, and not, as suggested on p. 10, to information as to 'related' corporations.

(f) that paragraph 5 of Part B of the 10th Schedule be amended to provide for information relevant to unissued securities (p. 10).

47. Application of section 184 to offers by natural persons: We have stated above (paragraph 17) that in our view the Act should afford the same protection to shareholders in respect of takeover offers made by natural persons as it does in the case of offers by corporations. This will involve the amendment of the definitions (e.g. substituting a definition of 'offeror' for that of 'offeror corporation') and extensive recasting of the section, which is expressed so as to apply only to offers by corporations. In the same way, the requirements of the 10th Schedule will have to be modified to apply to offers by natural persons. Some of the requirements of Part B of the 10th Schedule are inappropriate for offerors who are natural persons and the question will arise as to what kind of information should be required. In other parts of this report we have suggested the extension of the scope of section 184 to prevent its operation being defeated by the use of persons or corporations to carry out transactions which are forbidden to the person or corporation by whom they are controlled (see, for example, paragraphs 25 and 28). Similar considerations will apply to other recommended provisions (see, for example, paragraph 20). It may be possible to cover all these cases by a general provision, but we have not attempted the detailed drafting of provisions to give effect to our recommendations, and when a draft is prepared further provisions may well prove to be necessary to ensure the completeness and

consistency of the legislation. We would add that, although we have not given detailed consideration to the question whether the information now required to be given by offeror corporations is adequate or appropriate, except as specifically stated in this report, we expect in due course to be examining the prospectus provisions of the 5th Schedule, and we may then make recommendations which would render it desirable to make consequential modifications of the requirements of the 10th Schedule.

48. We should also draw attention to the fact that sub-section (7) of section 184 applies the provisions of sections 46 and 47 to the statements required to be made pursuant to sub-section (2) (a). It should be made clear that these sections apply whether the offeror is a natural person or a corporation.

49. As appears from the Officers' memorandum of October 1968 (p. 12. section F) three proposals for amendment of section 184 have already been agreed upon by the Standing Committee. The first two of these have been dealt with in the proposed sub-sections (7D) and (7B) and (7c) of the General Revision Bill Draft (pp. 98 and 99) to which we have referred in paragraph 20. We see no objection to the third proposal.

50. One further suggestion made to us should be mentioned, namely, that the period which must elapse between notice of offer and the making of the offer should be extended, with the object of giving the shareholders sufficient time, if so minded, to alter the articles so as to restrict the voting power of foreign shareholders. As we have indicated earlier in this report, we have not regarded the protection of Australian companies from takeover bids by foreign companies as falling within our terms of reference, and we have therefore not made any recommendation with regard to this proposal. We would point out, however, that the protection sought by the proposal would appear to be illusory. Where such a restriction already exists, the foreign offeror will make his offer conditional upon a change in the articles. Where it does not exist, he will make his offer conditional upon the voting power remaining unchanged. At all events, as we have said, the considerations involved in this suggestion are matters of government policy unconnected with the protection of investors as such, and we do not make any recommendation about them.

51. **Section 185:** Section 185 of the Act makes provision for the acquisition of the shares of non-assenting members, or for the non-assenting members to require the purchase of their shares, where the holders of more than 90% in nominal value of the shares have agreed to a takeover proposal. If, as we suggest, section 184 is to be made to apply to takeovers by natural persons, similar changes should be made in the operation of section 185. It was said by the High Court in the Ready Mixed Concrete Case (Colonial Sugar Refining Co. Ltd. v Dilley 41 ALJR 189) that section 185 provides merely for the consequences of a takeover offer made pursuant to section 184. As a matter of history, section 185 appeared in the legislation for some time before the enactment of section 184, and there would appear to be cases to which section 185 is applicable which would not fall within section 184, e.g., a proposal made to the holders of 90% of the (non-voting) preference shares. The neglected 10% might, we think, wish to avail themselves of section 185 to compel purchase of their holdings and in our view section 185 should be available to them in such a case.

52. There is another aspect of section 185 which we think requires attention. Where the shares in a company are divided into different classes, and the offer is for the whole of the shares in the company, it would appear that the 90% referred to in paragraph 51 above is to be calculated on the total shareholding only, with the result that even if a majority of the shareholders of one

class reject the proposal, their shares may be compulsorily acquired if they hold less than 10% in nominal value of the total shareholding (see Australian Consolidated Press Ltd. v Australian Newsprint Mills Holdings Ltd. 105 C.L.R. 473). The wording of section 185 differs to some extent from the section considered in that case, but we think, as did the Jenkins Committee (see paragraph 284 of its report) that section 185 should be amended to make it clear that where there are different classes of shares, the 90% is to be calculated separately in relation to each class.

53. Other proposals for the amendment of section 185 are embodied in section 36, paragraphs (c), (d), (e), (f) and (g) of the G.R.B. Draft (pp. 99-102). We have examined these proposals and see no objection to them. We would suggest, however, that in the proposed new sub-section (4) of section 185, the relationship of companies (and if section 185 is applied to takeovers by persons, of those persons) should be defined by reference to the definition of substantial shareholdings in the proposed Division 3A of Part IV. The same considerations would apply to the phrase '(other than shares already held at the date of the offer by, or by a nominee for, the transferee company or its subsidiary)', which appear in sub-section (1) of section 185. Somewhat similar recommendations were made by the Jenkins Committee (paragraph 291).

54. We would also recommend that a shareholder to whom sub-section (4) of section 185 applies should have the same right to choose between alternative considerations as a dissenting shareholder is given under the proposed sub-section (1A) (see G.R.B. page 99).

55. We would also suggest that the proposed new sub-sections (7), (7A) and (8) should provide not only for the dividends, bonus shares or rights referred to, but also for the case where the shares themselves may have been exchanged for other shares under a later scheme. We would suggest that all the words following 'consideration' in line 9 of the draft of sub-section (7) (G.R.B. p. 101) be deleted and the following inserted 'and any accretions thereto and any property which may become substituted therefore to the Treasurer of the State', and that corresponding amendments be made so far as necessary in sub-sections (7A) and (8).

CONCLUSION

56. In our first interim report most of our recommendations were accompanied by, or made in the form of, actual drafts of the amendments we proposed. We adopted this course partly because the formulation of an actual draft assists in judging the feasibility of a legislative proposal, and often discloses unexpected ramifications, and partly because the complexity of the accounts and audit provisions is such that, in the absence of actual drafts, it would be almost impossible to assess the inter-action of the proposed amendments. These considerations do not apply with quite the same force to the problems discussed in this report. Nevertheless, if we had felt ourselves able to take a more leisurely approach to the subject, we would have wished to compile a draft embodying all the recommendations in this report. Even then, we would expect that situations which we had not envisaged would arise, and that loopholes would be found which would require further legislative treatment. The problems relating to takeovers are complex and difficult, and while it is unlikely that a perfect solution can be found, our recommendations, if adopted, will in our view add substantially to the protection and equitable treatment of shareholders and should be effective to deal with those abuses which have come to our attention.

R. M. EGGLESTON
J. M. RODD

P. C. E. Cox

28 February 1969

EXTRACTS FROM GENERAL REVISION BILL REFERRED TO IN SECOND INTERIM REPORT OF COMPANY LAW ADVISORY COMMITTEE

New Divisions 3A and 3n inserted in Part IV.

7. (e) After section 69 of the Principal Act there shall be inserted the following headings and sections:

'DIVISION 3A. - Substantial Shareholdings.

Application of Division and interpretation.

69A. (1) This Division applies to and in respect of a company of which the shares or any proportion or class of shares are quoted on a prescribed Stock Exchange in the Commonwealth.

(2) In this Division:

'Voting capital.'

"Voting capital" means such issued share capital of a company in respect of which this Division applies as carries rights to vote in all circumstances at general meetings of the company.

'Substantial shareholding.'

"Substantial shareholding" in relation to a company means:

(a) the interests in the voting capital of the company held by a person who is interested in shares comprised in the voting capital of a nominal value equal to one-tenth or more of the nominal value of the voting capital; or

(b) the interests in a class of the voting capital of the company held by a person who is interested in shares comprised in the class of a nominal value equal to one-tenth or more of the nominal value of the class.

Register of substantial interests in share capital.

69B. (1) A company shall keep a register of holders of substantial shareholdings and shall within (seven?) days of being given information by a person in accordance with section 69c, enter the information in the register against the name of the person.

(2) The register shall be so kept as to show the names of the holders entered in alphabetical order, and the entries against any name in order of time.

(3) A company shall not, by complying with this section, be affected with notice of, or put upon inquiry as to, the rights of any person in relation to any shares.

(4) The register shall be kept at the company's registered office, and shall be open to the inspection of any member without charge and of any other person on payment for each inspection of $0.50 or such less sum as the company requires.

(5) Any person may request the company to furnish him with copy of the register, or any part thereof, on payment in advance of $0.20 or such less sum as the company requires for every one hundred words or fractional part thereof required to be copied and the company shall cause any copy so requested by any person to be sent to that person within a period of twenty-one days or within such further period as the Registrar thinks reasonable in the circumstances, commencing on the day next after the day on which the request is received by the company.

(6) The Registrar may at any time in writing require the company to furnish him with a copy of the register or any part thereof and the company shall furnish him the copy within seven days.

(7) If default is made in complying with this section, the company and every officer of the company who is in default shall be guilty of an offence.

Penalty: $1,000. Default penalty.

Person interested in shares on commencement of Division to give notice within 21 days.

69c. A person who on the coming into operation of this section has a substantial shareholding in a company shall give notice to the company of the subsistence of the interest constituting the substantial shareholding at the said commencement and the number of shares comprised in the voting capital or class of voting capital (specifying it) in which each interest subsists at the said commencement (which notice shall set out his name and address and where he is director of the company, state that fact):

(i) if he knows at the said commencement of the subsistence of the interest - within seven days of the said commencement;

(ii) if he does not know at the said commencement of the subsistence of the interests - within seven days of his coming to know of the subsistence of the interests.

Person interested as result of change of status of company or share capital to give similar notice.

69D. A person who as a result of happening of either of the following events:

(a) a company's becoming one to which this Division applies; or

(b) a company's share capital of any class becoming voting capital:

has a substantial shareholding in a company shall give notice to the company of the subsistence of the interests constituting the substantial shareholding at the happening of the event and the number of shares comprised in the voting capital or class of voting capital (specifying if) in which each interest subsists on the happening of the event (which notice shall set out his name and address and, where he is a director of the company, state that fact):

(i) if he knows at the happening of the event of the subsistence of the interests - within seven days of the happening of the event;

(ii) if he does not know at the happening of the event of the subsistence of the interest - within seven days of his coming to know, of the subsistence of the interests.

Interests and changes of interests to be notified.

69E. Subject to sections 69C and 69D a person who as the result of the happening of any event:

(a) comes to have or ceases to have a substantial shareholding in a company; or

(b) while continuing to have a substantial shareholding in a company acquires an interest in other shares comprised in the voting capital or the class of voting capital (as the case may be), or suffers a decrease in the number of shares comprised in the voting capital or class of voting capital (as the case may be) in which the interests constituting the Substantial shareholdings subsist:

shall notify the company of the happening of the event (specifying it) and the date on which it occurred, and, according to the circumstances, the number of shares comprised in that voting capital or class of voting capital (specifying it) in which the interests constituting the substantial shareholding subsist immediately after the happening of the event or the fact that, immediately thereafter, he is not interested in the voting capital or class of voting capital (specifying it) to the extent concerned or at all, as the case may be (which notice shall set out his name and address and, where he is a director of the company, state that fact):

where at the happening of the event he knows of the change in his interests - within seven days of the happening of the event;

where at the happening of the event he does not know of the change in his interests - within seven days of his coming to know of the change in his interests.

Person failing to comply with sections 69C, 69D or 69E guilty of offence.

69F. A person who fails to comply with sections 69% 69D or 69E shall be guilty of an offence.

Penalty: $1,000. Default penalty: $200.

Consent of Minister to proceedings.

69G. Proceedings in respect of an offence against section 69F shall not be instituted without the consent of the Minister.

Interests.

69H. (1) In this Division, references to a person's being interested in shares in a company shall, subject to the following provision of this section, be construed so as not to exclude an interest on the ground of its remoteness or the manner in which it arises or by reason of the fact that the exercise of a right conferred by ownership thereof is, or is capable of being made, in any way subject to restraint or restriction.

(2) A person who has an interest under a trust whereof the property comprises shares (other than a discretionary interest) shall be deemed to be interested in the shares.

(3) A person shall be deemed to be interested in shares if a body corporate is interested in them and:

(a) that body corporate is or its directors are accustomed to act in accordance with his directions or instructions; or

(b) he is entitled to exercise or control the exercise of one-third or more of the voting power at any general meeting of that body corporate.

(4) A person shall be deemed to be interested in shares if:

(a) he enters into a contract for the purchase thereof by him;

(b) he has a right, otherwise than by virtue of having an interest under a trust, to call for delivery thereof to himself or to his order (whether the right is exercisable present or in the future);

(c) not being a registered holder thereof, he is entitled to exercise or control the exercise of any right conferred by the holding thereof.

(5) Persons having a joint interest shall be deemed each of them to have that interest.

(6) It is immaterial that shares in which a person has an interest are unidentifiable.

(7) So long as a person is entitled to receive, during the lifetime of himself or another, income from trust property comprising shares an interest in the shares in reversion or remainder, shall be disregarded.

(8) A person shall be not treated as interested in shares if, and so long as, he holds them as a bare trustee or as a custodian trustee.

(9) There shall be disregarded:

(a) an interest of a person subsisting by virtue of his holding an interest within the meaning of section 76;

(b) an interest as holder of shares of a person whose ordinary business includes the lending of money and who holds them by way of security only for the purposes of a transaction entered into in the ordinary course of business;

(c) an interest of the Public Trustee subsisting by virtue of his office;

(d) an interest of the Prothonotary of the Supreme Court subsisting by virtue of his office;

(e) an interest of the Registrar subsisting by virtue of his office; (f) such other interests of a class of persons of a particular person as may be prescribed by the Governor in Council.

(10) Delivery to a person's order of shares or debentures in fulfillment of a contract for the purchase thereof by him or in satisfaction of a right of his to call for delivery thereof, or failure to deliver shares or debentures in accordance with the terms of such a contract or on which such a right falls to be satisfied, shall be deemed to constitute an event in consequence of the occurrence of which he ceases to be interested in them, and so shall the lapse of a person's right to call for delivery of shares or debentures.'.

S. 184. Takeover often.

(b) After sub-section (7) of section 184 there shall be inserted the following sub-sections:

"(7A) Where an offeror corporation has made a takeover offer in accordance with this section, the offeror corporation may thereafter, subject to sub-sections (7B) and (7c) vary the terms of the offer so far only as the variation:

(a) increases the amount of any cash sum that it offers as consideration or part consideration for the shares proposed to be acquired;

(b) where shares were offered as consideration or part consideration for the shares proposed to be acquired, increases the number of those shares which are offered; or

(c) extends the time for acceptance:

by giving notice in writing of the variation to the person to whom the offer was made.

(7B) Where a takeover offer is varied notice in writing of the proposed variation shall forthwith be given to the offeree corporation.

(7c) A notice given under sub-section (7A) or sub-section (7B) shall set out particulars of such alterations of or additions to the statement referred to in paragraph (a) of sub-section (2) as would be required to be made if the statement had been made in respect of the varied offer and at the time when the offer is varied.

(7D) Where a person accepts a takeover offer within three months before offers which were made to holders of other shares or, as the case may be, to holders of other shares of the same class, are varied, he shall be deemed not to have accepted [he offer before the variation, but to have accepted the offer as varied on the variation, or as the case may be, on the latest of the variations.

(7E) Where a takeover offer is made subject to a condition requiring acceptance of offers in respect of a minimum number of shares, or of a minimum number of shares of any class, the offeror corporation may declare the offer to be free of the condition by giving to each member of the offeree corporation a notice in writing which declares that the offer is free of the condition and sets out the number and proportion of shares of the offeree corporation which the offeror corporation then holds or to which it is beneficially entitled, or where the shares of the offeree corporation are divided into classes, the number and proportion of shares of each class which the offeror corporation then holds or controls.

(7F) Where a takeover offer is made subject to a condition requiring acceptance of offers in respect of a minimum number of shares, or of a minimum number of shares of any class, and the offer has not been declared to be free of the condition within forty-two days after the offer is made, a person who has within that period accepted the offer may withdraw his acceptance.";

S. 185, Acquiring shares compulsorily on takeover.

(c) In sub-section (1) of section 185 for the word "seven" there shall be substituted the word "fourteen ";

(d) After sub-section (1) of section 185 there shall be inserted the following sub-section:

"(1A) Where alternative considerations were offered to and accepted by the approving shareholders, the dissenting shareholder shall be entitled to elect not later than the expiration of one month from the date on which the notice is given under sub-section (1) or seven days from the date on which a statement is supplied pursuant to sub-section (3) (whichever is the later) which consideration he will accept, and if the dissenting shareholder fails to make such an election within the time allowed by this section, the transferee company may, unless the court otherwise orders,

determine which of the considerations shall be paid allotted or transferred to the dissenting shareholder.";

(e) For sub-section (4) of section 185 there shall be substituted the following sub-section:

"(4.) Where in pursuance of any such scheme or contract the transferee company becomes beneficially entitled to shares in the transferor company which, together with any other shares in the transferor company to which the transferee company or any corporation which by virtue of sub-section (5) of section 6 is deemed to be related to the transferee company are beneficially entitled, comprise or include nine-tenths in nominal value of the shares in the transferor company or of any class of those shares, then:

(a) the transferee company shall within one month from the date on which it becomes beneficially entitled to those shares (unless in relation to the scheme or contract it has already complied with this requirement) give notice of the fact in the prescribed manner to the holders of the remaining shares or of the remaining shares of that class who have not when the notice is given assented to the scheme of contract or been given notices by the transferee company under sub-section (1);

(b) any such holder may within three months from the giving of the notice to him require the transferee company to acquire the shares in question:

and where a shareholder gives notice under paragraph (b) of this sub-section with respect to any shares, the transferee company shall be entitled and bound to acquire those shares on the terms on which under the scheme of contract the shares of the approving shareholders were transferred to it, or on such other terms as are agreed or as the court on the application of either the transferee company or the shareholder thinks fit to order.";

(f) In sub-section (5) of section 185 for the expression "after the expiration of one month after the date on which the notice has been given or, if an application to the court by the dissenting shareholder is then pending, after that application has been disposed of" there shall be substituted the following expression:

"within fourteen days after whichever of the following last happens:

(a) the expiration of one month after the date on which the notice is given;

(b) the expiration of fourteen days after a statement of names and addresses required to be supplied under sub-section (3) is supplied; or

(c) where an application has been made to the court by a dissenting shareholder, the application is disposed of -";

(g) For sub-sections (7) and!8) of section 185 there shall be substituted the following sub-sections:

"185. (7) Where any sum or any consideration other than cash is held in trust by a company for any person under this section or any corresponding previous enactment it may, after the expiration of two years and shall before the expiration of ten years from the date on which the sum was paid or such consideration was allotted or transferred to it pay the sum or transfer the consideration to the Treasurer of the State and where any consideration other than cash consists of shares in a corporation, shall pay or transfer to the Treasurer together with the consideration any dividends bonus shares or rights to subscribe for shares which are held by it in right of the shares.

(7a) Where any sum or consideration other than cash had at the commencement of this Act been held by a company in trust for a person under a previous enactment corresponding to this section for ten years or more since the sum was paid to it or the consideration allotted or transferred to it shall pay the sum or transfer the consideration to the Treasurer of the State within one year from the commencement of the Companies (General Revision) Act 1968 and where any consideration other than cash consists of shares in a corporation shall pay or transfer to the Treasurer together with the consideration any dividends bonus shares or rights to subscribe for shares which are held by it in right of those shares. (Transitory provision may be required in States where no corresponding earlier legislation).

(8) The Treasurer shall sell or dispose of any consideration other than cash and any bonus shares or rights to subscribe for shares so received and any bonus shares or rights to subscribe for shares which he comes to hold in right of any shares in a corporation so received in such manner as he thinks fit and shall deal with the proceeds of such sale or disposal, any sums so received and any dividends paid to him in respect of shares in a corporation as if they were moneys paid to him under the provisions of the Unclaimed Moneys Act 1962.

(8A) Where any consideration other than cash transferred to the Treasurer under this section or any corresponding previous enactment includes shares in a corporation, the Treasurer shall not be subject to any obligation:

(a) to pay any calls;

(b) to make any contribution to the debts and liabilities of the corporation; or

(c) to discharge any other liability:

in respect of the shares, whether such-obligation arises before or after the date of the transfer, and shall not be liable to be sued for any calls or contribution or other liability, but this sub-section shall not affect the right of any corporation to forfeit any share upon which any call or contribution remains unpaid or any liability undischarged."